

The International Comparative Legal Guide to:

# Merger Control 2005

A practical insight to cross-border merger control issues



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### Relevant authorities and legislation

#### 1 Who is/are the relevant merger authority(ies)?

The Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice share lead responsibility for enforcing the principal federal antitrust statutes governing mergers and acquisitions. In addition to these federal agencies, Attorneys General of the fifty states and various US territories also can—and increasingly do—challenge transactions under these federal statutes or under state antitrust statutes. Federal and some state antitrust statutes also permit injured private parties to challenge mergers and acquisitions in certain circumstances.

The FTC is an independent regulatory commission established by Congress in 1914, with statutory authority to enforce section 7 of the Clayton Act, to prohibit anticompetitive mergers and other conduct as an “unfair method of competition” under section 5 of the Federal Trade Commission Act, and to administer the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), among other powers. The FTC has issued rules implementing the HSR Act (“HSR Rules”). The FTC may initiate administrative proceedings against a transaction and may issue orders to cease and desist, divest assets, disgorge profits, or undertake other relief necessary to restore competition. The FTC may also petition federal district court for a preliminary injunction barring a transaction during the pendency of an FTC agency proceeding, as well as a permanent injunction and other equitable relief.

The FTC is composed of five Commissioners appointed by the President with the advice and consent of the Senate. Its staff is organized into three Bureaus, only two of which have responsibility for mergers and acquisitions. The Bureau of Competition is organized into divisions, each responsible for investigating transactions involving industries assigned to it. The Bureau of Competition works closely with the industrial organization economists of the Bureau of Economics. The two Bureaus report separately to the Commission on all potential merger challenges. The FTC also has several regional offices that report to the Bureau of Competition, some of which occasionally become involved in reviewing mergers involving parties located nearby or involving industries in which they have developed substantial expertise. The full Commission approves the initiation of all administrative proceedings or court actions to challenge a merger.

The Antitrust Division is one of the litigating divisions of the Department of Justice, itself a Cabinet-level department of the Executive Branch. The Division exercises the Executive Branch’s statutory authority to enforce the Clayton Act, the Sherman Act, and the HSR Act, along with other statutes. The Division does not share the FTC’s power to initiate an administrative proceeding to challenge a merger, but has the power to challenge mergers in federal district court and to seek preliminary and permanent injunctive relief, including divestiture, rescission, and other kinds of equitable relief designed to maintain or restore competition.

The Division is organized into several sections and regional offices, including three litigation sections and three regulatory sections that handle most merger reviews. Like the FTC, the Antitrust Division assigns specific industries to these sections. The Division also has two economic sections tasked with assisting the litigation and regulatory sections in their merger reviews.

The applicable antitrust statutes do not provide for other agencies of the federal government to override the merger review decisions of the FTC and the Antitrust Division. The two antitrust agencies work closely, however, with agencies and departments that have particular interests in affected markets, such as the Department of Defense regarding defense industry mergers. Some sectoral regulators also review transactions under sector-specific regulatory regimes, which can include assessment of competitive effects in parallel with the antitrust agencies’ merger reviews.

#### 2 What is the merger legislation?

The main federal substantive statute governing mergers and acquisitions is Section 7 of the Clayton Act, which prohibits the acquisition of stock or assets by any person if “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. Mergers may also be challenged as anticompetitive conspiracies or monopolistic conduct under Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1 and 2. Premerger review is governed by the HSR Act, which requires parties to notify both federal antitrust agencies of a transaction meeting certain jurisdictional requirements and to observe specified waiting periods before consummating the transaction. 15 U.S.C. § 45. The FTC’s HSR Rules interpret and implement procedures for complying with the HSR Act. 16 C.F.R. Parts 801-803. In addition to certain investigatory tools pro-

vided by the HSR Act, the FTC may use sections 6(b) and 9 of the Federal Trade Commission Act, 15 U.S.C. §§ 46(b) and 49, and the Antitrust Division may issue compulsory civil investigative demands under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, in order to compel the production of information and evidence during a merger investigation. Finally, if the Antitrust Division chooses to resolve a merger challenge by entering into a settlement with the parties, then the Antitrust Procedures and Penalties Act (more commonly known as the Tunney Act), requires it to seek federal court approval after public notice and consideration of public comments. 15 U.S.C. § 16.

No significant reforms of these statutes are currently being considered, but the FTC has announced its intention to revise the HSR Rules to change the treatment of transactions involving unincorporated entities. Currently transactions involving partnerships, limited liability companies, and other non-corporate entities are treated differently from each other and differently from transactions involving corporations, leading many non-corporate transactions not to be subjected to notification and review under the HSR Act. The FTC has proposed extensive revisions to the implementing rules that would, in essence, treat all non-corporate entities alike and much more like corporations. The FTC has published draft changes which it hopes to finalize in late 2004 or early 2005.

### 3 Is there any other relevant legislation for foreign mergers?

The Omnibus Trade and Competitiveness Act of 1988 created section 721 of the Defense Production Act of 1950 ( the “Exon-Florio Provision” ), which authorizes the President or his designee “to determine the effect on national security” of proposed or pending mergers, acquisitions and takeovers “by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the U.S.” 50 U.S.C.A. App. Sec. 2170. Any investigation must begin within thirty days after receipt of “written notification” and must end within forty-five days thereafter. The President then has fifteen days to determine whether the foreign interest “might take action that threatens to impair the national security” and that other provisions of law do not provide “adequate and appropriate authority for the President to protect the national security,” and, if so, whether to suspend or prohibit the transaction or seek divestiture relief. Notice is voluntary, although non-notified transactions remain indefinitely subject to potential divestiture. Hence, a strong incentive exists to provide “written notification” where any legitimate national security issue may be presented by a proposed transaction.

