Multi-Jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?

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The globalization of economic activity has led to massive increases in both trade flows and cross-border investments. Lower tariffs and the reduction of other barriers to trade, combined with the pursuit of new customers and limited growth prospects in home markets, has provided a powerful impetus for international expansion in many industries. These drivers, supplemented by an urgent need for scale and scope efficiencies, are fuelling an international merger wave of gigantic proportions. The evidence greets us every morning in the financial pages. In one recent issue, the *Wall Street Journal* reported four breathtaking deals: *Exxon/Mobil*, the number one and two oil companies in the United States, to create the world’s largest privately-owned oil company; *Hoechst/Rhone Poulenc*, to form the world’s largest life-sciences company; *Deutsche Bank/Bankers Trust*, to create the world’s highest asset financial services group; and *Viag/Alusuisse Lonza*, to become a multi-field global leader.

During this period of dynamic economic change, the world has also seen a remarkable growth in the antitrust oversight of mergers. Multinational entities proposing to merge now find themselves faced with some form of merger review in most of the significant jurisdictions where they operate. As recently as 1990, fewer than 20 countries had a merger review system — and less than half a dozen were applied with rigour. Today, at least 82 countries have some form of antitrust laws, with an additional 24 engaged in the development

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1 The authors are partners in the Competition and International Trade Group of McMillan Binch in Toronto, Canada. This article is an expansion of a paper presented at the 1998 annual meeting of the American Bar Association (Toronto, Canada) and at the International Bar Association, Second Annual Competition Seminar (Fiesole, Italy). The assistance of Tim Brown (Kirkland & Ellis) on the original paper and Brian Hilbers (McMillan Binch) on the current article is gratefully acknowledged.

Of these, over 50 countries have enacted merger regimes and many more are under consideration. Although there has been some unilateral movement towards greater conformity, multi-jurisdictional mergers continue to be complicated by many substantive and procedural variances between domestic merger review regimes. Such variances are manifest in different policy objectives, anti-competitive thresholds, analytical factors, information requirements, time limits and remedies, not to mention a host of practical nuances. These differences, coupled with the prospect of reviews in numerous jurisdictions, make multi-jurisdictional mergers complex, time-consuming and expensive. If a boon for antitrust lawyers, the proliferation of regimes has been anything but for clients seeking to transact across borders.

The theoretical and practical issues arising from multi-jurisdictional merger review have received considerable attention over the past few years from academics (both legal and economic), practitioners and bar associations, and government agencies and officials.

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The costs imposed by multiple reviews — both direct (e.g., professional advisors’ fees, management time, filing fees, etc.) and indirect (e.g., efficiencies lost by delayed transactions, enforcement errors, business uncertainty, etc.) — are sizeable, and one may legitimately question what it is about the merger as a form of business activity that warrants such a time-consuming and costly approval process? Nevertheless, most commentary in this area (perhaps because of the political imperative of being seen to be responsive to the economic trends of globalization) has focused on improving, rather than dispensing with, international merger reviews.

The most ambitious options to address this issue would replace domestic merger review systems with a uniform code of pre-merger review and an international merger review agency or dispute resolution system. Such concepts have been criticized as unworkable or overly ambitious at this juncture, in large part because of the difficulties of reconciling the numerous substantive and procedural variations of disparate merger review systems. But the remarkable success of Europe’s one-stop shop for high-threshold mergers, with national oversight for smaller or local transactions, should be kept in focus by the nay-sayers. Of course, concerns over national sovereignty encroachment are never far below the surface in this policy debate.

With a view to heightening the common denominator and addressing the needs of both merger participants and enforcers, this paper explores the establishment of an opt-in, process-oriented, multi-jurisdictional pre-merger notification treaty. Signatories to the treaty would permit merging parties to utilize a single filing form for all participating jurisdictions, including common information requirements and uniform time limits. In return, merging parties would waive confidentiality restrictions to allow the agencies to exchange information and cooperate in their investigations. Such a system would provide significant cost savings for merging parties (and the global economy), while agencies would benefit from the ability to coordinate their reviews of cross-border transactions more efficiently and effectively.

Section I of the paper provides an overview of the purposes underlying the explosion of merger review legislation. Section II analyses the recent merger enforcement experience of selected jurisdictions. Section III briefly discusses the benefits of coordinated review of multi-jurisdictional transactions as well as the progress to date. Section IV identifies principles which could underpin a politically workable system of multi-jurisdictional merger review, while Section V proposes a framework for a treaty which reflects these principles.

I. Purposes of Merger Review

The marked substantive and procedural variations between merger review regimes are partly attributable to different underlying philosophies. Rowley and Baker have identified three categories into which most merger review systems fall:

- **Market Dominance Regimes**, which generally provide that a merger which enables a leading firm to achieve or strengthen a dominant position in a market may be prohibited.

- **Substantial Lessening of Competition Regimes**, which typically seek to prevent mergers that are likely to tighten the control of a small group of players in a market or provide a single firm with market power.

- **Public Interest Regimes**, which consider not only the effect on competition of a proposed transaction, but such other factors as employment, export promotion and international comparative advantage.

The many substantive differences between merger regimes have contributed to the pessimism which greets proposals for convergence of domestic merger standards. While domestic systems display significant procedural differences as well, there are some important commonalities which suggest better prospects for the convergence of merger review procedure. Indeed, a comparison of pre-merger notification requirements pursuant to the European Union Joint Venture “Short Form” and “Form CO,” the United States Pre-Merger Notification and Report Form and Joint Model “Second Request,” the Canada “Short Form” and “Long Form,” the United Kingdom/France/Germany “Common Form,” and the new OECD Model Form discloses many conceptual similarities even though there are important differences in the details.

With the passage of the **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (the “HSR”), the United States bolstered its substantive merger law with “a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are

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8 Many focus on consumer welfare or total economic welfare, but some employ broader public benefit criteria.


10 This is the approach which has predominated in Europe under the *Treaty of Rome*, the European Union *Merger Regulation* and their progeny.

11 The United States, Canada and Australia are among the countries which have adopted this approach.

12 Examples of this approach can be found in the United Kingdom, France and Spain.

13 See the chart in Appendix II.

consummated.”¹⁵ Prior to the introduction of pre-merger review, agencies and commentators decried the occurrence of the “midnight merger” — a transaction which closed without agency knowledge. In passing the HSR, United States legislators sought to eliminate incentives for “speedily and surreptitiously consummating suspect mergers and then protracting ensuing litigation.”¹⁶ Other factors which led to support for the passage of pre-merger review legislation were a lack of effective preliminary relief (e.g. injunctions or hold-separate orders), as well as the problem of “unscrewing the eggs” post-merger.¹⁷

Pre-notification systems are now pervasive, but their success has not come without notable costs. One undesirable by-product is a sizeable compliance burden for the many transactions which are not anti-competitive, in addition to those few that are. The United States HSR system has been criticized for the overly broad application of merger review provisions to competitively neutral or inconsequential transactions.¹⁸ And at the time of HSR passage, no one could have predicted the multiplication of merger review schemes worldwide, or the concept of having to pay a filing fee for the privilege of being investigated. Section II of the paper reviews some of the more significant of these costs, both from the perspective of domestic merger review generally, and in the context of multi-jurisdictional mergers.

II. Recent Enforcement Experience

To assess how merger review currently functions, we requested enforcement statistics from twenty-three jurisdictions.¹⁹ Fourteen responded, including eleven with substantially complete answers to the survey questions.²⁰ The survey focused on five main areas:

• the number of notifiable transactions;

¹⁷ Ibid. at 829-831.
¹⁹ Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, European Union, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Mexico, New Zealand, Poland, Spain, Sweden, Switzerland, United Kingdom, United States and Venezuela. Jurisdictions were selected based on subjective assessments of their experience with merger review as well as to achieve geographic and substantive law diversity.
²⁰ Completed questionnaires were returned by Australia, Canada, European Union, Germany, Ireland, Italy, Mexico, New Zealand, Poland, Sweden and Switzerland. Argentina and Japan responded to the questionnaire but were unable to provide statistics as requested. The United States provided a partial response.
• where applicable, the proportion of transactions which are cleared in a quick “first phase” versus a full “second phase” review;\(^{21}\)

• the extent to which merger review makes a difference in the form of prohibitions or other remedial actions or abandoned transactions;

• the time required to complete first and second phase assessments; and

• the public sector employment and budgets devoted to merger enforcement.

We had hoped to obtain data which was segregated between “domestic” and “international” transactions to the extent that agencies employed such classifications for their own purposes. Since only two jurisdictions\(^ {22}\) were able to respond on this basis, the data we report in Appendices III and IV includes all notifiable transactions in each jurisdiction.

III. Reportable Transactions

As can be seen in Appendix III, the survey found a wide range in the number of notifiable mergers in 1998. Not surprisingly, the United States led the pack with 4,728 transactions while Switzerland handled a mere 27. Leaving aside these two outliers, which can be explained largely by country size, most agencies were clustered in the 125-320 range. The other two exceptions — Poland (1,750) and Germany (1,333) — are not easy to understand by reference to country size and appear to result from using thresholds which catch on order of magnitude more transactions than most jurisdictions.

Unfortunately, these basic data do not permit a determination of how many transactions require filings in multiple jurisdictions, nor an indication of historical trends. They generally also omit non-notifiable transactions which

\(^{21}\) As discussed below, the applicability of these concepts varied between jurisdictions and, in systems which do not have formally segregated phases, the enforcement agency determined whether and how to apply the distinction in responding to the survey.

\(^{22}\) Of those jurisdictions which responded to the questionnaire (see supra note 21), only Switzerland and Mexico distinguished between “domestic” and “international” mergers. In Switzerland, where an international merger is defined as a “concentration activity producing effects in the Swiss market and in other markets,” 16 of the 27 mergers subject to notification in 1998 (i.e. 59%) were international mergers (unpublished information provided by the Swiss Competition Commission). In Mexico, 78 of 218 mergers subject to notification in 1997 (i.e. 36%) had an international component (unpublished information provided by the Mexican Federal Economic Competition Commission). Additionally, the Chairman of the US Federal Trade Commission has stated that, of the “full-phase merger investigations” in the United States, “over the last several years, at least 50% have involved a foreign party or assets or information located abroad” (Pitofsky, supra note 3 at 8). While the Canadian Competition Bureau did not provide segmented data, it has been reported that in 1998 Canadian companies were involved in 403 cross-boarder acquisitions valued at US$41 billion, while foreign companies made 240 acquisitions in Canada worth US$15 billion (Financial Post, supra note 2).
come to the attention of enforcement agencies. Nevertheless, they do show that there are thousands of mergers that undergo competition law review every year.

