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COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- BIAC --

25 February 2014

This note is submitted by BIAC to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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SUMMARY OF DISCUSSION POINTS

– BIAC –

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 3 for its roundtable on investigations of consummated and non-notifiable mergers.

1. Introduction

1. The business community fully supports vigilant competition law enforcement designed to prevent anticompetitive mergers. Agency enforcement efforts, however, must be balanced against the need for businesses to have legal certainty that bona fide transactions, at some reasonable stage, do not face belated investigations and challenges. Belated enforcement not only limits the ability of Agencies to prevent the competitive harm that is the purpose of merger enforcement, but can also foist substantial costs on businesses and result in considerably less efficient markets than would exist if the merged entity were allowed to stand.

2. Certainty in this context, along with some element of predictability, is necessary because “[t]hey provide a coherent framework for behavior, enabling [businesses] to conclude whether or not specific actions and expectations are permissible and reasonable.”¹ Businesses need finality in their transactions in order to efficiently and effectively function and provide valuable contributions to the market and consumers. They also need to know when it is safe to close a transaction and begin the costly and timely process of integration and reconfiguration. Since the risks in merger enforcement are high for all parties involved, “guesswork and gamble” should be removed from the process whenever possible.² Antitrust agencies should strive to apply the antitrust laws in a “more certain, more predictable, more incisive, and more prompt” manner.³

3. Premerger notification programs were created with some of these goals in mind. They were intended to provide a coherent framework that would complement the goals of antitrust enforcement agencies with the needs of the business world to act within a prompt timeframe. Many businesses today rely on the premerger process to properly screen mergers for legality. In suspensive regimes, businesses may finalize deals only after transactions are reviewed and cleared by the antitrust agencies.⁴ And many of these deals might not close or even be initially proposed if businesses faced the unbounded prospect that

¹ Wayne H. Elowe, Predictability in Merger Enforcement After *California v. American Stores*: Current Uncertainties and A Proposal for Change, 42 CASE W. RES. L. REV. 599 (1992).

² Philips Elman, The Need for Certainty and Predictability in the Application of the Merger Law, 40 N.Y.U. L. REV. 613, 613 (1956).

³ Id.

⁴ David L. Meyer, Section 2 Standards and Consumer Welfare: Some Lessons from the World of Merger Enforcement, 2007 COLUM. BUS. L. REV. 371, 386 (2007).

such deals might be challenged in the future.⁵ However, in spite of the premerger notification program and businesses reliance on clearance to close and ultimately integrate, in the past decade there has been a rise, particularly within the United States, of long and costly post-closing investigations. These investigations have targeted not only notified, consummated deals that received agency clearance but also sub-threshold consummated transactions.

4. The investigations of notifiable and/or cleared deals raise a variety of concerns in the business community, which requires predictability in deciding whether it is worth the financial investment to close a transaction. In fact, in cases involving properly notified transactions in suspensive regimes, businesses should be afforded certainty that there will be no further review unless the notification was incomplete, misleading or erroneous.

5. Not all jurisdictions provide the clarity and legal certainty in applying merger review principles, despite the benefits for both the business community and government. A reasonable deadline for the government to initiate a post consummation review provides a clear timeline for businesses to confidently plan out their integration processes and actualize the benefits of the deal without fear of having to unwind the transaction at an indefinite time. Furthermore, antitrust agencies are better equipped to achieve their goals when prompt action is taken. Appropriate remedies, such as divestiture, have a better chance of success when deals are challenged and remedies applied sooner rather than later.

6. While the concerns are somewhat different for sub-threshold consummated deals, businesses engaged in these smaller transactions also deserve certainty. They may not undergo premerger notification, but they still face the same challenges as larger transactions in needing to know when they should integrate. These businesses may actually have more to lose when faced with late investigations because litigation can be so costly that it outweighs the value gained in the deal. Therefore, post consummation review in sub-threshold deals may stifle a company's desire to even pursue these opportunities in the first place.

7. Moreover, merger notification thresholds often are set based on a standard of materiality, recognizing that at some de minimus level, the potential harm to consumers is not sufficiently significant to warrant the attention of resource-strapped government agencies.

8. Thus, the trend of post-consummated notifiable and sub-threshold deals presents a challenge for companies, consumers, and the functioning of markets that is not outweighed, in all cases, by the agencies' rationale for intervening in these closed transactions.

