



# **ICN Investigative Techniques Handbook for Merger Review**

**June 2005**

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# Introduction

The International Competition Network (ICN) was launched in October 2001 by antitrust officials in 14 jurisdictions – Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States and Zambia. As stated in its website ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)), the ICN “seeks to provide competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. It is focused on improving worldwide cooperation and enhancing convergence through dialogue.”

This Handbook is one step in that path. It is the result of a three-year effort by the members of the Investigative Techniques Subgroup of the Merger Working Group (see Annex 1 for a list of Subgroup members). The chapters appearing in this Handbook are updated versions of articles published on the ICN website in 2004. The materials were composed, compiled and reviewed by all of the subgroup members, and the Handbook represents the collective experience of the group with investigative tools and techniques used in merger review.

The legal and economic importance of effective merger review via the use of suitable investigation techniques cannot be overemphasized.

From a legal perspective, our basic duty in the merger process is to investigate proposed mergers and acquisitions to determine – empirically not theoretically – whether they may substantially harm competition. The ability to determine whether a merger likely will create or enhance market power is dependent upon the use of appropriate investigative tools.

The importance of having appropriate tools to obtain information relevant to the review of proposed transactions is recognized by the ICN in its Recommended Practice on Competition Agency Powers, proposed for adoption in Bonn, which advocates that “Competition Agencies should be provided with appropriate investigative tools and mechanisms by which the agency can compel merging and third parties to produce relevant information, for example, by providing the competition agency with the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information.”

From an economic standpoint, mergers have an immediate effect on the structure of the market, and prohibiting potentially damaging mergers is an effective way to prevent the creation of market power. On the other hand, the cost to the merging firms, consumers and other market participants of a wrong decision can be substantial. The use of appropriate investigation techniques to evaluate the competitive concerns a merger can raise – using the right tools for the job – is crucial to reach the “correct” decision as quickly and efficiently as possible. In addition, common knowledge of the techniques used by the agencies can increase certainty in the market, as firms know what to expect when submitting a merger request.

The objectives of this Handbook are to inform ICN members of the various tools and techniques used in merger review as well as to help members organize and use their tools more efficiently and to provide for an effective process for the evaluation of evidence.

The Handbook is organized as follows. **The first chapter** summarizes the findings of a

**survey among ICN members** carried out in 2003, and reflects agency practice. This survey can help inform agencies about what are viewed by member countries as “the advantages and disadvantages of the tools and techniques use in merger investigations around the world, enable them to make better use of the tools they currently have and facilitate the adoption of those they might like to have.”

**Chapter two** discusses how to **plan a merger** investigation. The idea is to create a merger plan in which the most salient features of the merger are laid out, alternative theories of harm are presented, sources of evidence and pertinent facts to help address these theories are identified, and administrative tasks and timetables are laid out. Great emphasis is placed on the plan being a living document, with updates on tasks carried out, theories corroborated or found to be irrelevant, and new theories and tasks added as necessary.

**The third chapter** addresses the issue of **developing reliable evidence** in merger cases. The chapter focuses on alternative data sources, the probative value and relevance of evidence procured, the reliability of the data gathered, depending on both its source and the circumstances under which it was compiled. The chapter presents useful tips for deciding whether to dispatch written requests to the parties or to rely upon oral interviews, and provides insight into obtaining information that is unbiased.

**The fourth chapter** concerns **economic and econometric analyses**, and the benefits from including economists in merger review. The chapter first presents a short survey on the intensity of use of different types of economic analyses in the different ICN jurisdictions based on the results of the 2003 survey. It then lists different types of analyses that can be carried out, the strengths and weaknesses and appropriateness of each for merger analysis, and the data necessary for each type of test. Quite a bit of emphasis is also placed on the importance of not relying solely on the quantitative analyses, but rather to viewing these as complimentary to the qualitative evidence gathered.

**The final chapter** of this Handbook presents a **private sector perspective** on merger review. The chapter recognizes the importance of effective merger control to the economy, but implores Agencies to keep two major issues in mind when conducting their investigations – length and cost. How quickly a merger is evaluated can be crucial for firms. Long processes can be very harmful, possibly even making the outcome of the analysis irrelevant. More direct costs due to burdensome data requests can make the process even more burdensome for firms, a problem exacerbated by multi-jurisdictional reviews for which documents need to be translated. The chapter also gives the private sector’s perspective on which types of investigative tools are likely to be most useful in different situations. Finally, it supports timely and frequent contacts between the agency and the merging firms in order to help lower the costs and make the investigation process less time consuming and more efficient.