The President has delegated authority to investigate proposed or pending transactions and to make recommendations regarding appropriate action to the Committee on Foreign Investment in the U.S. (“CFIUS”) which is chaired by the U.S. Treasury Department. The other CFIUS members are the Departments of Defense, State, Commerce and Justice, the Office of the U.S. Trade Representative, the Office of Management and Budget, and the Council of Economic Advisors.

Acquisitions by foreign entities can also be subject to sector-specific regulatory review and limitations in certain highly-regulated industries, such as electric power, broadcast telecommunications, and banking.

### 4 Is there any other relevant legislation for mergers in particular sectors?

In general, mergers and acquisitions in most heavily regulated industries are subject to review by the relevant sectoral regulator, sometimes in addition to review by the federal antitrust agencies. Examples of such concurrent or overlapping review include the following sectors: banking, telecommunications, surface transportation, electric power, and interstate natural gas transportation.

### Transactions caught by merger control legislation

### 5 Which transactions are caught – in particular, how is the concept of “control” defined?

The HSR Act requires the parties to notify the antitrust agencies and to wait a specified number of days before consummating any acquisition of “voting securities” or “assets” meeting certain jurisdictional thresholds. The Act reaches a wide range of transactions, including acquisitions of majority or minority interests in corporations, acquisitions of tangible or intangible assets, mergers, consolidations, and for-profit joint ventures involving contributions from two or more persons. Exemptions are available for certain categories of transactions (*see Question 12 below*), including the acquisition of instruments, such as warrants, convertible shares, and share options, that require the exercise of some right to convert or exchange before conferring the power to vote for directors of a corporation. Conversion or exchange of such instruments into voting securities with the present right to vote is treated as the acquisition of voting securities and may be subject to notification requirements.

A change of control is not required, and minority investments in corporations can require notification if the thresholds are satisfied. Acquisitions that result in shareholdings of less than ten percent of a corporation’s outstanding voting securities are exempt, however, if made solely for the purpose of investment. Once fifty percent of a corporation’s voting securities have been acquired in transactions that have satisfied the HSR Act’s notification and waiting period requirements, then further acquisitions from that corporation are exempt from the HSR Act.

Although notification does not turn on a change of control, the HSR Rules define “control” primarily for the purpose of identifying the “acquiring” and “acquired” parties. In general, control exists as follows:

- A corporation is controlled by a person (i) holding fifty percent or more of its outstanding voting securities or (ii) having the contractual power to designate fifty percent or more of the corporate board of directors.
- A non-corporate entity like a partnership or limited liability company is controlled by a person having the right (i) to fifty percent or more of the entity’s profits or (ii) to fifty percent or more of the entity’s assets upon dissolution.

The FTC has proposed amending the HSR Rules in ways that would, in effect, establish a new control test for acquisitions of interests in non-corporate entities like partnerships and limited liability companies. Under the current rules, interests in a non-corporate entity have been deemed to be neither assets nor voting securities and acquisitions of such interests have not required notification unless all of the interests are acquired. The proposed

amendments would define an interest in a non-corporate entity to be the right to a share of profits or to a share of the entity's assets upon dissolution. Notification would be required when control over such an entity is achieved by acquiring fifty percent or more of the interests in the non-corporate entity.

#### 6 Are joint ventures subject to merger control?

Although the formation of a joint venture or other corporation does not itself require notification, the parties forming it may need to notify their receipt of the new corporation's voting securities in exchange for their initial contributions to the entity. The HSR Rules include special rules that treat contributors as persons acquiring the new entity's voting securities and the new entity as an acquired person. The new entity does not need to notify its receipt of contributions at the time of formation. Each contributor's acquisition of the new entity's voting securities, however, is separately subjected to special jurisdictional thresholds, as follows:

- Contributors acquiring voting securities valued at more than US\$200 million (€176.8 million) must notify the acquisition. This dollar threshold is subject to adjustment every year after September 30, 2004 (see *Question 7 below*).
- Contributors acquiring voting securities valued at more than US\$50 million (€44.2 million) but not more than US\$200 million (subject to annual adjustment) must notify the acquisition if either (i) the contributor has worldwide annual net sales or worldwide total assets of at least US\$100 million (€88.4 million), the new entity will have worldwide total assets of US\$10 million (€8.8 million), and at least one other contributor has worldwide annual net sales or worldwide total assets of at least US\$10 million, or (ii) the contributor and at least one other contributor both have worldwide annual net sales or worldwide total assets of at least US\$10 million, and the new entity will have worldwide total assets of at least US\$100 million.

Acquisitions of voting securities in conjunction with the formation of not-for-profit joint ventures or corporations are exempt from notification.

The FTC's proposal to amend the HSR Rules would establish special provisions to treat the formation of unincorporated entities roughly the same, although notification would only be required if a contributor acquires control of the new entity.

#### 7 What are the jurisdictional thresholds for application of merger control?

In general, notification is required for acquisitions that satisfy the following tests:

- **Commerce Test:** Is either the acquiring or the acquired person engaged in US commerce or in any activity affecting US commerce?
- **Size of Transaction Test:** Will the acquiring person hold assets or voting securities of the acquired person in excess of US\$200 million (€176.8 million)?
- **Size of Person Test:** For transactions in which the acquiring person will hold US\$200 million or less but more than US\$50 million (€44.2 million), does either the acquiring person or the acquired person have worldwide total assets or worldwide annual net sales of

at least US\$100 million (€88.4 million) while the other has at least US\$10 million (€8.8 million)?