2. The need for certainty in merger transactions

9. While jurisdictions differ on the need for premerger notification, a large number of jurisdictions consider pre-merger notification "essential to allow [their] governments either to stop anticompetitive mergers or to negotiate remedies with the parties."⁶ Such notification provisions were established to give the agencies adequate time to challenge mergers, and seek modifications if necessary, before a deal is closed and companies begin to integrate and become one.⁷ A secondary but equally important reason for the pre-merger programs is to "avoid[] the costly and complicated process of seeking an order through the

⁵ Id.

⁶ Choe Chongwoo & Chander Shekhar, *Compulsory or Voluntary Pre-Merger Notification, Theory and Some Evidence*, MPRA Paper No. 13450, (Feb. 2009), at 1, available at http://mpra.ub.uni-muenchen.de/13450/1/MPRA_paper_13450.pdf.

⁷ Id.

courts to unscramble a merger after it has been consummated.”⁸ And last but not least, these programs were intended to provide greater certainty to the companies and consumers in navigating and understanding their place in the market.

10. However, in some jurisdictions obtaining clearance of a notified deal, or the closing of a sub-threshold deal, is not always the end of the matter. Although “post-[deal] challenges give the antitrust agencies a valuable enforcement tool, they also present substantial hardships”⁹ to the business community, and may adversely impact the same consumers the government aimed to protect. More specifically, such challenges are problematic because they often “result in prolonged litigation, . . . , freeze companies’ abilities to conduct business plans, and often result in prolonged and ultimately inefficient divestiture proceedings.”¹⁰ In essence, they can lead to all of the issues that governments hoped to avoid in establishing premerger notification regimes.

11. A 1956 case, *United States v. El Paso Natural Gas (“El Paso”)*,¹¹ highlights the problems that can arise when challenging consummated mergers. In *El Paso*, “a divestiture order was obtained only after seventeen years of litigation and six United States Supreme Court decisions.”¹² After the first seven years of litigation, the Supreme Court ordered El Paso to divest Pacific Northwest Pipeline Corporation, a potential competitor, “without delay.”¹³ It would take an additional ten years of court involvement for the divestiture to be completed.¹⁴ Unsurprisingly, *El Paso* was the poster child in advocating for the creation of the United States premerger notification program under the Hart-Scott-Rodino Act (“HSR”).¹⁵ HSR and the many pre-merger programs modelled after it, were, therefore, established to eradicate the need for companies and the government to undergo the concerns from *El Paso*.

12. Today, where businesses may expend significant resources on premerger notification, increasingly to a number of different agencies around the globe, certainty and finality should be a reasonable expectation of premerger review. The very reason that premerger investigations are bound by time limits are to incentivize agency staff “to investigate and make enforcement recommendations within a relatively short time period.”¹⁶ These time limits also enable the agencies and businesses concerned to work together, often faced with overcoming the challenges posed by seriously different procedures and timeframes to reach consistent well-reasoned outcomes. However, for post-consummated reviews, some jurisdictions, such as the United States, have no similar incentive or pressure.¹⁷ In fact, in the realm of

⁸ *Id.*

⁹ David Givensky, *Investigating Consummated Mergers: The Antitrust Agencies’ Shift Toward a Retroactive Enforcement Policy*, 32 REV. BANKING & FIN. L. 88, 89 (2012-2013).

¹⁰ *Id.*

¹¹ 376 U.S. 651 (1964).

¹² John Warren Titus, *Stop, Look, and Listen: Premerger Notification Under the Hart-Scott-Rodino Antitrust Improvements Act*, 1795 DUKE L.J. 355, 367 (1979).

¹³ William Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, Before The Conference Board, Washington D.C. (Oct. 29, 1996), and before the 35th Annual Corporate Counsel Institute, Northwestern University of Law, Corporate Law Center, San Francisco (Oct. 31, 1996), at 2, available at <http://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Givensky, *supra* note 9, at 95.

¹⁷ Givensky, *supra* note 9, at 95.

consummated deals, there are no “hard deadline[s]” and staff has the incentive “to turn over every nook and cranny in the investigation to minimize the risk of a surprise down the road.”¹⁸ In short, the expectation of certainty and finality can be frustrated by the absence of “statute of limitations” for post-merger agency investigation and follow-on court actions.

13. Furthermore, when faced with post consummation challenges, companies have more at stake and thus are more willing to litigate [to save their transaction] than if the investigation occurred pre-consummation.¹⁹ The government is also more likely to initiate litigation in these circumstances because there is generally more evidence that can be collected post-consummation.²⁰ Unfortunately, with litigation comes lengthy investigations, high costs, and a number of other derivative effects that negatively impact the challenged businesses, consumers, and market.