Most jurisdictions base pre-notification on asset and/or sales thresholds. The bewildering variety of threshold structures and methodologies can only fully be appreciated by attempting to apply them to a transaction involving parties with activities in numerous countries. One of the more puzzling approaches involves worldwide financial data (e.g. the EU’s worldwide turnover threshold): from the perspective of the reviewing jurisdiction, it is hard to see how foreign sales or assets are a relevant consideration. Market share tests (e.g. Belgium’s 25% market share threshold) are even more problematic because of the uncertainty they generate. Market definition is such a subjective, fact-intensive and economics-intensive process that it can not be a reasonable basis for imposing pre-notification obligations.

Threshold levels can be raised (or lowered) to contract (or expand) the number of transactions which are pre-notifiable. However, domestic review systems generally do not index reporting thresholds to inflation and/or increases in the average value of companies as measured by stock market indices. The result is “notification creep,” with an increasing proportion of mergers becoming reportable. In the United States, for example, the HSR size-of-person and size-of-transaction threshold tests have not been adjusted for over 20 years. Although the HSR was designed to apply only to “the very largest corporate mergers — about the 150 largest out of the thousands that take place every year,” the 4,728 HSR filings in fiscal 1998 represent a 433% increase in notifiable transactions since fiscal 1983. Similarly, Canada has not adjusted its pre-notification thresholds since they were introduced in 1986, although the number of notifiable transactions has not mushroomed in the same manner.

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23 For exceptions, see the notes to Appendix III relating to Canada, New Zealand and Poland.
26 H.R. Rep. No. 94-1373 (1976) at 11, as quoted in Sims and Herman, supra note 18 at 877.
27 Based on the Consumer Price Index, the effect of inflation on the thresholds for review under the Canadian system would increase the Cdn$400 million party-size and Cdn$35 million target-size thresholds to almost Cdn$560 million and Cdn$50 million, respectively (as of May 1998). Indexing to account for the effects of inflation is not unheard of in Canadian legislation: under the Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 14.1, the threshold for a reviewable transaction involving a “WTO Investor” is revised annually to take account of inflationary effects.
28 Annual Reports of the Director of Investigation and Research (http://strategis.ic.gc.ca/SSG/ct01345e.html).
Whether domestic review thresholds are too high or low, or well structured or not, is a question which individual jurisdictions would do well to consider. The low levels of second phase assessments and merger challenges (see detailed discussions below) suggest that there may be room to reduce the number of transactions which are subject to pre-notification. This conclusion is reinforced when one allows for the probability that non-reportable transactions which have a clear negative impact on competition will come to the attention of the authorities through complaints from marketplace participants. Thankfully though, harmonization of threshold structures and levels is not a necessary component of a common form filing treaty for reasons discussed more fully below.

IV. Second Phase Assessments

The survey requested data on the number of mergers cleared after a relatively quick preliminary determination (“first phase assessment”) as opposed to a more comprehensive review (“second phase assessment”). The purpose was to explore whether transactions which are clearly not anti-competitive are quickly identified and processed while those raising serious issues receive in-depth scrutiny. Some systems (e.g. the EU’s Merger Regulation and the US HSR process) have two formal stages built in. Many others do not, and the survey left it to the agency to determine how to respond to these concepts. Only Poland did not provide statistics which responded to this distinction in some manner.

While recognizing the imprecision and variability in the first and second phase concepts resulting from this methodology, the survey results are nonetheless revealing. As seen in Appendix III, Australia and New Zealand both conduct second phase assessments on more than one third of all notifiable transactions. However, their average time for the first phase is noticeably lower than other jurisdictions (10-15 and 2-3 days, respectively) which suggests that they may employ a comparatively superficial first phase. Germany and Switzerland each send 15-20% of notifiable mergers into a second phase after spending about three weeks on a first phase assessment. The European Union bumps only 5% of transactions into stage two after a 30-day first stage, and the remaining jurisdictions surveyed use a second phase for less than 3% of mergers (albeit sometimes after a longer first phase — such as 30-45 days in Ireland).

29 The questionnaire requested statistical information for both a “First Phase Assessment” and a “Second Phase Assessment”. The jurisdictions surveyed were provided with the following definitions: “A First Phase Assessment means the time during which a preliminary determination is made concerning the anti-competitive aspects of the proposed merger, if this is distinct from the making of the final determination (e.g., an initial “Hart-Scott-Rodino Act” filing versus a “Second Request,” or the “Stage One” versus “Stage Two” process under the EU Merger Regulation, or any preliminary determination versus a more systematic review); and “A Second Phase Assessment means the time during which a comprehensive analysis of the proposed merger is undertaken and a formal decision is made”. It was left to the individual jurisdictions to fit their particular merger review statistics into this framework.

30 The Swiss merger numbers are so low (4/27 in 1998 and 4/23 in 1997) that they may not be very representative.
In summary, the first/second phase data indicates that most jurisdictions currently clear at least 95% of transactions as non-problematic in an average time of one month or less. While the efficiency potential of a well-functioning two-stage regime is huge, merging parties do not fully benefit from this at present because in most jurisdictions the phases are not formally structured and time-limited in a way that reduces unnecessary delay and uncertainty in transaction planning and implementation.

V. Mergers Requiring Remedial Action

There are three main ways in which enforcement agencies obtain results in merger cases: actual prohibition of a transaction; clearance after some other remedial action (often a negotiated restructuring); and abandonment of transactions in the face of agency concerns. The survey requested information about each of these outcomes. For analytical purposes we have combined prohibitions and other remedial actions to obtain a measure of the frequency with which agencies undertake explicit enforcement action. Abandonments have been kept separate because it is often unclear whether enforcement agency concerns are a primary or ancillary reason for the merging parties’ decision not to proceed.

Regardless of whether few or many transactions receive a second phase assessment, the data in Appendix III indicate that the number of transactions which are prohibited or cleared after remedial action in most jurisdictions is very low (a potent fact to be borne in mind when assessing cost/benefit of the rapidly multiplying systems). For example, in 1998:

- the Canadian Competition Bureau obtained three remedial actions (and no prohibitions) in the 195 pre-notified transactions (i.e. a 1.5% challenge rate);

- the Swedish Competition Authority examined 156 mergers, of which only one (or 0.6%) was prohibited and no others required remedial action;

- New Zealand and Poland did not prohibit or obtain other remedial action in any of the mergers their agencies reviewed (320 and 1,750 transactions, respectively);

- the European Commission was one of the most interventionist agencies, with two outright prohibitions in addition to ten first stage and five second stage...
clearances with undertakings in 245 cases (i.e. an overall challenge rate of 6.9%).

Abandonments were more frequent than prohibitions or other remedial actions in several jurisdictions. However, even if all abandonments were counted as enforcement agency victories (which is not a valid assumption for reasons noted above), the percentage of notifiable transactions which are abandoned range from a low of 0% in Canada, Ireland and Italy to a high of 4% in Australia.

VI. Time to Complete Reviews

Most enforcement agencies were able to provide average time for first phase versus second phase reviews. As Appendix III indicates, the differences are substantial: phase one is typically being completed in three to four weeks, whereas a transaction which goes through the second phase will have a total elapsed time of two to five months. On the other hand, there is seldom much difference in the average elapsed time for prohibitions, other remedial actions and transactions which are cleared in a second phase.

If the average phase one times could be converted to maximums, we expect that most merging parties could live comfortably with them (although three weeks is much more reasonable than four or more for transactions which are not complex or problematic). In contrast, average times of several months for transactions requiring a second phase review are troublesome. In our view, if merging parties and enforcement agencies are working diligently, very few cases should require more than three months for a thorough review. Moreover, averages do not provide the certainty needed for transaction planning; merging parties want to know in advance what amount of time to budget for competition review of their transaction.

Mergers are almost always time sensitive. Delay breeds uncertainty in product markets, labour markets and capital markets. A lengthy review process creates a splendid opportunity for competitors to raid customers

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35 Germany had more prohibitions (five) and the same number of other remedial actions, but on a population of 1,333 transactions (i.e., a 1.6% challenge rate). Switzerland had the highest percentage challenge rate (11%), but it arose from such a small case flow (one prohibition and two other remedial actions in 27 total cases) that it may not be representative. Switzerland also provided data for 1997. When the 1997 and 1998 statistics are combined, Switzerland’s challenge rate falls slightly to 8% (one prohibition and three other remedial actions in 50 total cases).

36 As indicated in Appendix III, the EU statistics include ten transactions (one of which was resolved with undertakings) notified pursuant to the Treaty Establishing the European Coal and Steel Community, art. 66.

37 Australia and New Zealand are notable exceptions, with cumulative reported average times of two to three weeks for transactions which go into the second phase. However, this is likely a function of sending much larger numbers of transactions into phase two, as discussed above.
and staff,\textsuperscript{38} not to mention the emergence of competing bidders in public market transactions. Furthermore, as Sims and Herman have pointed out, “[d]uring the time that deals are delayed, the parties to a transaction lose the savings, efficiencies and synergies (assuming there are any) that induced their respective business decisions to do the deal in the first place, and the economy is denied whatever competitive benefits would result.”\textsuperscript{39}

The Canadian Competition Bureau has attempted to address timing issues using “service standard” guidelines (14 days for “non-complex,” 70 days for “complex” and 150 days for “very complex” mergers) which accompanied the introduction of filing fees in the autumn of 1997. During the first year of operation under these guidelines, the average period for completion of reviews was 11 days for “non-complex” transactions and 45 days for “complex” transactions.\textsuperscript{40} However, the service standards are non-binding, and the clock starts to run only after the Bureau has received the information that it deems necessary to properly complete an investigation.\textsuperscript{41} There is also no legal limit on the length of a Competition Bureau investigation other than the three-year limitation period for challenging a transaction under the \textit{Competition Act}.\textsuperscript{42} This can be contrasted with the European Union’s one-month and four-month time frames for first and second stage proceedings\textsuperscript{43} — a model which has demonstrated the feasibility and benefits of guaranteed time limits for merger decisions.\textsuperscript{44}

\textsuperscript{38} Competitors sometimes present complaints to enforcement agencies for this very purpose, even if they do not expect to succeed in having the transaction blocked. See, T. Smith and H. Sterling, “Challenging Competitors’ Mergers: A Real Strategic Option” (1996) 65 Antitrust Law Journal 57.

\textsuperscript{39} Sims and Herman, \textit{supra} note 18 at 885-886.

\textsuperscript{40} \textit{Competition Bureau Fee & Service Standards Report - 1998} (Discussion paper prepared by the Competition Bureau for the Fee and Service Standards Forum, 2 February 1999) [unpublished]. Complex mergers are defined as transactions between direct or potential competitors, or between customers and suppliers, where there are indications that the transaction may create or enhance market power according to the enforcement policies set out in the \textit{Merger Enforcement Guidelines} issued by the Director of Investigation and Research in March 1991 (the “MEGs”). Very complex mergers are those which are likely to create or enhance market power according to the enforcement policies set out in the MEGs, and in which Competition Tribunal proceedings are a strong possibility.