- **Exemption Test:** Is the transaction covered by any exemptions?

After September 30, 2004, all of these dollar thresholds will be adjusted annually by the FTC to account for increases in the gross national product.

The HSR Rules provide complex definitions of the terms "acquiring person" and "acquired person." In essence, these terms include not only the entities directly engaging in the transaction, but also all entities directly or indirectly controlled with them by the same "ultimate parent entity." The ultimate parent entity of a person is simply a natural person or entity not controlled by any other person. If a person directly or indirectly controls a joint venture (for instance, by holding fifty percent or more of the voting securities, *see above*), then the joint venture is deemed entirely incorporated within that person. This means that a fifty-fifty joint venture may be deemed a part of two separate persons for the purposes of the HSR Act and Rules.

A person's total assets are those stated on its last regularly prepared balance sheet, and the annual net sales are those stated on the person's last regularly prepared annual statement of income and expense. The total assets and annual net sales must be the worldwide figures for the whole "person," not just the entities or assets directly involved in the transaction. The financial statements must have been prepared according to the person's normal accounting principles and be as of a date no more than fifteen months before the notification (or consummation, if no filing is required). The financial statements must also consolidate all entities directly or indirectly controlled by the person's ultimate parent entity; if not consolidated, then the total assets and annual net sales must be recomputed to include those of all unconsolidated entities.

#### 8 Does merger control apply in the absence of a substantive overlap?

If a transaction satisfies the jurisdictional thresholds of the HSR Act and does not qualify for any exemption, then the parties must notify and wait the specified period of time regardless of whether there is a substantive overlap. As a practical matter, however, the federal antitrust agencies rarely subject transactions without a substantive horizontal overlap to any searching review.

#### 9 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Both the HSR Act and the substantive Clayton Act reach all transactions that affect US commerce or involve persons engaged in US Commerce. As a consequence, the lack of a local subsidiary or of local assets in a jurisdiction does not necessarily mean that these statutes do not apply. The HSR Rules include exemptions for certain "foreign" transactions, however, that essentially require minimum contacts with the United States in the form of local assets or sales in or into the country valued at more than US\$50 million (€44.2 million) (*see Question 12*).

Failing to notify transactions evincing such minimum contacts risks civil penalties. For instance, as recently as

April 2004, the Canadian Manulife Financial Corporation was forced to pay a fine of US\$1 million for failing to notify its acquisition of John Hancock Financial Services, Inc. stock.

**10 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.**

There is no general “override” mechanism to require notification and review under the HSR Act of transactions that do not satisfy the statutory thresholds. The HSR Act does not, however, preclude the federal antitrust agencies from investigating and challenging transactions that fall below the thresholds. Although rarely done, the agencies may even challenge a transaction that met the thresholds, was notified under the HSR Act, and was not challenged upon initial review. Notably, since the thresholds were raised in 2001, the agencies have made a point of challenging several small transactions, as well as several transactions that passed through HSR Act review. In addition, state Attorneys General and private parties may also seek to challenge transactions without regard to whether they required notification under the HSR Act.

**Notification and its impact on the transaction timetable**

**11 Where the jurisdictional thresholds are met, is notification compulsory?**

Filing notification under the HSR Act is mandatory for all transactions satisfying the statutory thresholds and not falling within one of the statutory or regulatory exemptions. There is no deadline for such filings, but the parties are required not to consummate the transaction until the applicable waiting period has expired or the antitrust agencies have granted an “early termination” of the waiting period.

**12 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.**

Neither the HSR Act nor the substantive Clayton Act incorporates any exemption for transactions involving “small markets.”

The HSR Act and Rules exempt more than two dozen other categories of transactions. The most significant of these apply to certain foreign assets or voting securities, certain goods or realty in the ordinary course of business, certain kinds of real property, certain oil, gas and coal reserves, certain acquisitions solely for investment, certain intraperson transactions, and certain acquisitions by creditors or insurers. Determining whether an exemption applies to a transaction requires carefully applying detailed rules to the specific circumstances of the transaction.

**Foreign Transactions**

The FTC has exempted four categories of acquisitions involving foreign assets or voting securities from notification under the HSR Act. In general, these exemptions provide as follows:

- **Acquisitions of Foreign Assets** are exempt if either (i) the foreign assets that will be held generated sales in or into the United States of US\$50 million (€44.2 million) or less during the acquired person’s previous fiscal year or (ii) both parties are foreign, the acquiring

party will hold no more than US\$200 million (€176.8 million) (as adjusted annually) of the acquired person’s assets or voting securities, and the aggregate sales in or into the United States and the aggregate total assets in the United States of the two parties were respectively less than US\$110 million (€97.2 million) during the previous fiscal year.

- **Acquisitions of Foreign Voting Securities by a US Person** are exempt if the foreign issuer and all entities directly or indirectly controlled by it neither (i) hold more than US\$50 million of assets in the United States nor (ii) made sales in or into the United States of more than US\$50 million during the previous fiscal year.

- **Acquisitions of Foreign Voting Securities by a Foreign Person** are exempt if (i) the acquisition will not confer control of the issuer, (ii) it will confer control but the issuer and all entities directly or indirectly controlled by it neither (a) hold more than US\$50 million of assets in the United States nor (b) made sales in or into the United States of more than US\$50 million during the previous fiscal year, or (iii) both parties are foreign, the acquiring party will hold no more than US\$200 million (€176.8 million) (as adjusted annually) of the acquired person’s assets or voting securities, and the aggregate sales in or into the United States and the aggregate total assets in the United States of the two parties were respectively less than US\$110 million (€97.2 million) during the previous fiscal year.