14. First, lengthy investigations of consummated deals often “paralyze markets.”²¹ While companies are forced to expend a great amount of their talent and resources in litigation, their productivity and contribution to the market is compromised. Therefore, the number of lost opportunities for both businesses and the market generally could be considerable.²²

15. Second, challenged businesses may be unfairly disadvantaged because their competitors are able to “move[] on and continued to develop next-generation products” while they are burdened with the investigation.²³ Additionally, these challenged businesses may lose customers, vendors, and employees throughout the review process because of the uncertainty that the business may be broken up.²⁴ These consequences are extremely disconcerting when an investigation concludes that no antitrust violation was found and the deal is able to remain intact. Furthermore, the investigations also may backfire and directly undermine the government’s main “goal of defeating anti-competitive effects.”²⁵ For example, a business may “pull[] some of its competitive punches in the marketplace,”²⁶ during an extended investigation.

16. Third, the costs attributed to these cases can be substantial. These investigations not only impact the businesses challenged, but also place “significant financial and manpower burdens” on the government as well as “third parties subject to the compulsory process.”²⁷

17. Finally, with time as a key factor, governments may be hard-pressed to establish effective competition in the cases where litigation is required to unmake a deal. “Challenging and remedying

¹⁸ Carl W. Hittinger & Lesli C. Espito, *Non-Reportable Transactions No Longer Safe From Antitrust Scrutiny*, 242 LEGAL INTELLIGENCER 22 (2010).

¹⁹ Givensky, *supra* note 9, at 94.

²⁰ Givensky, *supra* note 9, at 94.

²¹ Scott Sher, *Undoing Done Deals: The Chicago Bridge Decision*, DEALLAWYERS.COM (January 19, 2005), available at <http://www.deallawyers.com/Blog/2005/01/undoing-done-deals-the-chicago-bridge-decision.html>.

²² *Id.*

²³ *Id.*

²⁴ J Thomas Rosch, *Consummated Merger Challenges--The Past is Never Dead* (Mar. 29, 2012), at 20, available at <http://www.ftc.gov/speeches/rosch/120329springmettingspeech.pdf>.

²⁵ Givensky, *supra* note 9, at 96.

²⁶ Rosch, *supra* note 24, at 20.

²⁷ Rosch, *supra* note 24, at 20.

anticompetitive acquisitions after they have been consummated is often difficult and ineffective.”²⁸ As more “time passes and as the assets become more intertwined,” it becomes more complicated or even impossible to unwind an anticompetitive deal.²⁹ If the government does not put a business on notice of its plan to investigate soon after a deal is consummated, the business will begin to either replace or combine “the target’s assets, technology, and personnel . . . with those of the acquiring firm [which makes it] nearly impossible to unwind the transaction and restore the acquired firm to its former status as an independent competitor.”³⁰ Therefore, even if a court determines that a deal resulted in substantially lessening competition, “effective relief may no longer be practicable.”³¹

3. Consummated (notifiable) deals

18. The review of consummated notifiable deals should be limited to cases where the deal was never properly notified or where the notification was significantly incomplete or erroneous.

19. The EU, UK, and Canada generally limit their challenges of consummated mergers, only investigating when deals failed to notify the agencies when required to do so or when notification was voluntary in the first place. Furthermore, “[i]n almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality.”³² But the United States is an outlier with an ability to bring a “subsequent challenge, even decades following the closing.”³³ Canada’s approach is much more reasonable, providing a limited time frame for challenging a consummated notified deal.

3.1 Mandatory suspensive regimes

20. The United States, the European Commission, and Canada are all mandatory suspensive regimes, while the United Kingdom is an example of a non-suspensive voluntary regime. Under a mandatory suspensive regime, proposed acquisitions that meet a certain threshold, must not only notify their respective agency, but also receive clearance before being able to close.

21. In the US, both the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) have the power to regulate transactions under the Clayton Act and to review at a premerger stage under the HSR Act. Importantly, both the Clayton Act and the HSR Act include a concept of “materiality.” The Clayton Act requires that any lessening of competition be “substantial,” while the HSR Act invokes a materiality test to determine whether a transaction need be notified. Section 7 of the Clayton Act

²⁸ Maureen K. Ohlasuen, *An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification* (Nov. 5, 2013), at 18, available at http://www.ftc.gov/sites/default/files/documents/public_statements/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger/131105mkochilespeech.pdf.

²⁹ Givensky, *supra* note 9, at 96; *see also* Hittinger & Espito, *supra* note 18, at 22 (“Determining which assets need to be sold in order to resolve the issue can be complicated, difficult and sometimes impossible once the assets are integrated.”).