\textsuperscript{41} This may involve substantially more information than prescribed for a filing under the \textit{Competition Act}, R.S.C. 1985, c. C-34, Part IX.

\textsuperscript{42} \textit{Ibid.}, s. 97. The submission of either a Short or Long Form pre-notification filing enables merging parties to proceed at their own risk to complete a transaction after the lapse of a 7- or 21-day waiting period, respectively. However, parties which attempt to complete a transaction prior to receiving Bureau sign-off can face challenges before the Competition Tribunal, and s. 100 of the \textit{Competition Act} enables the Bureau Director to apply to the Tribunal for an order temporarily prohibiting the completion of a transaction.


\textsuperscript{44} See W.J. Kolasky and L. Greenfield, “Merger Review in the EU and US: Substantive Convergence and Procedural Dissonance” (October/November 1998) Global Competition Review 22 at 24; and Baker \textit{et al.}, \textit{supra} note 6 at 467. As Baker \textit{et al.} point out, however, time limits would be a radical step in some jurisdictions, particularly where merger challenges are adjudicated in domestic courts.
VII. Enforcement Costs

While recognizing that public resources are only a small part of the total cost of merger review, we felt it would be informative to survey enforcement staffing levels and costs. We were surprised to find that many agencies have difficulty providing these data.

Appendix IV summarizes full-time-equivalent staffing levels, which ranged from a handful of professional staff in some agencies to 267 professional and support staff for the US Department of Justice (i.e. excluding the merger staff complement of the Federal Trade Commission). Eight jurisdictions provided enough data to enable a calculation of average transactions per full-time equivalent staff. The range was substantial, with the EU at the low end of the spectrum (3.5) and Sweden slightly outpacing Poland at the high end (19.5 and 16.5, respectively). However, we are not inclined to read too much into these data because it would be difficult to separate efficiency effects from those arising out of systemic differences in substance and procedure.

Half of the responding jurisdictions were unable to identify the amount of the total agency budget which is consumed by merger enforcement. Of the remainder, only Switzerland devoted in the vicinity of half of the budget to mergers; most others were in the 10% to 20% range. Appendix IV indicates that, on a per transaction basis, Switzerland’s average cost was dramatically higher (US$79,141) than the other five jurisdictions for which such a calculation was possible. The EU was next highest at US$29,160, with New Zealand running the low cost operation at US$1,001 per notification. Again, it should be noted that the survey did not provide a basis for distinguishing between systemically-driven cost differences versus those attributable to operational efficiency and inefficiency.

Filing fees represent revenue to enforcement agencies (or at least government coffers generally), but an increasingly significant cost to merging parties. More than half the responding jurisdictions have copied this US innovation. Canada introduced fees of Cdn$25,000 (US$16,335\textsuperscript{45}) for pre-notification transactions (and requests for Advance Ruling Certificates) in November 1997. The total estimated fees for fiscal 1999 exceed Cdn$6.6 million (US$4.3 million). In Germany, with notification fees averaging DM10,700\textsuperscript{46} per transaction, the Antitrust Authority received fees in excess of DM14.3 million (US$8.6 million) in 1998. The HSR process, which remains in a

\textsuperscript{45} To facilitate comparisons, US dollar amounts have been calculated using currency exchange rates for December 31, 1998.

\textsuperscript{46} Unlike most jurisdictions, the fee is determined according to the personnel and material expenses of the Antitrust Authority, with account also being taken of the economic significance of the concentration. In principle, the fee will not exceed DM100,000 (US$60,400), but this figure can be doubled in exceptional cases.
class by itself, at US$45,000 and having generated over a quarter of a billion dollars in filing fees last year.

Agency budgets and filing fees represent only the tip of the iceberg. Unfortunately, there is no comprehensive data on the overall public and private costs of merger review. However, Sims and Herman have attempted to quantify the costs of merger review in the United States. They identify and estimate various direct costs (filing fees, regulatory delay, out-of-pocket costs for professional advisors, lost management and other employment time, etc.) and indirect costs (excessive relief, the growth of unreviewable agency discretion, bad incentives, etc.). They conclude that, on a conservative basis, it costs slightly more than US$1 billion annually (as of 1996) for the review of transactions which raise virtually no antitrust problems in the United States.47 Clearly, there is an urgent need for work to identify and quantify the quickly escalating cost burden of international merger review.

VIII. Opportunities to Enhance Procedural Coordination

This section briefly summarizes the potential benefits from coordination of international merger reviews and progress to date towards this objective.

IX. Benefits of Coordinated Reviews Approach

While precise data is not available, we know from anecdotal evidence and experience that an increasing number of transactions are being subjected to review in multiple jurisdictions. The resources consumed by merger review in a single jurisdiction are multiplied when two or more jurisdictions are involved. Furthermore, multi-jurisdictional review of mergers presents unique challenges to merging parties and to domestic agencies. A multi-jurisdictional pre-merger notification system could provide benefits to both stakeholder groups and to the global economy.

1) Reduced Barriers to Investment Flows and Economic Integration

One factor which may be cited in favour of coordination is the effect of globalization itself: transactions may be so integrated into international commerce that domestically-focused merger reviews no longer make economic or practical sense. It is generally recognized that cross-border merger transactions can generate significant economic welfare gains. As with free trade, global welfare will be enhanced if domestic barriers to market-driven investment transactions are reduced.

It seems to us that this is primarily a rationale for long-term convergence of substantive merger standards towards an economically sound framework. Nevertheless, coordination of merger review processes

47 Sims and Herman, supra note 18 at 884-92.
is likely to contribute to this objective by reducing the risk that any one jurisdiction would impede a benign or efficiency-enhancing transaction.

II) **Fewer Conflicting Decisions**

A frequently advanced rationale for coordinating merger review is the avoidance of conflicting decisions in different jurisdictions. The US$15 billion Boeing/McDonnell Douglas merger is a high-profile example of such conflict. Despite the transaction having received approval from the Federal Trade Commission in the United States, the European Commission opposed Boeing’s exclusive supply arrangements with three US airlines because it believed the merged entity would control too much of the global market for commercial aircraft and threaten the viability of Airbus Industrie, the sole remaining (and European-based) competitor. Boeing was required to scrap its exclusive arrangements and provide competitors with certain aviation technology in order to secure approval for the transaction in the European Union. Conversely, when Ciba-Geigy and Sandoz proposed to merge to form Novartis, the Federal Trade Commission exacted much harsher remedies than did the European Commission in various cross-border markets.

Despite these well known examples, divergence is the exception, not the rule. When it occurs, though, it is an unhappy outcome not only for the merging parties, but for the enforcement agencies which are under pressure to explain their differences. Conflicting decisions will remain a possibility so long as individual domestic agencies are enforcing their own substantive laws. However, procedural coordination should reduce the likelihood of conflicting decisions by moving enforcement agencies towards more common factual bases and in-depth discussions of relevant issues throughout their investigations.

III) **Lower Transaction Costs**

Without denigrating the first two benefits, it seems clear that the most important gain from procedural coordination is a reduction of transaction costs. This objective is hardly glamorous, but it would make a real difference. Merger review involves significant direct transaction costs, both private (e.g. retaining lawyers and economists,

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filing fees, management time, staff hours lost to working on document production requests, etc.) and public (e.g. staff time, payments to external advisors, other agency or court resources, etc.). Indirect costs, if less visible are potentially of greater concern, including the impact of delay and the welfare effects of over- or under-enforcement errors. Given that the overwhelming majority of mergers are competitively benign, the potential global welfare cost to delaying or preventing the achievement of merger efficiencies needs to be taken more seriously in an environment of multiplying regimes. In addition, the aggregate length and costs of the review processes may have a chilling effect on transactions which would be efficiency-enhancing.

X. Progress to Date

IV) The ABA Report

In 1991 the American Bar Association’s Report of the Special Committee on International Antitrust (the “ABA Report”) examined a number of antitrust issues arising from globalization including conflicts in international merger review. The ABA Report focused on reporting requirements for mergers, extraterritorial enforcement and conflicts of jurisdiction, and access to information outside the jurisdiction of the investigating agency. Its recommendation of harmonized content and timing for pre-merger reporting requirements, the establishment of a two-stage filing system, and the sharing of confidential information among enforcement agencies (subject to appropriate confidentiality safeguards) provided a visionary roadmap for procedural improvements which has yet to be fulfilled.

V) The OECD

The ABA Report was followed in 1994 by a study that Richard Whish and Diane Wood authored for the OECD. Chapter IV of Appendix IV summarizes employment and budgeted costs for merger review by enforcement agencies in Australia, Canada, European Union, Germany, Ireland, Mexico, New Zealand, Poland, Sweden, Switzerland and United States.

See the challenge statistics in Appendix III which are discussed above.

It has been reported that the length and cost of merger review played a significant role in the cancellation of the proposed merger of Ernst & Young and KPMG (see, for example, C. Mahood, “Accounting Merger Scuttled”, The Globe and Mail (14 February 1998)). For further discussion of regulatory burdens and transaction costs as a disincentive to complete procompetitive transactions, see Blumenthal, supra note 15 at 817-818; Fox, supra note 5 at 594; and Campbell and Trebilcock (1993), supra note 5 at 129.


Ibid. at 205-208.

Whish and Wood, supra note 7.
the study explored the motivations, advantages and disadvantages for both enforcement agencies and the business community of greater cooperation and convergence in merger reviews. Like the ABA Report, it concluded that substantive harmonization was premature, but the time was ripe to address procedural issues. Cost savings from better coordinated procedures would translate into more efficient and effective conduct of investigations, which in turn would benefit customers. From the agencies’ perspective, cooperative efforts might contribute to minimization of duplication, ease of gathering information and avoidance of conflict. For merging parties, the principal benefits from cooperation would be a reduction in review time and costs.

The Whish and Wood recommendations included:56

- the establishment of a waiver system which would enable parties to waive confidentiality in return for expedited consideration or reduced fees;

- the implementation of guidelines governing the treatment by the agencies of merging parties’ confidential information;

- the utilization of a common filing form with common information requirements; and

- the convergence of time periods within which agencies would complete their reviews of proposed transactions.