- **Acquisitions By or From Foreign Governments** are exempt if (i) the ultimate parent entity is controlled by a foreign state, government, or agency and (ii) the assets are located in that foreign state or the voting securities are issued by an entity organized under the laws of that state.

It is important to remember that these exemptions apply only to the notification and other procedural requirements of the HSR Act and Rules. Even exempted transactions can be challenged under the substantive Clayton Act, which reaches all transactions, including “foreign to foreign” transactions, that affect US commerce or involve persons engaged in US commerce.

**Goods and Realty in the Ordinary Course of Business**

Acquisitions of new goods, current supplies, and durable goods all can be exempt in certain circumstances if not part of the acquisition of an operating unit. In contrast, acquisitions of goods as part of the acquisition of all or substantially all the assets of an operating unit, conducted by the acquired person as a business undertaking, are not exempt.

**Real Property**

Similarly, new facilities, certain used facilities, certain unproductive real property, agricultural property, hotels and motels, golf courses and swim and tennis clubs, certain office and residential property, and certain rental spaces and warehouses may also be exempt if not part of the acquisition of a business.

**Oil, Gas and Coal Reserves**

Acquisitions of oil, natural gas, shale and tar sands, rights to such assets, and associated exploration and production

assets are exempt if the value of all such rights and assets to be held will not exceed US\$500 million (€442 million).

Similarly, acquisitions of coal reserves and rights to coal reserves, and associated exploration and production assets are exempt if the value of all such rights and assets to be held will not exceed US\$200 million (€177 million).

#### Acquisitions Solely for Investment Purposes

Acquisitions that result in shareholdings of less than ten percent of a corporation's outstanding voting securities are exempt, if made solely for the purpose of investment.

#### Intraperson Transactions

Acquisitions of assets or voting securities in which the acquiring person and the acquired person are the same by reason of holdings of voting securities are exempt. In other words, if a single ultimate parent entity controls both the seller and the buyer through holdings of fifty percent or more of voting securities, then the acquisition is exempt. The exemption does not apply if one or more entities involved is not a corporation or control is exercised through contractual rights to appoint members of the board of directors.

The FTC's proposed amendments to the HSR Rules would expand the exemption to cover transactions among unincorporated entities that are controlled by the same ultimate parent entity by reason of holding fifty percent of the voting securities or having the right to fifty percent of the profits or fifty percent of the assets upon dissolution.

#### Underwriters, Creditors, Insurers or Institutional Investors

Acquisitions of voting securities in the ordinary course of business by underwriters in the process of underwriting are exempt. Certain acquisitions of assets or voting securities in the ordinary course of business by a creditor in a bona fide credit transaction are exempt. Certain acquisitions of assets or voting securities in the ordinary course of business by an insurer under the terms of an insurance contract are exempt.

Acquisitions of voting securities by certain institutional investors like banks, registered investment companies, pension trusts, and charitable foundations are exempt if made directly by them in the ordinary course of business solely for investment and not sufficient to cause the acquiring person to hold more than fifteen percent of the outstanding voting securities of the issuer.

#### 13 Where a merger technically requires notification and clearance, what are the risks of not filing?

All violations of the HSR Act, including failing to notify and observe the applicable waiting period or providing incomplete information in the notification, are punishable by a civil penalty of up to US\$11,000 per day of violation. There is no absolute maximum total fine, nor any statute of limitations. The federal antitrust agencies have aggressively prosecuted violations in recent years. Recent cases include the US\$1 million fine paid by Canadian Manulife Financial Corporation for failing to notify its accumulation of more than US\$50 million of stock in US insurer John Hancock and a US\$800,000 fine paid by Bill Gates for failing to notify an acquisition of voting securities under circumstances inconsistent with the investment-only exemption.

Transactions completed without clearance are not ipso

facto invalid or unenforceable, but they are subject to challenge under the antitrust laws.

As explained in greater detail above, acquisitions of foreign assets or of control of foreign corporations that generate more than US\$50 million of sales in or into the United States generally do require filing, even if no subsidiaries or assets are held in the United States. The antitrust agencies are vigilant and aggressive about preserving their power to review and block even foreign transactions if they affect US markets.

#### 14 Is it possible to carve out local completion of a merger to avoid delaying global completion?

No. The HSR Act does not provide any mechanism for consummating transactions outside the United States, and the antitrust agencies will ordinarily seek to remedy or block any transaction that will affect US markets. As noted below, the US agencies often try to coordinate remedies with authorities in other reviewing jurisdictions.

#### 15 At what stage in the transaction timetable can the notification be filed?

Notifications may be filed on the basis of a signed contract, letter of intent or agreement in principle so long as the acquiring party accompanies the filing with an affidavit or a statement under penalty of perjury affirming the party's good faith intention to complete the transaction described in the document. Tender offers and other acquisitions of voting securities from third parties may be notified as soon as the offeror is able to attest by affidavit or statement under penalty of perjury (i) that the issuer has received notice of the offer in a prescribed form and (ii) that the offeror has a good faith intention to make the acquisition or, in the case of a tender offer, that the offeror has publicly announced its intention to make the tender offer.