³⁰ Hittinger & Espito, *supra* note 18, at 22 (internal citations removed).

³¹ Ohlasuen, *supra* note 28, at 18.; *see also* Scott A. Sher, *Closed But Not Forgotten Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 53-54 (2004) (“[O]nce the proceedings had ended, appropriate remedies often could not be fashioned, because either the government could not identify a suitable buyer, the assets of the two parties had become too intertwined to separate through a divestiture order, or the acquiring firm had purposefully stalled the investigation and trial, while wasting the acquired party’s assets and make the latter unattractive to any potential buyer.”).

³² THE MERGER CONTROL REVIEW, (Ilene Knable Gotts ed., 4th ed. 2013) at x (hereinafter “Gotts”).

³³ *Id.*

specifically prohibits any acquisition of stock or assets in any line of commerce or affecting commerce where the effect “may be substantially to lessen competition or to tend to create a monopoly”.³⁴ In 1976, the US enacted the HSR Act to strengthen the FTC and DOJ’s enforcement of Section 7 of the Clayton Act,³⁵ and to “eliminate the deleterious effects of post-consummation challenges.”³⁶

22. Under the HSR Act, businesses whose transactions met a certain threshold must notify both agencies of their anticipated deal in order to provide the agencies with enough time to challenge the merger before its consummation. The US employs three tests to determine which transactions are required to file with the agencies prior to closing: (1) the commerce test, (2) size of transaction test, and (3) the size of person test.³⁷ Unless an exemption applies, notification is required if the transaction meets the three tests. Most transactions generally satisfy the commerce test, which is met if either party is engaged in U.S. commerce or in any activity affecting U.S. commerce. Therefore, the analysis generally turns on the other two grounds.

23. Under the size of the transaction test, a transaction is only subject to filing if the total amount of voting securities and assets of the target exceed \$70.9 million.³⁸ If the transaction is valued at \$283.6 million, the parties must file unless an exemption applies. However, if the transaction exceeds \$70.9 million but is under \$283.6 million, a filing is required only if the acquiring person has “total assets or annual net sales of at least \$141.8 million” and “at least one other person has total assets or annual net sales of \$14.2 million.”³⁹

24. Transactions falling below this level of materiality are exempted from the requirements of the HSR Act, and do not require premerger notification or clearance from the DOJ or FTC in order to close. However, regardless of whether the transaction meets the HSR threshold of materiality, both the DOJ and FTC have the jurisdiction to challenge transactions indefinitely after consummation because the Clayton Act lacks a statute of limitations for DOJ or FTC enforcement.⁴⁰

25. Canada’s antitrust laws and premerger notification regime are similar to the US. In Canada, the Commission Bureau has authority to review a variety of transactions under the Competition Act to ensure that a transaction does not or will not prevent or lessen competition.⁴¹ There are two parts of the *Competition Act* that apply to mergers and similar transactions: the pre-merger notification provisions in Part IX of the *Competition Act*; and the substantive merger review provisions in Part VIII of the *Competition Act*.

³⁴ Clayton Act § 7, 15 U.S.C. § 18.

³⁵ Gotts, *supra* note 32, at 469.

³⁶ Jessica C. Strock, *Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies*, 53 WM. & MARY L. REV. 2147, 2156 (2012); Sher, *supra* note 31, at 54 (“According to the House of Representatives [during the HSR’s Act’s passage], substantial costs accompany post-close review ‘to the firms, the courts, and the marketplace . . . [m]erger litigation simply need not always continue for years and even decades -- but if it takes place after consummation, it generally will . . .’” (citing H.R. Rep. No. 94-1373, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 2637, 2637)).

³⁷ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

³⁸ The jurisdictional thresholds are adjusted each year for inflation. The current thresholds are available at <http://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>. The 2014 threshold will not be effective until Feb. 24, 2014.

³⁹ Gotts, *supra* note 32, at 469.

⁴⁰ Sher, *supra* note 31, at 41; *see also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

⁴¹ Competition Act (R.S.C., 1985, c. C-34).

26. While the Act in general applies to all transactions that have substantial effect on the Canadian market, the premerger notification requirement, Part IX, only applies to transactions that meet a certain threshold as established by two tests.⁴² In order for the filing requirement to be triggered, the transaction must satisfy both the party-size test and the transaction size test.⁴³ Under the party size test, the parties to the transaction, together, must have (1) assets in Canada that exceed C\$400 million in aggregate value, or (2) annual gross revenues from sales in, from or into Canada that exceed C\$400 million in value. Under the transaction test, the value of the transaction must be in excess of C\$80 million.⁴⁴ When a filing is required, the parties cannot close their deal until they receive approval from the Canadian Commission Bureau. Upon a filing being deemed, the initial waiting period of 30 days begins. At the end of this period, the Commissioner may issue a supplementary information request, which is similar to the US Second Request. If a second request is issued, the Commissioner has 30 more days to investigate the transaction once the party complies with the request. Under the Competition Act, the Commissioner may also terminate the waiting period early.