After a long delay, a working party of the OECD Committee on Competition Law and Policy has recently adopted a relatively modest report and common filing form which incorporate some of the Whish and Wood recommendations.57 Twenty-eight jurisdictions58 reached consensus on the form, demonstrating that a common form, even when drafted at a relatively low common denominator, is feasible. However, it remains to be seen whether this initiative will be endorsed by the OECD Council and whether member states will in fact follow the non-binding recommendation for a common form filing.59

VI) The United Kingdom/France/Germany Common Form

56 Ibid. at 98-111.
57 OECD Report and Form, supra note 7.
58 The members of the OECD Committee on Competition Law and Policy are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and European Union.
59 A summary of the provisions of the common form is included in Appendix II.
In September 1997, the United Kingdom, France and Germany adopted a voluntary common filing form which enforcement agencies in each country will accept when a merger is to be examined in two or more of the jurisdictions. Merging parties opting to utilize the system will be told within one month whether additional information is required. Each agency continues to enforce its own laws in the manner it considers appropriate.

Unfortunately, this regime does only a little to address the cost and time issues which arise with multi-jurisdictional mergers. Also, use of the form does not significantly speed up the review processes since the three participating agencies have only undertaken to “seek, where possible, to coordinate their timetables for final decisions”60 (which may, in fact, result in faster jurisdictions slowing down). In addition, parties opting to use the form may still face demands for significant additional information from any or all of the agencies before a decision can be made under their respective laws. Finally, the incentive to utilize the form is uncertain because the information requirements may exceed those which an individual jurisdiction would require.61

The common form has not had much practical impact on pre-merger notification in the United Kingdom, France or Germany. It has been used once for notification in Germany. In some cases (e.g. Federal Mogul’s £1.5 billion acquisition of British autoparts maker T & N) the form has been used in the United Kingdom and France, while Germany has been notified under its domestic regime, which has a lighter filing requirement.62 Furthermore, no other country has taken up the invitation to join this system. Notwithstanding its shortcomings, however, the joint form represents both an agency effort which deserves to be applauded and a base from which further progress can be pursued.

VII)  Bilateral Agreements and Case-by-Case Cooperation

The most tangible progress to date has occurred through bilateral cooperation agreements between governments or their enforcement agencies.63 During the past decade, there has been a

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60 Introductory Comments to the Common Form for Mergers in the United Kingdom, France and Germany. See also commentary by N. Charbit and C. Coasnes, “Multi-merger Notification Form” (December 1997, January 1998) Global Competition Review 53.
62 Information received from the German Antitrust Authority and European competition law practitioners.
remarkable shift in focus from avoiding enforcement conflicts to friendly cooperation. The turning point was the 1991 agreement between the United States and the European Union which provides for cooperation on three main levels:64

- antitrust officials will share information concerning antitrust enforcement policy;
- each jurisdiction will inform the other of anti-competitive conduct which is “relevant to, or may warrant, enforcement activity” in the other jurisdiction; and
- antitrust officials may request non-confidential information in the possession of the other enforcement agency.65

The EU/US agreement and its progeny66 do not empower antitrust authorities to use their own investigative powers to collect evidence in the other jurisdiction or to require the requested agency to do so on their behalf. Nor do they contemplate exchanges of information which are subject to statutory confidentiality protections. These restrictions can be contrasted with the “MLAT” between Canada and the United States67 which provides for the collection and exchange of

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65 In 1998, there were 43 notifications by the EU and 39 notifications by the US under this agreement (unpublished information provided by the European Union), a substantial increase over the 3 EU and 9 US notifications in 1991 (Report on the Application of the Competition Rules in the European Union (Report Prepared Under the Sole Responsibility of DG IV in Conjunction with the Twenty-Seventh Report on Competition Policy, 1997 - SEC (98) 636) (also at http://europa.eu.int/comm/dg04/public/en/index.htm)). (These figures represent the number of cases in which one or more notifications were made, not the total number of notifications.)
66 See Canada/US, supra note 63; and Canada/EU, supra note 63.
evidence using formal powers and the exchange of confidential information, but only in criminal matters such as conspiracy cases. The United States has enacted framework legislation for extending these more expansive types of cooperation to non-criminal matters including mergers (subject to a continued confidentiality restriction on pre-merger filings). However, only one “antitrust mutual assistance agreement” (with Australia) has been negotiated pursuant to this enabling legislation and it is not yet in force.

In practice, the major enforcement agencies currently cooperate and coordinate to a considerable extent on many cross-border transactions. When confidentiality restrictions impede the desired level of cooperation, they do not hesitate to request waivers from merging parties which allow confidential information to be discussed and, sometimes, confidential documents to be exchanged. Merging parties typically grant such waivers when requested to do so because of the risk that an investigation will slow down and/or become more in-depth and adversarial if they refuse. The merging parties may also benefit if more focused and expeditious reviews result from this ad hoc process, but such outcomes are far from certain because the waiver grants are not normally tied to timing commitments by the agencies.

69 See Australia/US, supra note 63.
XI. Principles for Coordinating Multi-jurisdictional Merger Reviews

The success of any proposal to address the problems raised by multi-jurisdictional mergers will hinge upon there being sufficient incentives for all stakeholders in the process to utilize an alternative system of review. Fortunately, some of the interests of the principal stakeholders — merging parties and domestic enforcement agencies — do coincide. Both stand to benefit from a system which minimizes the potential for conflicting decisions: agencies would be subject to less embarrassment and pressure to explain differing results, and merging parties would welcome the greater certainty which such a system would provide. Moreover, both are constrained by finite financial resources: a review system which uses common information requirements, exchanges of information, and uniform time limits to reduce the costs and time associated with the review of multi-jurisdictional transactions should generate material public and private sector transaction cost savings. With such incentives in mind, the balance of this section sketches the principles which should guide the design of a more integrated review process.

XII. Respect for Sovereignty

One of the shortcomings of previous attempts to integrate domestic merger review systems has been a perception that such proposals might usurp the jurisdiction of competition law enforcement agencies and legislators. Without the support of such agencies and legislators, integration is bound to fail. Their support for a multilateral treaty on procedural matters should be obtainable because it would not erode the underlying substantive regime or enforcement agency responsibilities in their own jurisdiction. Legislators will retain the autonomy to enact law that reflects particular policy goals, and enforcement agencies will not be constrained in the substantive application of that law. A process-oriented multilateral treaty would merely provide an alternative procedural framework through which multi-jurisdictional mergers could be reviewed in a more efficient and cost-effective way while respecting cultural and legal differences among jurisdictions.

XIII. Transparency

Transparency is vital to the legitimacy and hence effectiveness of any multi-jurisdictional merger review system. As markets become more integrated, actions of one agency are increasingly likely to have an impact on firms and agencies located elsewhere in the world. Accordingly, it is important for enforcement authorities in each jurisdiction to make information about their general policies and practices, as well as their decisions in particular cases (subject, of course, to appropriate confidentiality safeguards) accessible to both their counterparts in other countries and to business enterprises and their advisors.

A number of jurisdictions already achieve a high degree of transparency at the policy level in published annual reports and guidelines, as well as through regular speeches at conferences and other public communications. The
OECD also compiles reports on the competition policies and practices of various jurisdictions.\textsuperscript{70} However, with the notable exception of the European Union, the level of transparency for decisions on specific transactions is modest to abysmal.

Transparency is relevant during, as well as at the end of, the review of individual transactions (subject again to appropriate safeguards for confidential information). In multi-jurisdictional merger investigations, it would be beneficial for enforcement agencies, merging parties and perhaps the public in each jurisdiction to be aware of significant steps taken by all reviewing agencies. Notification requirements imposed on merging parties, and/or public announcements by enforcement agencies when significant milestones occur, could be used to minimize the potential for surprise and conflict among agencies while providing merging parties, investors and other interested marketplace participants with information on the progress of an investigation.

XIV. \textbf{Flexibility to Opt In or Opt Out}

The benefits from cooperation and convergence will vary from case to case, depending on market dynamics and other factors specific to each individual transaction and investigation. For example, a merger involving direct competitors in a truly global market will be well-suited to common information requirements and inter-agency collaboration because similar (indeed, overlapping) issues will need to be addressed in every jurisdiction. The benefits of an integrated approach to merger review will be more modest where few jurisdictions are affected, relevant geographic markets are local rather than supranational,\textsuperscript{71} market structure and competitive conditions vary greatly within such markets, and competition concerns arising in any country would most naturally be remedied by divestitures of one of the merging parties’ local subsidiaries. This suggests that an “opt in” (or perhaps “opt out”) approach would be useful to allow merging parties (and perhaps agencies as well) to determine when it would be appropriate to utilize a multi-jurisdictional review process.\textsuperscript{72}

XV. \textbf{Consistent Information Requirements and Time Frames}

Inconsistent deadlines and different information requirements are two of the worst obstacles faced by the parties to multi-jurisdictional mergers.\textsuperscript{73} These issues could be addressed through a common filing form containing a specific list of required information which, when satisfied, would trigger waiting periods that are uniform for each jurisdiction. Such an initiative should also

\textsuperscript{70} For 1995-96, 20 members of the OECD submitted reports (http://www.oecd.org/daa/citp/ar.english.htm).

\textsuperscript{71} For a general discussion of the link between convergence approaches and the scope of relevant geographic markets, see Campbell and Trebilcock (1993), supra note 5.

\textsuperscript{72} Baker \textit{et al.}, supra note 6 at 446-447.

\textsuperscript{73} See, for example, Whish and Wood, supra note 7 at 102, as well as the discussions above relating to these issues.
garner support from enforcement agencies because greater certainty regarding the timing of the activities of counterparts in other jurisdictions would permit the allocation of resources in a more efficient manner.

XVI. Information Exchanges Subject to Appropriate Safeguards

From the perspective of enforcement agencies, one of the major incentives for internationalization of current systems is to obtain greater latitude for inter-agency cooperation and information exchanges than is permitted by existing bilateral agreements. Enforcement agencies in most jurisdictions do not have the ability to share protected confidential information in the absence of explicit authorizing legislation or a formal treaty (i.e. a bilateral agreement or memoranda of understanding between governmental authorities will not suffice).74 Moreover, the United States legislation which authorizes “antitrust mutual assistance agreements” with foreign law enforcement agencies contains a carve-out that precludes the disclosure of the contents of pre-merger filings.75

It is already common for enforcement agencies to ask merging parties to provide written waivers which allow officials to discuss confidential information and/or exchange confidential documents. It is difficult as a practical matter to refuse such requests. However, merging parties are legitimately concerned about the risks of “downstream” disclosure of confidential information or documents to other governmental authorities and/or third parties. Any multi-jurisdictional merger review treaty must simultaneously address the need for inter-agency exchanges and appropriate safeguards.