#### 16 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

Merger review under the HSR Act proceeds in two principal stages until the decision either to allow the transaction to proceed or to seek to block it. In the first stage, the parties must wait thirty days (fifteen days in the case of a cash tender offer) after notification before completing the transaction. The parties may request "early termination" of this initial waiting period, which the FTC and the Antitrust Division may grant at their discretion. During this initial waiting period, the relevant staffs of both agencies will assess whether to open an investigation. If one agency requests an investigation, it will generally receive "clearance" from the other to do so. If both agencies wish to investigate, they generally assign the matter to the agency with the greater expertise in the industry.

After "clearance" the investigating staff will ordinarily contact counsel for the parties seeking additional information and possibly requesting interviews of company officials. Usually the staff will also contact customers, competitors and in some cases suppliers of the parties for information about the industry. Although not mandatory, responding to staff requests generally provides an opportunity to identify and potentially resolve or narrow substantive concerns about the transaction at an early

stage. Depending on the timing and issues involved, parties often provide a paper or meet with the staff to present answers to specific questions and to explain in detail why the transactions will not reduce competition.

Some proposed mergers raise competitive concerns that can be resolved informally during the initial waiting period through the advocacy process described above. In those cases, the agencies will grant early termination if requested or will allow the waiting period to expire, and the parties are free to complete the transaction immediately thereafter. The agencies do not issue a letter or order “approving” or “clearing” the transaction.

In some cases significant competitive concerns remain at the end of the initial waiting period. If some additional time would be useful to narrow or resolve these concerns, the acquiring person has the option of “pulling and refiling” its notification before the expiration of the initial waiting period. This informal procedure effectively gives the authority an additional period of up to thirty days to consider the transaction. A second filing fee is not required if the notification is for exactly the same transaction, the forms are updated, and the refiling is completed within two business days after the original filing was withdrawn. The parties may avail themselves of a free refiling only once.

The second stage of merger review arises if the investigating agency continues to have significant competitive concerns at the end of the initial waiting period (or a second one after pulling and refiling). In that case, the agency can issue a Request for Additional Information and Documentary Material, more commonly known as a “second request.” The effect of a second request is to extend the mandatory waiting period until thirty days (ten days in the case of a cash tender offer) after the parties certify substantial compliance with the request.

A second request demands answers to an extensive set of detailed questions and the production of a large volume of documents about the transaction, the parties, and the industry. The investigating staff will often also interview senior company officials under oath (“depositions” or “investigational hearings”). Compliance is time consuming and costly. These costs can be exacerbated for foreign parties by the requirement to translate documents into English. Parties commonly negotiate with the investigating staff to narrow the demands or to respond to certain critical issues quickly in the hope of resolving concerns and avoiding the burdens of a full response. Although there are no statutory or administrative deadlines for the conduct of the investigation after a second request, the agencies generally are receptive to negotiating a schedule for various phases of the second request response, including phased production of documents and information, meetings with the parties, exchanges of economic data, informal disclosure of the agency’s substantive concerns, and discussions of proposed remedies with senior staff within the agencies.

Once all parties have certified substantial compliance with their second requests, the investigating agency can, and almost always does, extend the waiting period an additional thirty days (ten in the case of cash tender offers). During this period the agency must decide whether to allow the transaction to proceed or seek a court order to block it. Generally the parties will also attempt to negotiate a “consent decree” or “consent order” requiring divestiture of assets or other measures to remedy the

anticompetitive effects alleged by the agency. At the end of the extended waiting period, if the agency takes no action, then the parties may consummate the transaction.

**17 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?**

Yes. Transactions requiring notification must not be consummated before expiration or early termination of the applicable waiting period. As noted above, the initial waiting period is thirty days (fifteen for cash tender offers), which may be extended by issuance of a second request until thirty days (ten for cash tender offers) after substantial compliance with the second request. Although the antitrust agencies may grant “early termination” of the waiting period if they complete their review early, there is no mechanism to allow parties to consummate a transaction before the completion of the merger review process. Consummating a transaction early is subject to the same penalties applicable to other violations of the HSR Act—civil fines of up to US\$11,000 (€9,700) per day of violation.

**18 Where notification is required, is there a prescribed format?**

Notifications must be made using a prescribed form available on the FTC’s web site at <http://www.ftc.gov/bc/hsr/hsrform.htm>. The form calls for a description of the parties and the transaction; revenues from each party’s US operations broken down by line of business; worldwide lists of all subsidiaries, minority shareholdings and minority investors in each party; geographic information about each party’s US operations in overlapping lines of business; and information about previous acquisitions by the acquiring person in any overlapping lines of business. The filing also must include copies of recent filings with the US Securities and Exchange Commission; the most recent annual report and audited financial statements; and most importantly copies of certain documents analyzing the transaction with respect to specified competition-related issues. All parts of the form must be completed or an explanation offered for why completion was not possible. There is no need for pre-notification discussions with the antitrust agencies, although the FTC’s Premerger Notification Office is available to answer questions about whether notification is required or how to complete the form.

**19 Who is responsible for making the notification and are there any filing fees?**

In general, both acquiring and acquired persons must file separate notifications. The acquiring person is responsible for paying the applicable filing fee, although the parties may agree to divide it among themselves as they see fit. Filing fees are required for all notifications, and the filing will not be deemed complete unless the correct fee is paid within two business days after submission of the form and documentary attachments.