27. If the Commissioner finds that a transaction will prevent or less competition, the Bureau can make an application to the Tribunal, requesting an order that would refrain the parties from consummating the transaction. The Commissioner may also seek similar relief from the Tribunal after a transaction has been consummated. However, unlike the US, in Canada, the Commissioner can only bring forth an action up to one year after the transaction closed.⁴⁵

28. Like the US and Canada, the EU is empowered to regulate transactions to ensure that a transaction does not “significantly impede[] effective competition.”⁴⁶ The EU merger regulation, Council Regulation 139/2004 (the “EUMR”), is the primary body of law regulating transactions. Under the EUMR, the European Commission has authority to review transactions that are stated to be within its jurisdiction.

29. Article 1 of EUMR lays out the transactions that fall within the jurisdiction of the European Commission as opposed to the individual member states: “Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.” A community dimension exists “where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”⁴⁷ or if all the following exist: (1) the parties combined worldwide turnover exceeds €2.5 billion; (2) each of at least two parties has a Union-wide turnover exceeding €100 million; and (3) in at least three Member States (i) the parties’ combined turnover exceeds €100 million, and (ii) at least two parties each have turnover exceeding €25 million⁴⁸

⁴² Neil Campbell, James Musgrove, Mark Opashinov & Devin Anderson, *Canada*, in GETTING THE DEAL THROUGH: MERGER CONTROL (2014), available at http://lbrcdn.net/files/gtdt/pdfs/books/20/editions/232/232_7.pdf.

⁴³ Competition Act, Part IX (R.S.C., 1985, c. C-34) (Can.).

⁴⁴ The jurisdictional threshold is adjusted each year for inflation. See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03524.html> for latest threshold.

⁴⁵ 2009 S.C., ch. 2 (Can.).

⁴⁶ John Davies, Rafique Bachour & Angeline Woods, *European Union*, in GETTING THE DEAL THROUGH: MERGER CONTROL (2014), available at http://lbrcdn.net/files/gtdt/pdfs/books/20/editions/232/232_10.pdf.

⁴⁷ Article 1.2, EUMR.

⁴⁸ Article 1.3 EUMR

30. Article 4 of the EUMR, similar to the US's HSR Act and Part IX of the Canadian Competition Act, subjects to premerger notification all mergers which meet one of the thresholds to have a community dimension.⁴⁹

31. As a suspensive regime, if a filing is required under the EUMR, the parties cannot close their transaction until the European Commission is done with its review. In order to start the process, parties must complete a Form CO.⁵⁰ Once the Form is submitted, the official time limit starts with the Commission having 25 working days to issue a decision, called Phase I. It is possible for Phase I to be extended up to 10 working days. The Commission may initiate Phase II if it has doubts about the transaction after finishing Phase I. If the Commission decides that a transaction prohibited, it will provide the parties with a statement of objections between working day 40-45. Parties generally have two weeks to respond and they can request an oral hearing.

32. Post consummation review by the European Commission can occur only in cases where businesses failed to file a notification despite being required to file under the EUMR, where a party was responsible for filing incorrect information or where there has been a breach of any condition or obligation imposed in connection with a positive decision.⁵¹

33. Therefore, while the United States, Canada and the EU all have the power to investigate consummated notifiable mergers, only the United States appears to exercise this power to review consummated mergers that filed premerger notifications and received clearance. Two US cases help demonstrate these issues and present a strong case for establishing more stringent guidelines for when post consummation review should be allowed.

34. *United States v. Evanston* raises issues concerning an agency's ability to effectively restore competition in post consummated cases years after the fact. In 2000, Evanston filed a pre-merger notification under the HSR Act to acquire Highland that was not challenged by the government. Four years later, in 2004, the FTC filed an administrative complaint alleging that the transaction violated Section 7 of the Clayton Act by substantially lessened competition. The case was litigated by the parties in an administrative process that took over three and a half years to complete.