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74 See generally, Baker et al., supra note 6 at 455-460.
75 International Antitrust Enforcement Assistance Act of 1994, supra note 65, § 6204(1) exempts from disclosure to foreign agencies all “antitrust evidence that is received by the Attorney General or the Commission under section 18a of this title [referring to Section 7A of the Clayton Act, as added by title II of the Hart-Scott-Rodino Act].”
XVII. An International Merger Review Treaty

Leaving aside the question of whether “hard” harmonization of substantive merger rules may be feasible or desirable in the long-term, the time has come for progress on the procedural front. Applying the principles outlined above, this section discusses the establishment of a multilateral treaty which would leave existing domestic merger review regimes intact, while committing signatories to accept an “overlay” of standardized timing rules, filing forms, information sharing protocols and other procedures for cross-border mergers.\(^{76}\)

XVIII. Which Mergers Would Be Subject to the Treaty?

Reaching agreement about triggering thresholds for transactions which would be subject to a multi-jurisdictional merger review treaty is likely to be difficult because the major jurisdictions have very different merger definitions and pre-notification thresholds. Although it might be possible to develop consensus on some core principles, an “opt in” mechanism would obviate the need to do so: the parties (or perhaps also the relevant enforcement agencies) to any transaction which is subject to substantive review (or perhaps only those subject to mandatory pre-notification) under the merger review laws of two or more signatory jurisdictions would have the option of electing to proceed under the treaty. This approach would avoid the need to establish or converge on a common set of pre-notification thresholds and would ensure that the treaty process is employed only when benefits are expected to be derived from its use.

XIX. Common Filing Requirements

Any material which is likely to be of interest to all reviewing agencies should be provided in a common core filing. Merging parties should be required to provide each affected agency with this filing, which would focus on general information about each party and the proposed transaction. Party-specific information might include basic corporate and contact information for each party, brief descriptions of relevant businesses and affiliates, and annual reports. Transaction-specific material could include a general description of the proposed transaction, the underlying business objectives, timing, any ancillary restrictions entered into by the parties, and a list of any foreign authorities notified.

Each affected jurisdiction should also receive a separate (but similarly structured) annex containing information that is relevant to that particular jurisdiction. This might include sales/production data for relevant

\(^{76}\) The material in this section draws heavily on the “International Merger Review System” outlined in Baker et al., supra note 6 at 462-478; as well as additional proposals for a non-legislative “NAFTA Merger Review System” which D.I. Baker and A.N. Campbell presented to the NAFTA Working Group on Trade and Competition in April 1997. The significance of the treaty mechanism is that it would either have direct legal effect in jurisdictions such as the United States or at least require the governments in countries such as Canada to enact appropriate legislative and/or rule changes to give effect to the commitments made to other treaty signatories.
products sold/produced in the jurisdiction, along with customers, suppliers and competitors lists. These types of information are already called for in many filings, but often using different methods or formats.\textsuperscript{77}

In addition, each jurisdiction could develop a distinct annex for information specific to its domestic merger review law. For example, failing firms and efficiencies are relevant factors in Canadian and United States merger analysis but may not be relevant in other jurisdictions. Similarly, the European Union requires information regarding financial support received by the merging parties because of its concerns with state aid and market integration. However, such annexes must be used sparingly, in order not to lose the benefits of a streamlined and coordinated process. Over time, many of the distinctions between these country-specific annexes might be expected to disappear.

XX. \textbf{Two-Stage Pre-notification}

Transactions proceeding under the merger review treaty should be subject to a two-stage filing procedure, with specific information requirements and time limits established for each stage. A two-stage pre-notification system is essential for minimizing transaction costs by clearing the vast majority of mergers which do not raise serious competition issues after a straightforward review.\textsuperscript{78} This would reduce the compliance burden significantly in jurisdictions such as the European Union which have extensive up-front filing requirements.\textsuperscript{79}

The first stage would provide enforcement agencies with the limited information needed to determine whether serious competitive issues are raised by a proposed transaction. The second stage would be a more elaborate filing, designed to provide each interested agency with a sufficient amount of time and prescribed information to determine whether a proposed transaction should be challenged (although not necessarily all the evidence which an agency might desire to complete such a proceeding, the assumption being that discovery or other similar domestic procedures would remain available for this purpose after the expiry of the second stage waiting period). Such a filing should be pre-defined and should be less onerous than the HSR “Model Second Request” currently employed in the United States.

\textsuperscript{77} For example, the European \textit{Form CO} requires that relevant information regarding the five largest independent suppliers and customers be provided; the US Model HSR “Second Request” requires similar information regarding the 20 largest customers of the parties to the proposed merger, but no supplier information is required; and the proposed amendments to Canada’s Long Form will require similar information regarding the merging parties’ 40 largest independent suppliers and customers. There is no reason that the nature and amount of customer and supplier information could not be standardized so that the merging parties can employ one approach for preparing the relevant information for each jurisdiction.

\textsuperscript{78} As discussed above, the statistics regarding transactions reviewed and challenged in Appendix III demonstrate the value of this approach.

\textsuperscript{79} This approach found favour in the ABA Report (1991), supra note 6 at 16, which urged that the compliance burden involved in satisfying extensive information requests be limited to the small number of transactions which actually raise competitive concerns.
It is essential that the information requirements in both stages be kept relevant and reasonable if the cost-saving potential of common filings is to be realized and merging parties are to have an incentive to opt into the system. It is also vital that the information requirements be pre-defined rather than left to the discretion of reviewing agencies. Experience with the HSR Second Request process demonstrates that an open-ended second stage would be incompatible with the objectives of a coordinated and efficient multi-jurisdictional review process. A prescribed form for the second stage filing would not preclude individual agencies from using their own formal investigative powers to continue an investigation and, if appropriate, challenge a transaction. However, pre-defined filing requirements allow merging parties to plan their affairs with some certainty and to put themselves in a position (after reasonable production of information and passage of time) of being legally entitled to proceed with a transaction at their own risk, unless the reviewing agency initiates formal enforcement proceeding and/or obtains interim “no close” or “hold separate” injunctive relief.

It is beyond the scope of this paper to develop a specific model for either the first or second stage filing. Nevertheless, Appendix II contains a comparative analysis of the information requirements in two European, two US and two Canadian filings, as well as the common forms developed by the United Kingdom/France/Germany and the OECD. It leads us, at a high level of generality, to offer the following observations:

- The US first stage HSR Pre-Merger Notification and Report Form and the Canadian Short Form illustrate how a fairly modest filing can be used as part of a two-stage process in which more extensive information requirements are only imposed on transactions that appear to raise significant competition issues. However, the initial HSR form does contain an onerous requirement to search for and produce all “4(c) documents” containing various types of information that have been prepared for or by officers or directors.

- The EU’s “short form” for joint ventures does not significantly reduce the Form CO requirements, and hence is not very useful as a model for the initial form in a two-stage system.

- The HSR Model Second Request and the European Form CO call for voluminous narrative, data and documentary responses which should only be necessary for enforcement agencies to have for the small subset of transactions which raise significant competition concerns. The Canadian Long Form is somewhat less burdensome.

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80 It has been argued that the HSR Second Request process provides agencies with “the ability to ask for information to essentially create the automatic stay of a transaction”: Sims and Herman, supra note 18 at 881.

81 We have used the proposed revisions which are expected to be enacted later this year, rather than the current requirements which are about to become obsolete.
While it still would require very substantial effort to complete, we believe it is the best of the three to use as a model for developing a second stage filing.

- The United Kingdom/France/Germany and OECD common forms are interesting amalgams of elements from various sources. Of the two, the OECD form seems more focused, although it includes a document requirement modelled on the US “4(c)” concept. By attempting to use a single stage approach, both are longer than a good short form and shorter than a good long form.

XXI. Waiting Periods and Time Limits

A multi-jurisdictional treaty should establish tight but attainable uniform time limits for each review stage. Waiting periods of 14-21 days after a first stage filing and three to six weeks following a second stage filing might be reasonable. These time frames are deliberately challenging to ensure that the time and cost advantages of a coordinated review process are not frittered away. Of the jurisdictions which responded with information regarding the average time required to complete merger reviews (see Appendix III), most did not complete the second phase within an average of 63 (i.e. 21 plus 42) days, and only two of seven jurisdictions providing relevant data reported an average of less than 35 (i.e. 14 plus 21) days. However, half the jurisdictions responding to the questionnaire completed the first phase in an average of 21 days or less.

As noted above, the expiry of no-close waiting periods need not preclude an agency from subsequently challenging a transaction or obtaining interim injunctive relief where there is a genuine risk of a “scrambling the eggs” scenario. However, an indefinite overhanging regulatory risk is not necessary or desirable in situations where agencies have had a full opportunity to review a transaction. Accordingly, there should be outer time limits for challenging transactions which are reviewed under the treaty. For agencies which have a combined investigative and adjudicative role, we would like to see the European Commission’s five month time frame (from the initial filing date) adopted as a global standard. For systems in which investigation and adjudication are assigned to separate agencies, it seems reasonable to require enforcement agencies to determine whether to initiate proceedings within one or two months following the

82 In Canada, merging partners have the option of submitting the Long Form at the outset, in which case only the second of the two waiting periods is applicable. This is attractive for merging parties in situations where the transaction is likely to be bumped into a Long Form or to reduce timing risks. It also allows the agency to proceed with a detailed review much more quickly, but if agencies are already tight time pressure in a multi-jurisdictional setting, this scenario might be unattractive. To provide some incentives for merging parties and some grace for recipient agencies, we suggest that half the first stage waiting period be added onto the second stage waiting period when a second stage filing is submitted at the outset.

83 In practice, unless merging parties have anticipated being required to submit a second stage filing and have compiled it during the first stage waiting period, the agency would have additional days or weeks of review time over and above the sum of the two waiting periods.
expiry of the second stage waiting period.84 Time limits should then also be applied to adjudicative bodies in those jurisdictions where this is constitutionally feasible.85 Ideally, such time limits would be no more than three or four months from the initiation of a contested proceeding or six to eight weeks from the commencement of a consent proceeding.86

All waiting periods and time limits should be extendable with the consent of the merging parties. However, it is important to design a regime with crisp default time limits to provide incentives for expeditious review and opportunities for merging parties to evaluate the implications of an extension relative to other available options.

XXII. Inter-agency Communication and Information Exchanges

The ability of enforcement agencies to discuss and exchange relevant confidential information (subject to appropriate safeguards) should facilitate public and private transaction cost savings. This could be achieved by making the common, but currently ad hoc, practice of merging parties granting waivers which allow agencies to exchange confidential information into a prerequisite for a transaction to proceed under the merger review treaty.87 In order to induce such waivers, merging parties must have full confidence that their confidential information will not be disclosed or used for other purposes.