### Substantive assessment of the merger and outcome of the process

#### 20 What is the substantive test against which a merger will be assessed?

The Clayton Act bars all mergers and acquisitions the effect of which “may be substantially to lessen competition, or to tend to create a monopoly” in a line of business. Interpretations of this standard by the courts and the antitrust agencies have evolved over time but now largely follow the analytical structure outlined by the agencies in their joint Horizontal Merger Guidelines (available at <http://www.ftc.gov/bc/docs/horizmer.htm>). As a general matter, the agencies seek to challenge transactions that are likely to create or enhance “market power” or to facilitate its exercise. Market power is defined as the ability profitably to maintain prices above competitive levels for a significant period of time.

Analysis under the Guidelines involves the following issues:

- defining the relevant product and geographic markets within which to assess the effects of the transaction;
- screening transactions on the basis of market shares, concentration, and changes in concentration to identify those that do not require significant further review;
- identifying and assessing market characteristics that suggest market power could be created or enhanced, including factors making unilateral exercise of market power more likely or making it easier for market participants to coordinate in an oligopolistic market;
- assessing whether entry by new competitors or expansion by existing ones would be timely, likely, and sufficient to counteract the effects of concern;
- determining whether efficiency gains due to the transaction are substantiated, quantified, reasonably unavailable without the transaction, and sufficient to outweigh the effects of concern;
- assessing defences such as the potential that the acquired firm would exit the market absent the transaction.

The agencies use as a measure of concentration the Herfindahl-Herschman Index (“HHI”), which equals the sum of the squares of all market participants’ percentage market shares and ranges from zero to 10,000. The Guidelines indicate that transactions resulting in an HHI less than 1,000 or involving an increase of less than 50 points are unlikely to have adverse effects on competition and will not require further review of market factors. In contrast, transactions involving an increase of more than 100 points to an HHI between 1,000 and 1,800 are deemed likely to have adverse effects, and those involving an increase of more than 100 points to an HHI above 1,800 will be presumed to have adverse effects. The Guidelines indicate that transactions yielding these higher concentration levels will ordinarily require more detailed review of all factors listed above.

The agencies recently released historical data, however, that reveal they rarely investigate and challenge mergers at the concentration levels held out in the Guidelines as triggers. Outside the petroleum and banking industries, in markets with HHI below 1,800 and an increase of less than 500 points, there were no challenges and the few second requests were closed without enforcement action. In markets outside the petroleum industry with an HHI between 1,800 and 1,999 and an increase of less than 500

points, there was only one challenge. More detailed data from the FTC also suggest that in most industries a better guide to whether a transaction will be challenged may be simply whether the number of competitors will be reduced from four to three. As these data reflect, the likelihood and ultimate success of a challenge cannot be predicted solely on the basis of market shares and concentration, but depend on careful analysis of the markets involved.

Although not bound to do so, most courts now largely follow the analytical structure outlined by the Guidelines. But success is not a foregone conclusion for the agencies, as reflected in two recent and potentially far-reaching trial-court decisions. In rejecting the FTC’s petition for a preliminary injunction against an acquisition by Arch Coal, Inc., the district court refused to presume injury despite HHIs between 2,100 and 2,365 and HHI increases of between 49 and 224. The court also gave very little weight to evidence ordinarily relied upon heavily by the agencies—that customers were concerned the transaction would drive up prices. It also rejected the FTC’s long-standing position that a transaction must be assessed on the basis of the specific terms originally notified, not in light of divestitures or other changes that the parties unilaterally adopt without FTC approval before trial. For its part, the Antitrust Division suffered an unexpected defeat in its challenge of Oracle Corporation’s proposed takeover of Peoplesoft, Inc. As in Arch Coal, the Oracle court discounted the extensive testimony of customers and of plaintiffs’ economic expert, leading it to reject the Antitrust Division’s product market and geographic market definitions. Having rejected the agency’s preferred markets, the court also failed to find concentration increases justifying a presumption of injury and examined the agency’s claims of anticompetitive effects in great detail, ultimately rejecting them all in a wide-ranging opinion that addressed nearly every facet of economics and law bearing on merger review.

#### 21 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The HSR Act does not provide a procedure for third parties to submit formal complaints or to intervene formally in the antitrust agencies’ merger review process. Informal complaints will, however, be considered, particularly if accompanied by credible information supporting a conclusion that a merger has had or will have anticompetitive effects. As noted above, the agencies ordinarily will also attempt to speak to merging parties’ customers and occasionally also to their suppliers and to competitors in order to develop a complete understanding of the industry and affected markets. All such third parties are barred by statute from having access to any of the documents collected during the agency’s merger investigation. They are also barred from attending meetings or hearings with the merging parties or other third parties during the investigation.

If the reviewing agency ultimately brings suit in federal district court, or if the FTC initiates an administrative hearing, then third parties may have greater access to documents introduced in public portions of these proceedings. Consent decrees entered by the Antitrust Division also are subject to special court proceedings under the Tunney Act, which allows the district court to grant third

parties leave to intervene or to participate as *amicus curiae* in appropriate circumstances.

**22 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?**

To gather information from the parties, the FTC and the Antitrust Division primarily use requests for voluntary submissions of information and mandatory second requests. Like any other violation of the HSR Act, failure to comply with a the mandatory second request can lead to civil penalties of up to US\$11,000 per day of violation.