35. The ALJ's initial decision, issued in October 2005, held that the merger "substantially lessened competition" and ordered Evanston to divest Highland Park. The Commission confirmed the ALJ decision but deemed divestiture too drastic due to costs and disruption to patient services. FTC ordered separate and independent negotiating teams with firewalls to allow for separate negotiations with each hospital. This usual behavioral solution demonstrates the difficulties of determining an appropriate remedy after the parties have integrated and raises questions about the net benefit to consumers of the outcome.

36. *In re Chicago Bridge & Iron* provides another example of a protracted post consummation investigation and litigation. In early 2001, Chicago Bridge & Iron Company N.V. ("Chicago Bridge") acquired certain assets of the Engineered Construction and Water Divisions of Pitt-Des Moines ("PDM").⁵² Even though Chicago Bridge notified its acquisition of PDM under the HSR Act and did not consummate the transaction until the HSR waiting period expired in February 2001, the FTC issued an administrative

⁴⁹ Article 4, EUMR.

⁵⁰ Article 7, EUMR.

⁵¹ Article 8, EUMR

⁵² *In re Chicago Bridge*, 2004 WL 3142892.

complaint eight months later, on October 25, 2001. The complaint alleged that the transaction substantially lessened competition in four relevant markets.⁵³

37. The acquisition was found to be anticompetitive by the ALJ in June 2003, and Chicago Bridge was ordered to divest all assets obtained through the acquisition. On appeal, the Commission upheld the ALJ's Initial Decision but expanded the divestiture remedy, requiring Chicago Bridge to divide its business into two separate and distinct divisions that were capable of competing in the relevant markets.⁵⁴ Chicago Bridge appealed but Fifth Circuit denied review and upheld Commission's order on January 25, 2008. Thus, more than seven years after the initial HSR notification, Chicago Bridge was forced to create this artificial separation of assets in order to meet the FTC remedial demands.

3.2 *Non-suspensive voluntary regimes*

38. In voluntary regimes, businesses are not required to file a notification with their applicable antitrust enforcement agency in order to consummate a transaction. Parties often are advised that transactions of certain a scope and impact can be notified in order to provide some assurance that the agency will not seek to challenge the deal after closing. But whether or not these businesses choose to voluntarily file a notification, they are able to close their transaction without receiving approval or clearance.

39. For significant transactions, there is often a clear incentive to file and receive approval. Businesses that do file and wait for clearance gain certainty and finality. The UK is an example of a non-suspensive voluntary regime. Because the UK is a member state of the EU, UK national merger control, however, only be applies where the EU Merger Regulation does not apply or where a merger satisfying the EU Merger Regulation thresholds is referred back to the UK authorities. When the EUMR does not apply, UK mergers are regulated under the Enterprise Act 2002.

40. Under the Enterprise Act, a deal is subject to investigation if either the share/supply threshold or the turnover threshold is met. The share/supply threshold is satisfied if "as a result of the merger a share of at least 25 percent of the supply or purchases of goods and services of any description in the UK or a substantial part of it will be created or enhanced."⁵⁵ The turnover threshold is met when "the value of the turnover in the UK of the enterprise being taken over exceeds £70 million."⁵⁶

41. Since filing is voluntary, "the question of whether to notify a qualifying merger is accordingly essentially one of commercial risk assessment."⁵⁷ The Office of Fair Trading ("OFT") and as from April 2014 the Competition and Markets Authority ("CMA") have the authority to investigate deals whether or not they were notified. The OFT is the agency currently charged with conducting the first round of review ("Phase 1"). If the OFT finds that the transaction may lessen competition, it refers the transaction to the Competition Commission ("CC") for further review ("Phase 2"). The CC ultimately has been responsible for making a final decision on whether the transaction should be approved or prohibited. The CMA will have jurisdiction over both phases of the procedure and will be subject to time limits for each phase

⁵³ See *In re Chicago Bridge*, 2004 WL 3142892.

⁵⁴ See *Chicago Bridge & Iron Co. v. F.T.C.*, No. 05-60192, 2008 WL 203802 (5th Cir. Jan. 25, 2008) (disagreeing, among other things, with the ALJ's disregard for measuring market concentration with the Herfindahl-Hirschman Index).

⁵⁵ Enterprise Act 2002 (Eng.).

⁵⁶ Enterprise Act 2002 (Eng.).

⁵⁷ Alex Potter, Alison Jones & Martin McElwee, *United Kingdom*, in GETTING THE DEAL THROUGH: MERGER CONTROL (2014), available at <http://gettingthedealthrough.com/books/20/jurisdictions/7/unitedkingdom/>.

leading to its final decision which are made even stricter under the Enterprise and Regulatory Reform Act of 2013. Review of consummated deals is conducted in the same manner as review of preconsummated deals. The OFT, however, has and the CMA will have only four months after a deal becomes public to initiate an investigation.