An appropriate confidentiality regime has three fundamental components:88

- enforcement officials in each signatory jurisdiction should have the unrestricted ability (though not the obligation) to disclose confidential information to other signatory jurisdictions reviewing the same transaction;

- no retransmissions of confidential information to other federal or state government agencies or third parties should be permitted without the express written consent of the party which provided the information;89 and

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84 In total the agency would have roughly three months or longer to make this decision: a stage one waiting period of 14 to 21 days (or half of this if the parties went directly to stage two - see supra note 82); a stage two waiting period of three to six weeks; any time taken by the parties between stages one and two (see supra note 83); and the additional one or two month limitation period.
85 As Baker et al., supra note 6 point out, time limits could be a difficult step in some jurisdictions, particularly where merger challenges are adjudicated in domestic courts.
86 Assuming a total investigation phase in the vicinity of three months (see supra note 84), this would yield a decision which is a month or two longer than the five month standard that should be attainable for an integrated investigative and adjudicative regime.
87 See the OECD Report and Form, supra note 7, which proposes that a common filing form could itself contain a waiver that merging parties would sign when submitting the filing to various jurisdictions.
88 See Baker et al., supra note 6 at 477.
third parties should be precluded by law from using freedom of information requests, discovery procedures or other means to access confidential information transmitted or received by any agencies in a signatory jurisdiction.

As a condition of electing to proceed under the multi-jurisdictional review treaty, merging parties should be required to list in the filing all the signatory (and perhaps non-signatory) jurisdictions in which pre-notification filings are being submitted.\(^90\) Merging parties are often reluctant to provide this information because they fear that it will introduce new issues and cause delays, but it is information that enforcement agencies legitimately need to coordinate efficient and effective review processes.\(^91\) In addition, merging parties which decide to opt into the treaty review process should be required to advise the enforcement agency in each signatory jurisdiction in which they have assets or sales about the existence of the transaction, even if the local pre-notification thresholds are not exceeded. There may also be merit in requiring that the transaction be announced to the public at an appropriate time prior to the expiry of the first stage waiting period.\(^92\) The former requirement would ensure that all interested enforcement agencies have a meaningful opportunity to participate in a coordinated review of the merger, and the latter would allow potentially interested third parties to have their views taken into account in a timely way. Merging parties may be inclined to view these as disincentives to participation in the treaty process, but they have the virtue of reducing the risk of delays arising later in the review process.

To promote the goals of transparency and certainty, each agency reviewing a proposed transaction which is subject to the treaty should be required to keep other agencies and the merging parties informed about the progress of its review. Such updates could be periodic (\(e.g.\) every few weeks), event-based (\(e.g.\) upon a change in the status of an investigation or the occurrence of some event) or some combination of the two. Formal inter-agency consultation obligations could also be established prior to key decision-making points in the review process (\(e.g.\)

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\(^89\) While EU Member States and US state attorneys general currently participate to some degree in domestic merger review processes, we do not see any justification for allowing them access to confidential information in cases arising under a multi-jurisdictional merger review treaty unless they have become treaty signatories in their own capacity.

\(^90\) This would be a continuing obligation, with merging parties updating the enforcement agencies as additional notifications are made.

\(^91\) This requirement was advocated by Whish and Wood, supra note 7 at 107, who suggested that it would ensure that each agency becomes aware of the interests and involvement of all other agencies in a timely fashion, and that it could pave the way for an effective waiver system. Such an obligation is contained in the pending amendments to the Canadian pre-notification requirements: see Proposed Changes to the Regulations Respecting Notifiable Transactions Pursuant to Part IX of the Competition Act. These regulations are expected to be promulgated sometime in 1999 once the Competition Act amendments in Bill C-20 have been proclaimed into force.

\(^92\) This suggestion is patterned on the public announcement requirement in Europe: See EC, Merger Regulation, supra note 43, art. 20.
before the expiry of the stage one waiting period, with a view to minimizing the
number of agencies which would proceed to a second stage filing). In addition,
when an agency does call for second stage filing, it should be required to provide
the merging parties and the other affected agencies with a brief “Statement of
Issues” outlining the legal, economic and factual matters on which its review
would expect to focus. This concept, which is based on the Statement of
Objections procedure in the European Union merger review system, would
facilitate coordination between agencies and more focused reviews — with a
consequent reduction in public and private transaction costs.

XXIII. Clearances and Authorizations

Although not an essential component of a multi-jurisdictional
merger review treaty, it would be desirable to accommodate and encourage
participating jurisdictions to make an advance clearance system and/or an
authorization system available to merging parties.

Modelled along the lines of the Advance Ruling Certificate
mechanism in Canada, a clearance would involve the enforcement agency
binding itself not to challenge a transaction on the basis of information provided
by merging parties and gathered from other sources. It would provide an
expeditious method for approving mergers which do not raise serious competition
concerns. In addition, the merging parties could be exempted from pre-
notification if a clearance was obtained in a jurisdiction where a filing otherwise
would be required.

An authorization system of the sort used in Australia would be
useful when merging parties recognize that potential competition concerns are
apparent but want an early and definitive ruling that their transaction will not be
blocked and are prepared to go through a time-limited and predominately public
approval process to obtain this degree of certainty. Success on an application
would insulate a transaction from any further challenge by either federal or state
enforcement agencies in the relevant jurisdiction and, ideally, would extinguish
any private rights of action which otherwise would exist.

XXIV. Concluding Observations

Globalization and the extended jurisdictional scope of competition laws has
exacerbated the shortcomings of domestic merger review systems and triggered additional

93 Ibid., art. 18.
94 See Competition Act, supra note 40, ss. 102 and 103; and commentary in A.N. Campbell, Merger
Law and Practice: The Regulation of Mergers Under the Competition Act (Scarborough: Carswell, 1997) at
250-260.
95 Ibid., s. 113(b).
96 Trade Practices Act, 1974, s. 88(9); see also the commentary in Rowley and Baker, “Australia” in
supra note 9.
problems unique to the review of transactions in multiple jurisdictions. A streamlined procedural regime would benefit both merging parties and reviewing agencies by reducing costs, time and uncertainty for the expanding volume of cross-border transactions.

Unfortunately, little progress has been realized in this area to date. The reasons include perceived encroachments on national sovereignty and insufficient incentives for agencies or private parties to depart from the status quo. The international merger review treaty proposed in this paper attempts to minimize incursions on sovereignty by preserving domestic substantive merger rules and establishing an “overlay” which only supplants domestic procedures when parties to a multi-jurisdictional transaction opt into the treaty process. It also attempts to provide clear transaction-cost-saving incentives for both merging parties (e.g. common forms and time limits) and enforcement agencies (e.g. exchanges of confidential information subject to appropriate safeguards). Many of these steps could be taken by agencies on their own initiative or through intergovernmental bilateral arrangements, but a treaty would have the advantage of greater certainty, credibility and improved prospects for compliance.
## APPENDIX I
COUNTRIES AND TERRITORIES WITH COMPETITION LAWS AS OF 1996

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<th>Developed Countries</th>
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<tr>
<td>Finland (1957)</td>
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<td>Germany (1957)</td>
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<tr>
<td>Israel (1957)</td>
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<tr>
<td>Belgium (1960)</td>
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<tr>
<td>Switzerland (1962)</td>
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<tr>
<td>Spain (1963)</td>
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<tr>
<td>Luxembourg (1970)</td>
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<tr>
<td>Austria (1972)</td>
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<tr>
<td>Yugoslavia (1974)</td>
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<td>France (1977)</td>
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<tr>
<td>Greece (1977)</td>
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<tr>
<td>Iceland (1978)</td>
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<tr>
<td>Portugal (1983)</td>
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<td></td>
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<tr>
<td>Italy (1990)</td>
<td></td>
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</tr>
<tr>
<td>Slovenia (1993)</td>
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<tr>
<td>Malta (1994)</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

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1. The table includes a mix of countries and territories with competition laws as of 1996.
2. Some entries have notes indicating specific years or regions.
3. Yugoslavia's status is indicated by a note.
Croatia (1995)


1 The year in which a competition law was first adopted is indicated in parenthesis. This list is not necessarily complete as an increasing number of countries are enacting competition laws.
2 Competition law under preparation.
3 Developing
# Appendix II

## Pre-Merger Notification Requirements for Selected Jurisdictions

<table>
<thead>
<tr>
<th>INFORMATION REQUIRED</th>
<th>EUROPEAN UNION</th>
<th>UNITED STATES</th>
<th>CANADA</th>
<th>UNITED KINGDOM / FRANCE / GERMANY</th>
<th>OECD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Venture (&quot;Short-Form&quot;)</td>
<td>Form CO (&quot;Full-Form&quot;)</td>
<td>HSR Pre-Merger Notification &amp; Report Form</td>
<td>Model HSR &quot;Second Request&quot;</td>
<td>Short Form</td>
<td>Long Form</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contact Information</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incorporation Information</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organizational Structure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affiliate Information Officers and Other Personnel</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Businesses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annual Reports and Financial Statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Documents Filed with a Securities Commission</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TRANSACTION INFORMATION</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature of Proposed Transaction</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### General Information Regarding Transacting Parties

- **Contact Information**
  - Name and address

- **Incorporation Information**
  - Jurisdiction of incorporation

- **Organizational Structure**
  - Corporate chart for company, divisions and facilities involved with relevant products since Yr-3 (for affiliates also)

- **Affiliate Information Officers and Other Personnel**
  - Directories of employees involved with relevant products since Yr-3 (for affiliates also)

- **Businesses**
  - Identify each "line of business"

- **Annual Reports and Financial Statements**
  - Annual reports, audited financial statements and interim statements (for affiliates also)

- **Documents Filed with a Securities Commission**
  - Documents filed with the SEC since Yr-3