Third parties are not subject to the HSR Act's second request power, and the antitrust agencies therefore rely upon voluntary submissions and other general investigative powers to gather information from them. For example, the Antitrust Division may issue compulsory civil investigative demands ("CIDs") under the Antitrust Civil Process Act. 15 U.S.C. §§ 1311-1314. CIDs may request documents, oral testimony, or answers to written questions and can be enforced by recourse to federal district court. The FTC has parallel authority to issue CIDs in merger investigations and may also order production of written answers to specific questions, as well as issue subpoenas for testimony and the production of documents under sections 6(b) and 9 of the Federal Trade Commission Act. 15 U.S.C. §§ 46(b) and 49. Like CIDs, orders under sections 6(b) and 9 must be enforced by recourse to federal district court, but violations of these special FTC orders are also punishable by fines between \$1,000 and \$5,000 and by imprisonment up to one year pursuant to section 10 of the Federal Trade Commission Act. 15 U.S.C. § 50.

**23 During the regulatory process, what provision is there for the protection of commercially sensitive information?**

In general, confidential information is well protected from disclosure, and fear of disclosure is not a basis for withholding commercially sensitive information from the antitrust agencies. The HSR Act provides that information and documentary materials filed with the agencies may not be made public except as relevant to administrative or judicial proceedings or to the US Congress or a congressional committee. Similar protections exist for information and documents produced in response to civil investigative demands, which often are used to secure information from third parties. The antitrust agencies have taken the position that these protections prevent disclosure even of the existence of a notification, with only limited exceptions noted below.

The agencies have very strong incentives not to release any information or documents, because they rely heavily upon compliance with the HSR Act's procedures and they recognize that disclosure of the most sensitive information could, itself, impair competition. As a practical matter, therefore, disclosures do not occur except in the following very limited circumstances:

- If the parties request "early termination" and it is granted, then the names of the parties and the granting of early termination will be published in the Federal Register and by other means, including dissemination to news sources and posting on the FTC's web site.
- If the parties have publicly disclosed the existence of a

merger investigation, then the agencies have in the past been willing to confirm that they are conducting an investigation.

- During interviews or depositions of third parties such as customers, suppliers or competitors, the agencies may need to disclose information that could enable the third party to infer the names and basic nature of the transaction.
- As noted, documents and information collected during an investigation may be made public during the course of administrative or judicial proceedings to block the transaction. Even so, despite the reluctance of federal judges to seal evidentiary materials in public trials, the agencies may be persuaded to join the parties in seeking to seal portions of the record that involve commercially significant confidential information particularly if disclosure could, itself, have anticompetitive consequences.
- When closing already-public investigations without challenging a transaction, the agencies have begun during the past year to issue short statements explaining their decision not to act. To date these have not included confidential information.

As noted below, the antitrust agencies often cooperate with foreign antitrust authorities and, in appropriate cases, with state Attorneys General. The federal antitrust agencies are barred from sharing any documents or information collected during their merger review, unless the private parties supplying the information have specifically waived their confidentiality protections in writing. Such waivers have become fairly common and ordinarily include commitments by the receiving authorities to maintain confidentiality of all documents and information received.

**24 How does the regulatory process end?**

HSR Act reviews that do not result in a challenge by the antitrust agencies may end in the issuance of a letter terminating the applicable waiting period early or in the expiration of the applicable waiting period without any action by the agencies. Neither resolution precludes a later suit challenging the merger as anticompetitive by the agencies themselves or by third parties such as state Attorneys General and injured private parties.

If the investigating agency chooses to challenge the merger, it will initiate a proceeding in federal district court seeking preliminary and permanent injunctive relief against all parties barring consummation of the transaction. The FTC will, in addition, initiate an administrative proceeding against the parties to the same effect.

**25 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?**

The parties may attempt to negotiate remedies to alleviate anticompetitive effects of a merger. The antitrust agencies generally prefer structural remedies, such as the divestiture of assets sufficient to maintain the same level of competition as before the merger. The agencies will closely examine proposed divestitures to ensure that the buyer will rapidly be able to operate the assets as an effective competitor. In that regard, the agency staff will seek to construct a package of assets best able to function as an ongoing business. Remedies may need to include transi-

tional support services, licensing or sale of certain intellectual property, or “fencing in” provisions to prevent anticompetitive behaviour after completion of the revised transaction. In addition, the Federal Trade Commission tends to prefer approving the prospective buyer before agreeing to the remedy. The Antitrust Division tends not to require such an “up-front buyer” but generally insists that the divestiture occur somewhat quicker than does the FTC (e.g., within four months rather than six months). The Division is also more amenable to so-called “fix-it-first” solutions, in which the parties present the Division with a completed divestiture or a restructured transaction to resolve the problem without requiring entry of a formal court order. Both agencies tend to require appointment of a trustee empowered to speed up the process if divestiture is not accomplished within a set time, often aided by the power to add “crown jewel” assets to the divestiture package to enhance its appeal to potential buyers.

Agreed remedies are documented in a formal order. FTC investigations result in “consent orders” approved and issued by the FTC itself. The Antitrust Division has no power to issue orders itself and must initiate a proceeding in federal district court, in which it then enters a “consent decree” incorporating the terms of the agreed remedy. As noted above, the decree then is subject, under the Tunney Act, to a sixty-day period of public notice and comment and the Division must provide a written statement of the rationale and considerations entering into its decision to accept the consent decree.

**26 At what stage in the process can the negotiation of remedies be commenced?**

The parties may initiate discussions with the investigating antitrust agency at any time during the review process. There are no formal deadlines for completing such negotiations, but as a practical matter, the parties should seek to finalize their proposals well in advance of the termination of the waiting period, as much as two weeks in advance, to leave adequate time for the proposal to be reviewed by the various management levels up to and including the Commissioners of the FTC and the Assistant Attorney General in charge of the Antitrust Division.