42. The case, *Somerfield v. Competition Commission* demonstrates the stark difference between the UK and US regarding the time frame of review of post consummated deals. On October 25, 2004, Somerfield plc acquired 115 stores and other assets from Wm Morrisons plc.⁵⁸ On March 23 2005, this deal was referred to the Commission by the OFT. On September 2, 2005, four days before the statutory deadline expired, the Commission concluded that the transaction resulted in a “substantial lessening of competition” in respect to twelve of the local grocery markets, and by way of remedy it required Somerfield to divest itself of the twelve corresponding stores.⁵⁹ On September 28, 2004, Somerfield filed an application appealing the Commission’s decision, but the Competition Appeals Tribunal affirmed the decision and order on February 13, 2006.

4. Sub-threshold consummated deals

43. As noted, some transactions fail to meet the notification thresholds set out by authorities and may be closed without premerger review. Some jurisdictions nevertheless provide their antitrust agencies with jurisdiction over these deals. The US and Canada have power to investigate these transactions, while the EU does not have jurisdiction over transactions that fall below the thresholds provided in the EUMR. Many other jurisdictions follow the EU and actually do not allow review of sub-threshold deals.⁶⁰

44. There has been a recent trend by agencies vested with jurisdiction to investigate sub-threshold deals post-consummation.⁶¹ For example, there have been at least nineteen challenges to sub-threshold consummated mergers in the US since 2009.⁶²

45. While BIAC would not endorse anticompetitive mergers at any level, there are several issues relating to the investigation of sub-threshold transactions. First, thresholds reflect enforcement priorities: “In selecting notification thresholds, it is also crucial to set them at a sufficiently high level, so as not to impose unnecessary burdens on business or the reviewing agency and its limited resources.”⁶³

46. Second, the cost for regulating these transactions should be compared to the commerce impact: “Enforcement against mergers in small markets might not be justifiable exercises of prosecutorial discretion, even as an exercise in deterrence, in light of the small amounts of consumer welfare and the

⁵⁸ United Kingdom, Competition Comm’n, *Somerfield plc and Wm Morrison Supermarkets plc*, A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc (Sept. 2005), available at http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2005/fulltext/501.pdf.

⁵⁹ *Id.*

⁶⁰ For example, Germany, Finland, the Czech Republic, Macedonia, Morocco, Poland, Portugal, and Romania all do not allow their reviewing agencies to investigate transaction below their jurisdictional thresholds. See <http://gettingthedealthrough.com/books/20/merger-control/>.

⁶¹ Givensky, *supra* note 9, at 90.

⁶² *No Deal Too Small: FTC and DOJ Target Non-HSR Reportable Tech Deals in 2013*, (Aug. 6, 2013) available at <http://www.cooley.com/showalert.aspx?Show=68315>.

⁶³ Ohlhasuen, *supra* note 28, at 21.

high costs of enforcement.”⁶⁴ Furthermore, “[r]ather than spending time investigating mergers that are unlikely to be problematic, agency resources likely would be better utilized in pursuing cartel cases or other anticompetitive conduct.”⁶⁵

47. Third, the uncertain timeline for these investigations may frustrate the initiative and absorb significant resources from both the government and these potentially smaller businesses.⁶⁶ Under the US regime, there is no set timeline: “[U]nlike the HSR Act procedure, in a review of a non-HSR reportable transaction, the transacting parties do not have the benefit of statutory deadlines for the antitrust agency to decide whether or not to challenge the transaction.”⁶⁷ Moreover, “[i]n addition to the burden of unscrambling the eggs of a consummated merger, the legal fees to defend a company involved in an investigation of a non-reportable transaction can approach or exceed the value of the transaction itself.”⁶⁸

48. *In the Matter of MSC Software Corporation*, illustrates this concern. On June 24, 1999, MSC Software Corp. acquired Universal Analytics Inc., and on November 14, 1999 it also acquired Computerized Structural Analysis & Research Corp. Since the size of the transaction was only 18.4 million, MSC Software Corp. did not notify the FTC or DOJ of these two acquisitions. However, on October 10, 2001, almost two years after both deals closed, the FTC brought an administrative action, alleging that MSC Software Corp.’s acquisition of these two small firms was illegal. After lengthy investigation and initiation of litigation, FTC and MSC settled the dispute over MSC’s 1999 acquisition of two competitors. However, “[b]y the time the administrative hearing was to begin, MSC had spent approximately \$9.5 million in legal fees responding to the FTC’s investigation, over half the amount spent on the acquisitions themselves.”⁶⁹