- **Nature of Proposed Transaction**
  - Description of proposed transaction

---

1. For full details and specific requirements, refer to the respective authorities and regulations for each jurisdiction.
<table>
<thead>
<tr>
<th><strong>Assets or Securities to be Acquired</strong></th>
<th><strong>Ownership Structure and Control</strong></th>
<th><strong>Objectives and/or Expected Effects of Merger</strong></th>
<th><strong>Post-Merger Business Plans</strong></th>
<th><strong>Ancillary Restrictions</strong></th>
<th><strong>Timetable for Transaction</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>list and value of assets or voting securities to be held</td>
<td>proposed structure of ownership and control and percentage of securities to be held</td>
<td>n/a</td>
<td>documents and description of any planned change to facilities, corporate activities or products (for affiliates also)</td>
<td>description of any decision, commitment or undertaking relating to significant proposed changes to business</td>
<td>timetable for transaction</td>
</tr>
<tr>
<td><strong>TRANSACTION DOCUMENTS</strong></td>
<td><strong>Legal Documents</strong></td>
<td><strong>Information Prepared by or for Officers and Directors</strong></td>
<td><strong>Pro Forma Financial Statements</strong></td>
<td><strong>PRODUCT INFORMATION</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>analyses, reports, studies, and surveys prepared for board or shareholders’ meeting which analyse concentration (for affiliates also)</td>
<td>financial statements of merged entity as if transaction completed</td>
<td>describe product markets for EEA territory, Community, EFTA States</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>analyses, reports, studies and surveys prepared by or for a senior officer relating to price, market share, competition, innovation, or potential sales growth or expansion</td>
<td></td>
<td>each relevant product manufactured or sold, including detailed</td>
<td></td>
</tr>
<tr>
<td><strong>Products Purchased</strong></td>
<td>as a whole, and individual Member and EFTA States since Yr-3</td>
<td>manufacturing and brand name information (for affiliates also)</td>
<td>principal categories of products purchased and expenditures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Product Sales Data and/or Market Share Estimates</strong></td>
<td>portion of sales that are resales (for affiliates also)</td>
<td>estimated size of market (sale values and volume) and market share since Yr-3</td>
<td>gross sales for each principal category of products</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Additional Information About Products</strong></td>
<td></td>
<td>describe ways products are produced and sold and a comparison of pricing levels (for affiliates also)</td>
<td>n/a</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>GEOGRAPHIC INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Geographic Areas of Operation</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Location of Facilities</strong></td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>location of principal offices, plants, warehouses, retail establishments or other places of business</td>
<td></td>
</tr>
<tr>
<td><strong>Geographic Sales Data and/or Market Share Estimates</strong></td>
<td>turnover for each group and individual enterprise in United Kingdom, France, Germany and World-wide</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Transportation Methods and Costs</strong></td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SUPPLIER AND CUSTOMER INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Customer Contact Information</strong></td>
<td>for 20 largest customers (for affiliates also)</td>
<td></td>
<td>for 5 largest customers</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Vertical Relationship Between Parties</strong></td>
<td>nature and extent of vertical integration as compared to competitors</td>
<td>details of nature and extent of any vertical links between merging parties</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Supplier Contact Information</strong></td>
<td>for 20 largest independent suppliers (for affiliates also)</td>
<td></td>
<td>for 5 largest sellers</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>OTHER FACTORS RELEVANT TO ASSESSMENT OF COMPETITIVE EFFECTS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Previous or Future Acquisitions
- **Details of acquisitions since Yr-3 by parties and competitors (for affiliates also)**
- **List of notified mergers by parties since Yr-3**

## Entry or Exit History
- **If significant market entry since Yr-5 (or likely market entrant) provide contact information, estimate of market share and date of entry**
- **If entry, attempted entry or exit since Yr-10, provide contact information, products of entrant, date of entry or exit, and capacity information**

## Barriers to Entry
- **List and describe barriers to entry**
- **List barriers to entry**

## Remaining Competitors
- **Names and market shares of competitors with ≥ 5% market share in affected markets**

## Cross-Board Memberships
- **List board members who are also boards of undertakings active in market**

## Cooperative Agreements and Trade Association Activities
- **Details of cooperative agreements or trade associations (for affiliates also)**
- **List trade association memberships and submit documents provided by or to such organizations (for affiliates also)**

## Research and Development
- **Importance of R&D in market, including trends, technological developments, major innovations and innovation cycle**
- **Information regarding R&D for each relevant product (for affiliates also)**
- **Principal categories and anticipated sales of products approved for development or for commercial availability in next 3 years**

## Capacity Utilization
- **N/A**
- **N/A**
- **N/A**

## Marketing Information
- **Marketing, business and strategic plans since Yr-3**

## Additional Information Required for Joint Ventures
- **Provide contract information, contributions by each “person”, a general description of the proposed business and duration**

## Notes
- N/A

---

**Table Representation**

<table>
<thead>
<tr>
<th>Section</th>
<th>Details</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Previous or Future Acquisitions</td>
<td>Details of acquisitions since Yr-3 by parties and competitors (for affiliates also)</td>
<td>List of notified mergers by parties since Yr-3</td>
</tr>
<tr>
<td>Entry or Exit History</td>
<td>If significant market entry since Yr-5 (or likely market entrant) provide contact information, estimate of market share and date of entry</td>
<td>If entry, attempted entry or exit since Yr-10, provide contact information, products of entrant, date of entry or exit, and capacity information</td>
</tr>
<tr>
<td>Barriers to Entry</td>
<td>List and describe barriers to entry</td>
<td>List barriers to entry</td>
</tr>
<tr>
<td>Remaining Competitors</td>
<td>N/A</td>
<td>Names and market shares of competitors with ≥ 5% market share in affected markets</td>
</tr>
<tr>
<td>Cross-Board Memberships</td>
<td>List board members who are also boards of undertakings active in market</td>
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<tr>
<td>Cooperative Agreements and Trade Association Activities</td>
<td>Details of cooperative agreements or trade associations (for affiliates also)</td>
<td>List trade association memberships and submit documents provided by or to such organizations (for affiliates also)</td>
</tr>
<tr>
<td>Research and Development</td>
<td>Importance of R&amp;D in market, including trends, technological developments, major innovations and innovation cycle</td>
<td>Information regarding R&amp;D for each relevant product (for affiliates also)</td>
</tr>
<tr>
<td>Capacity Utilization</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Marketing Information</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Additional Information Required for Joint Ventures</td>
<td>Provide contract information, contributions by each “person”, a general description of the proposed business and duration</td>
<td></td>
</tr>
</tbody>
</table>
# Government Financial Support

## MISCELLANEOUS ADMINISTRATIVE MATTERS

| True and Complete | list of all agents and representatives (for affiliates also) | name, position and contact information of representative |
| Agents and Representatives | instructions given to person preparing notification |  |
| Instructions Given to Notifier | document destruction and retention policies and procedures |  |
| Document Destruction and Retention Policies | statement of reasons for privileged document claims | business secrets which may not be disclosed to foreign authorities |
| Privileged Documents and Business Secrets | |  |
| Foreign Authorities Notified | list of foreign authorities notified and date | authorization to disclose information to all notified foreign authorities |
| Waiver of Confidentiality | |  |
| Affidavit of Service | affidavit regarding nature of service for certain tender offers and acquisitions of voting securities |  |
| Notification Threshold | highest threshold for which notification is submitted |  |

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1. The information requested is for the most recent fiscal period unless otherwise noted by the designation of Yr-n” where “n” is the number of years previous to the last completed year. The information is a paraphrased summary of the pre-notification requirements contained in the filing form for each jurisdiction.

2. Form CO Relating to the Notification of a Concentration Pursuant to Regulation EC, Commission Regulation (EEC) No. 4064/89 of 21 December 1989, O.J. Legislation (1998) No. L61. The “Joint Venture” notification option is available in cases where a joint venture has a turnover and assets of less than ECU 100 million within the EEA, and the assets transferred to the joint venture are less than ECU 100 million in the EEA territory. However, the
Commission may require full, or appropriate partial, notification under the Form CO where the notification does not meet the “Joint Venture” threshold or where Form CO notification appears necessary for an adequate investigation with respect to possible competition problems.

3 Hart-Scott-Rodino Antitrust Improvements Act Notification and Report Form, FTC Form C4 (rev. 09/95).

4 The Joint Model Request illustrates the information typically required for an HSR Second Request. The Joint Model Request contains only suggested language; the particular circumstances of the merger will determine the exact types of information requested. The information below is only that contained in this Joint Model Request.

5 Proposed Changes to the Regulations Respecting Notifiable Transactions Pursuant to Part IX of the Competition Act. These regulations are proposed to be promulgated under the Competition Act, R.S.C. 1985, c. C-34 (“Competition Act”) as amended by Bill C-20, An Act to amend the Competition Act and to make consequential and related amendments to other Acts, 1st sess., 36th Parl., 1998. In the case of a notifiable transaction under the Competition Act, the notifying party can submit either a “Short Form” or “Long Form” response. However, if the “Director notifies that person within seven days of the day on which he receives the information that he requires the additional information” contained in the Long Form, the notifying party must supply the additional information contained in the Long Form (s. 120).

6 Common Form for Mergers in the United Kingdom, in France and In Germany.

## APPENDIX III
MERGER REVIEW STATISTICS FOR SELECTED JURISDICTIONS
FOR THE 1998 FISCAL OR CALENDAR YEAR

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>FIRST PHASE ASSESSMENT</th>
<th>SECOND PHASE ASSESSMENT</th>
<th>TOTAL PROHIBITED OR REQUIRING OTHER REMEDIAL ACTION</th>
<th>ABANDONED BY MERGING PARTIES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mergers Subject To Notification</td>
<td>Cleared Without Change</td>
<td>Average Time</td>
<td>Mergers Subject to Second Phase Assessment</td>
</tr>
<tr>
<td>Australia</td>
<td>126</td>
<td>76</td>
<td>10-15</td>
<td>45</td>
</tr>
<tr>
<td>Canada</td>
<td>195&lt;sup&gt;7&lt;/sup&gt;</td>
<td>190&lt;sup&gt;8&lt;/sup&gt;</td>
<td>n/a&lt;sup&gt;9&lt;/sup&gt;</td>
<td>5</td>
</tr>
<tr>
<td>European Union</td>
<td>245</td>
<td>235&lt;sup&gt;11&lt;/sup&gt;</td>
<td>30</td>
<td>12</td>
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<tr>
<td>Germany</td>
<td>1333</td>
<td>1300</td>
<td>21</td>
<td>243</td>
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<tr>
<td>Ireland</td>
<td>235</td>
<td>233&lt;sup&gt;13&lt;/sup&gt;</td>
<td>30-45</td>
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<td>Italy</td>
<td>317</td>
<td>315&lt;sup&gt;14&lt;/sup&gt;</td>
<td>27</td>
<td>2</td>
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<tr>
<td>Mexico (1997)</td>
<td>218</td>
<td>208&lt;sup&gt;15&lt;/sup&gt;</td>
<td>61&lt;sup&gt;13&lt;/sup&gt;</td>
<td>5</td>
</tr>
<tr>
<td>New Zealand</td>
<td>320&lt;sup&gt;17&lt;/sup&gt;</td>
<td>213&lt;sup&gt;18&lt;/sup&gt;</td>
<td>2-3</td>
<td>107&lt;sup&gt;18&lt;/sup&gt;</td>
</tr>
<tr>
<td>Poland</td>
<td>1750&lt;sup&gt;19&lt;/sup&gt;</td>
<td>1389&lt;sup&gt;20&lt;/sup&gt;</td>
<td>60&lt;sup&gt;18&lt;/sup&gt;</td>
<td>n/a&lt;sup&gt;21&lt;/sup&gt;</td>
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<tr>
<td>Sweden</td>
<td>156</td>
<td>146&lt;sup&gt;20&lt;/sup&gt;</td>
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<td>Switzerland</td>
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<td>United States</td>
<td>4728</td>
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<td>n/a&lt;sup&gt;22&lt;/sup&gt;</td>
<td>n/a&lt;sup&gt;22&lt;/sup&gt;</td>
</tr>
</tbody>
</table>
complicated merger review. For a more complicated review, the investigation may take between 182 and 365 days. Of the merger review.