**27 How are any negotiated remedies enforced?**

Negotiated remedies are embodied in a “consent decree” (Antitrust Division) or “consent order” (FTC). These decrees generally require regular reports for the agency to monitor compliance. If parties fail to comply, the agency may initiate an enforcement proceeding in federal district court seeking civil or criminal fines.

**28 Will a clearance decision cover ancillary restrictions?**

The federal antitrust agencies will ordinarily review all aspects of a notified transaction that might affect competition. Because merger review does not result in a positive declaration of legality that binds either the agencies or third parties, however, the absence of a challenge provides no legal certainty about the legality of any ancillary restrictions.

**29 Can a decision on merger clearance be appealed?**

In marked contrast to the European Commission, for example, the US antitrust agencies’ determination to challenge a transaction is not immediately binding upon the parties. To prevent consummation of a transaction after expiration of the HSR Act waiting period, the agencies must file suit in federal district court and convince a federal district court judge to enjoin the transaction. The agency must demonstrate a “probability of success on the merits” under the Clayton Act, which generally involves factual hearings on all issues relevant to a full challenge. With leave of the parties, the court will often consider the requests for preliminary and permanent injunctive relief at the same time, enabling the court’s decision to be appealed immediately.

In addition to seeking preliminary relief from the court, the FTC ordinarily will also initiate its own administrative proceeding challenging the transaction. The administrative challenge may proceed even if the district court rejects the FTC’s petition for preliminary injunctive relief.

**30 Is there a time limit for enforcement of merger control legislation?**

No. Mergers and acquisitions may be challenged at any time by the federal antitrust agencies, state Attorneys General, or injured private parties. Expiration or termination of the HSR Act waiting period does not prevent such later challenges. As a practical matter, however, the federal agencies very rarely challenge transactions that have passed HSR Act review.

**Miscellaneous**

**31 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?**

The FTC and Antitrust Division are very active members of the International Competition Network. The US antitrust agencies actively seek to coordinate with authorities of other jurisdictions reviewing the same transaction, and the HSR requires the parties to indicate whether the transaction is subject to notification and review in other jurisdictions. The form also gives parties the option to indicate which jurisdictions will receive notifications.

The United States has entered formal agreements to cooperate on antitrust matters with Australia, Brazil, Canada, Germany, Israel, Japan, Mexico, and the European Union and frequently cooperates informally with authorities in other jurisdictions. Whether formal or informal, none of these arrangements supplants the confidentiality restrictions of US law that prevent the agencies from sharing confidential documents or information collected during a merger investigation. It is common, however, for parties to consider waiving the restrictions for some or all of their confidential materials in order to facilitate coordination among various reviewing authorities, particularly if multiple jurisdictions are considering remedies.

**32 Please identify the date as at which your answers are up to date.**

September 30, 2004.



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Kenneth P. Ewing is a partner with the law firm of Step toe & Johnson LLP in its Washington office and a member of the firm's Antitrust Group. He advises US and foreign clients in a variety of industries regarding the antitrust laws of the United States and the European Union and antitrust implications of proposed mergers, acquisitions, joint ventures, and strategic alliances. His antitrust litigation experience includes defending treble-damages suits alleging conspiracies under the Sherman Act, investigations by the Federal Trade Commission and US Department of Justice's Antitrust Division, and administrative litigation regarding mergers in regulated industries. He is a member of the International Competition Network's group of private sector advisors on Notifications and Procedures for antitrust review of mergers and acquisitions. He serves on the Editorial Board for the next edition of the ABA Antitrust Section's multi-volume treatise, Antitrust Law Developments. He also has served as co-editor-in-chief of the Section's Mergers and Acquisitions Newsletter since 1999.



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## STEP TOE & JOHNSON LLP

Step toe & Johnson has a diversified antitrust and competition law practice based in both Washington and Brussels, with four major areas of focus.

First, Step toe has long represented clients in merger and non-merger investigations before the Antitrust Division of the Justice Department and the Federal Trade Commission. A majority of the partners in the antitrust practice group have worked for these agencies. In addition, as competition law enforcement has spread around the globe, so has Step toe's experience in defending merger and non-merger investigations in the European Union and elsewhere.

Second, due to its Washington roots, Step toe has represented clients in many regulated industries. As these industries have been deregulated in recent decades, many have lost their antitrust exemptions and Step toe lawyers have become highly knowledgeable about the application of antitrust law to the electric utility and power generation, telecommunications, airline, railroad, trucking, pipeline, maritime, insurance and financial services industries.

A third branch of Step toe's antitrust practice has been representation of clients as defendants in private class actions, other complex treble damage litigation, and parens patriae cases brought by state attorneys general. Over the past decade, Step toe has also increasingly represented clients in state court class actions based on unfair trade practice and consumer protection theories.

Finally, Step toe's white collar criminal practice has grown to be one of the most significant in Washington. Step toe's lead lawyers in this area have had extensive experience in the Justice Department before entering private practice. They have defended corporations and top management in several recent high profile criminal antitrust investigations and prosecutions.

In the Spring of 2004, Step toe enlarged its Brussels office to serve its clients' ever-growing EU regulatory needs, thus broadening and deepening its EU practice. The Brussels legal team has a long and distinguished history of working with the EU institutions. The team's regulatory competence is diverse, including EU / international trade, biotechnology and chemicals regulation, financial services and insurance, environment, technology and communications, competition, and litigation. Supplementing the EU regulatory practice, the Brussels office also offers well-qualified counsel on Belgian corporate, financial and commercial issues, and on international tax and structuring.

To learn more about Step toe, please visit us at <http://www.step toe.com>.