49. A more recent example of the US challenging sub-threshold consummated deals is *United States v. Bazaarvoice, Inc.* On June 12, 2012, Bazaarvoice, acquired PowerReviews, its primary competitor. Two days later, the DOJ launched an investigation and filed suit on January 10, 2013.⁷⁰ One year later, the court found Bazaarvoice’s violated Section 7 of the Clayton Act when it acquired PowerReviews.⁷¹ The court also held that “[i]n light of the findings of the Court, the government established that at law, it would be entitled to an injunction that requires Bazaarvoice to divest PowerReviews.”⁷² But since divestiture “is not a simple proposition 18 months after the merger,” the Court planned to hear more from the parties to

⁶⁴ Richard Liebeskind, *Challenges to Consummated Mergers: Making the Game Worth the Candle*, MERGERS AND ACQUISITIONS’ NEWSLETTER VOL. IV, NO. 2 (ABA Section of Antitrust Law), Spring 2004, at 25-26.

⁶⁵ Ohlhasuen, *supra* note 28, at 21.

⁶⁶ The United States has no deadline on when it must either initiate or finish an investigation into a sub-threshold consummated merger. Jurisdictions, like Mexico, are much more reasonable. Mexico provides that transactions below legal thresholds cannot be investigated after a year of completion. Article 22, FLEC.

⁶⁷ Rosch, *supra* note 24, at 23.

⁶⁸ Lauren S. Albert & Aryeh Friedman, *Non-Reportable Smaller Deals May Present Greater Risks, Costs Than Big -Ticket Deals That Must Be Reported to FTC, DOJ*, CORPORATE COUNSEL WEEKLY, VOL. 18, NO. 35, Sept. 10, 2003, at 279-280.

⁶⁹ *Id.*

⁷⁰ *United States v. Bazaarvoice*, No. 13-cv-00133-WHO, Dk. No. 244, at 4 (N.D. Cal. January 8, 2014) .

⁷¹ *Id.*, at 5.

⁷² *Id.*, at 10.

determine the appropriate remedy.⁷³ However, rather than return to court, the government and Bazaarvoice decided to mediate in an effort to reach an agreement on an appropriate remedy.⁷⁴

50. While Canada has also investigated some sub-threshold consummated mergers, unlike the US, such challenges are uncommon. Before the latest merger challenge in 2011, the previous one was in 2005. Generally, the Commissioner of Competition and the acquiring party will resolve any issues with a potential merger in negotiations “with some form of partial divestiture [as] the usual remedy.”⁷⁵

51. In 2011, the then-Commissioner Aitken moved to prohibit CCS Corporation’s (CCS”) acquisition of the shares of Complete Environmental Inc. and its wholly-owned subsidiary Babkrik Land Services Inc. Upon learning of proposed transaction, the Commissioner alerted the parties that she would challenge the merger if they closed the deal. On May 29 2012, the Tribunal announced its decision, which “upheld the Commissioner’s application and ordered that CCS divest the shares or assets of BLS on or before December 28, 2012, failing which a trustee is to effect a sale on or before March 31, 2013.”⁷⁶

5. Conclusion

52. Agency review of consummated mergers is justified in situations in which the parties have wrongfully provided information that is incomplete, misleading or erroneous. But intervention that takes place well after a transaction has closed is less likely to be efficient at preventing the competitive harms that the agencies seek to fend-off and more likely to be costly, drawn-out proceedings. Business following the rules and providing truthful, accurate and timely information to agencies charged with monitoring mergers should be afforded with a reasonable degree of legal certainty that their transaction will not be upended years later, especially when the overall impact of the merger, given its scope, is immaterial. In light of the experience reflected in past cases, agencies should observe, or self-impose, limitations periods after which they will not seek to investigate the mergers of yesteryear, and instead focus on more current and salient competition problems.

⁷³ *Id.*

⁷⁴ Melissa Lipham, *DOJ Wants Customer, Employee Data For Bazaarvoice Fixes*, LAW360, (Jan. 21, 2014), available at <http://www.law360.com/articles/502681/doj-wants-customer-employee-data-for-bazaarvoice-fixes>.

⁷⁵ Mark Katz, *Canada: Competition Bureau Wins Challenge to Non-Notifiable Merger*, KLUWER COMPETITION LAW BLOG, (July 3, 2012), available at <http://klowercompetitionlawblog.com/2012/07/03/canada-competition-bureau-wins-challenge-to-non-notifiable-merger/>.

⁷⁶ *Id.*