Commission examines all "business acquisitions" to determine if they breach section 47 of the Commerce Act. This number represents an approximation of all applications made to the New Zealand Commerce Commission, as well as all "business acquisitions" that the Commerce Commission becomes aware of. The Commerce Commission also refers to member states referred to in the Treaty Establishing the European Coal and Steel Community, art. 66 have been included (9 straight clearances and 1 clearance with undertaking). Not included in this number are 3 proposed mergers that the Commission referred to member states.

This number represents the average time for the completion of all merger assessments ("First Phase" and "Second Phase").

Approval of "business acquisitions" is voluntary under the Commerce Act, 1986 (N.Z.), however section 47 makes it an offence to acquire or strengthen dominance through "business acquisitions." This number represents an approximation of all applications made to the New Zealand Commerce Commission, as well as all "business acquisitions" that the Commerce Commission becomes aware of. The Commerce Commission examines all "business acquisitions" to determine if they breach section 47 of the Commerce Act.

Approximation. This number includes 21 applications (see supra note n) of which the vast majority of determinations were made during a "Second Phase Assessment."

This number refers to clearance applications. For those proposed mergers for which an application has not been made, a final determination is typically made between one to four weeks after the commencement of the merger review. There was also one "authorization" in 1998 which took approximately 40 days to complete.

This number refers to all mergers reviewed by the Polish Office for Competition and Consumer Protection. The Polish Office for Competition and Consumer Protection does not keep statistics which can be translated into a two-phase assessment process. This number represents the average time to complete a non-complicated merger review. For a more complicated review, the investigation may take between 182 and 365 days.

The numbers in this column may not equate with the numbers in the subsequent columns since this column contains commencements during the fiscal or calendar year, whereas the remaining numbers are based on concluded cases during the same time period.

Average time means the average amount of time from the receipt of data until completion of the relevant phase. Average time is measured in calendar days (as opposed to business days).

This number includes those proposed mergers that were abandoned by the proposed merging parties during a First or Second Phase Assessment. Except as noted, the statistics do not distinguish between abandonments which were or were not influenced by competition law concerns.

This number refers to all mergers reviewed by the Polish Office for Competition and Consumer Protection. This number refers to clearance applications. For those proposed mergers for which an application has not been made, a final determination is typically made between one to four weeks after the commencement of the merger review. There was also one "authorization" in 1998 which took approximately 40 days to complete.

This number refers only to proposed mergers which have been abandoned by merging parties due to competitive concerns raised by the Canadian Competition Bureau.

This number represents the average time for the completion of all merger assessments ("First Phase" and "Second Phase").

Approval of “business acquisitions” is voluntary under the Commerce Act, 1986 (N.Z.), however section 47 makes it an offence to acquire or strengthen dominance through “business acquisitions.” This number represents an approximation of all applications made to the New Zealand Commerce Commission, as well as all “business acquisitions” that the Commerce Commission becomes aware of. The Commerce Commission examines all “business acquisitions” to determine if they breach section 47 of the Commerce Act.

Approximation. This number includes 21 applications (see supra note n) of which the vast majority of determinations were made during a “Second Phase Assessment.”

This number refers to clearance applications. For those proposed mergers for which an application has not been made, a final determination is typically made between one to four weeks after the commencement of the merger review. There was also one “authorization” in 1998 which took approximately 40 days to complete.

This number refers to all mergers reviewed by the Polish Office for Competition and Consumer Protection. The Polish Office for Competition and Consumer Protection does not keep statistics which can be translated into a two-phase assessment process. This number represents the average time to complete a non-complicated merger review. For a more complicated review, the investigation may take between 182 and 365 days.

The numbers in this column may not equate with the numbers in the subsequent columns since this column contains commencements during the fiscal or calendar year, whereas the remaining numbers are based on concluded cases during the same time period.

Average time means the average amount of time from the receipt of data until completion of the relevant phase. Average time is measured in calendar days (as opposed to business days).

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This number refers to all mergers reviewed by the Polish Office for Competition and Consumer Protection. This number refers to clearance applications. For those proposed mergers for which an application has not been made, a final determination is typically made between one to four weeks after the commencement of the merger review. There was also one "authorization" in 1998 which took approximately 40 days to complete.

This number refers only to proposed mergers which have been abandoned by merging parties due to competitive concerns raised by the Canadian Competition Bureau.
There were 361 cases in which the Polish Office for Competition and Consumer Protection did not issue an opinion or decision. This number includes merger notifications in which (i) it was determined that the parties to the proposed merger were not required to notify the Office; (ii) in the course of proceeding with an investigation, the parties to the proposed merger abandoned the merger; and (iii) the pre-merger notification was returned to the parties as it did not meet the formal requirements specified in the merger law.

During the “First Phase Assessment” one proposed merger was cleared with some remedial action.

This number represents the average number of days for completion of all reportable transaction investigations (First and Second Phase Assessments).

FTC staff advised that there were only 46 cases in which a complete HSR Second Stage investigation took place, but the number of second requests issued was not available, except through a request under the Freedom of Information Act. In fiscal 1997, there were 122 second requests issued in the 3,438 transactions for which a second request could have been issued (see FTC/D05, Annual Report to Congress, Fiscal Year 1997 (http://www.ftc.gov/bc/hsr97/anrpt/anr972.htm)).

This number refers to those transactions withdrawn after an HSR Second Request was
### APPENDIX IV

**EMPLOYMENT AND COSTS OF MERGER ENFORCEMENT IN SELECTED JURISDICTIONS**

**FOR THE 1998 FISCAL OR CALENDAR YEAR**

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>Mergers Subject to Notification</th>
<th>Employment</th>
<th>Budgeted Costs ($US)²</th>
<th>Pre-notification Filing Fee ($US)³</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Merger Review Staff (FTE)⁴</td>
<td>Average Transactions Per FTE⁴</td>
<td>Total Agency</td>
<td>Merger Review</td>
</tr>
<tr>
<td>Australia</td>
<td>126</td>
<td>20</td>
<td>6.3</td>
<td>$23,305,400</td>
</tr>
<tr>
<td>Canada</td>
<td>195</td>
<td>44</td>
<td>4.4</td>
<td>$17,315,100</td>
</tr>
<tr>
<td>European Union</td>
<td>245</td>
<td>71</td>
<td>3.5</td>
<td>$45,637,205</td>
</tr>
<tr>
<td>Germany</td>
<td>1333</td>
<td>120⁸</td>
<td>11.1</td>
<td>$12,602,100</td>
</tr>
<tr>
<td>Ireland</td>
<td>235</td>
<td>4¹⁰</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Italy</td>
<td>317</td>
<td>45</td>
<td>7.0</td>
<td>$27,830,000</td>
</tr>
<tr>
<td>Mexico (1997)</td>
<td>218</td>
<td>17</td>
<td>12.8</td>
<td>$6,247,600</td>
</tr>
<tr>
<td>New Zealand</td>
<td>320</td>
<td>n/a¹³</td>
<td>n/a</td>
<td>$3,528,220</td>
</tr>
<tr>
<td>Poland</td>
<td>1750</td>
<td>106</td>
<td>16.5</td>
<td>n/a</td>
</tr>
<tr>
<td>Sweden</td>
<td>156</td>
<td>8</td>
<td>19.5</td>
<td>n/a</td>
</tr>
<tr>
<td>Switzerland (1997)</td>
<td>23</td>
<td>n/a</td>
<td>n/a</td>
<td>$3,640,500</td>
</tr>
<tr>
<td>United States</td>
<td>4728</td>
<td>267¹⁶</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

1. The authors would like to thank the following individuals and agencies for providing the data contained in this table: David Smith (Australian Competition and Consumer Commission); Daniel Campagna (Canadian Competition Bureau); Salvador Apodaca Sarabia (Mexican Federal Economic Competition Commission); Markus Wagemann (German Antitrust Authority); Gary Dickson (Irish Department of Enterprise, Trade and Employment); Mauro LaNoce (Italian Antitrust Authority); John Preston (New Zealand Commerce Commission); Ewa Kaliszuk (Polish Office for Competition and Consumer Protection); Eric Sahlin (Swedish Competition Authority); Peter Hafner (Swiss Competition Commission); and Charles Stark (United States Department of Justice).

2. The numbers in these columns represent US dollar equivalents of local currencies (generally as of December 31, 1998). The figures from Mexico were provided by the agency in US dollars.

3. The numbers in this column represent the number of full-time equivalent professional employees dedicated to merger review (excluding support staff, except where indicated).

4. The Average Transactions per FTE is calculated by dividing the Mergers Subject to Notification by the number of full-time equivalent Merger Review Staff.

5. The Average Cost per Notification is determined by dividing the Budgeted Costs for Merger Review by the number of Mergers Subject to Notification.

6. Total Fees are determined by multiplying the Pre-notification Filing Fee per Transaction by the number of Mergers Subject to Notification.

7. This number reflects budgetary information for staff, studies and library, but does not include offices, informatics, communications, consumables and the like.
This number represents the minimum personnel employed for merger review during 1998.

Average filing fee for pre-merger notification. The fee is determined according to the personnel and material expenses of the enforcement agency, with account also being taken of the economic significance of the concentration. In principle, the fee will not exceed US$60,400, but this figure can be doubled in exceptional cases.

This number refers to merger review personnel employed by the Department of Enterprise, Trade and Employment but not the Competition Authority (see further explanation in note k, below).

In Ireland, “First Phase Assessments” are conducted by the Department of Enterprise, Trade and Employment, while “Second Phase Assessments” are conducted by the Competition Authority. The Department of Enterprise, Trade and Employment has a merger-specific budget of US$222,750. The Competition Authority has a budget of US$1,485,000 (merger and non-merger). The Department of Enterprise, Trade and Employment estimates that the combined annual budget for merger reviews is US$742,500.

This fee is applicable to “First Phase Assessments.” There is no fee for “Preliminary Merger Notifications” or “Second Phase Assessments.”

Merger review is carried out by a small core unit, but additional investigators are temporarily assigned from other sections of competition law enforcement, as required. The New Zealand Commerce Commission does not calculate “full-time equivalents” of those engaged in merger review.

Fee charged for “clearance” applications. The fee charged for an “authorization” is US$11,849.

A fee is not charged for a “First Phase Assessment.” The fee indicated here is the hourly rate charged for a “Second Phase Assessment.”

This number represents the total staff employed by the U.S. Department of Justice. It does not include staff employed by the U.S. Federal Trade Commission.

This number is from the budget of U.S. Department of Justice. It does not include budgeted costs for the U.S. Federal Trade