To make the Handbook more “user-friendly,” the book begins with bullet points for each chapter that summarize the central subjects discussed in the chapter, and presents the most salient recommendations that arise from the discussions within the chapter. While we believe that the bullet points faithfully represent the chapters’ contents, we would nevertheless strongly recommend that the chapters be read carefully for their underlying logic, and that the bullet points be depended on for overview purposes only.

The Investigation Techniques Subgroup hopes that this Handbook will be useful to members in planning and carrying out effective merger review.

# Chapter 1 - Investigation Tools Overview

## Executive Summary

This chapter introduces the various tools that are typically available in merger investigations.

⇒ The investigative tools and their use in practice are described. The tools covered are:

- Notification/filing
- Compulsory requests for internal documents of the merging parties
- Compulsory written requests for information, addressed to third parties (competitors, customers, etc.)
- Voluntary production of information and documents
- Telephone interviews
- Sworn statements, depositions, affidavits
- Other forms of oral evidence
- Public invitation to comment published on web site, in official journal etc.
- Surprise inspections
- Scheduled site visits
- Outside experts and studies
- Public data
- Econometric analysis
- Accessory information technology tools

⇒ Enforcement powers, such as sanctions for non-compliance, are essential to ensure the effectiveness of the investigation tools.

⇒ A procedure for dealing with the protection of confidential business secrets should also be devised for use in conjunction with the investigation tools.

# Chapter 2 - Planning a Merger Investigation

## Executive Summary

The first step in an effective merger investigation is to develop a plan for conducting the investigation. This chapter addresses planning merger investigations from their inception to their conclusion.

⇒ Where the main issue is whether to begin an in-depth review, an initial plan need not be written or elaborate.

- The initial plan should focus on a few discrete tasks or, where appropriate, limited information requests that are able to be accomplished without using many resources.

⇒ When the threshold that requires a deeper look is crossed, the investigation team may find it useful to develop a written investigation plan.

- For its initial plan of action, the investigation team should focus on identifying the likely areas of concern raised by the transaction and determining factual issues for further investigation.

⇒ Any merger investigation plan ideally should cover items within three primary areas:

- Developing and tracking various *theories* of harm;
- Identifying sources of *evidence* and pertinent facts to help evaluate the investigative theories; and
- specifying administrative *tasks* and assignments, including careful scrutiny of available time.

⇒ Theories

- The theories portion of an investigation plan should include the basic facts of the transaction, present candidate theories of competitive effects, and identify unresolved questions critical to the investigation.
  - The investigative plan should include a stated *reason for the investigation* – a concise description of the transaction being investigated, and a brief explanation why the investigation is necessary.
  - The investigative plan should include the *main issues to be investigated* by identifying the *working theory of harm* for the investigation and any *unresolved questions* critical to the investigation.
- Beyond identifying candidate theories at the outset of an investigation, the investigation team should prioritize the theories. The investigation team should weigh the importance of different lines of inquiry and focus its efforts on those with the



greatest likelihood to reveal competitive effects.

- One conceptual approach to focusing some in-depth investigations is to identify a specific dispositive issue that has a clear path toward resolution. Known as a “quick-look” approach, this may be appropriate for matters in which the investigation team’s inquiry is focused on a limited number of issues or markets.

⇒ Evidence

- In the evidence portion of the investigation plan, the investigation team should focus on how to develop the information necessary to test the theories and to evaluate the significance of possible effects.
- The plan should identify the *types of information needed* to resolve key questions, the *likely sources of information*, and the *method to gather the needed information*.

⇒ Tasks

- The investigative plan should include an overall *timing plan* for completion of the investigation.
- The most important administrative aspect to include in the investigation plan is a schedule of tasks to be accomplished, or *agenda*, for the investigation, prioritizing for the most critical items.
- The investigative plan should identify specific *analytical economic projects* contemplated or underway and identify data or information needed to complete such projects and an estimated timetable for them.
- If the agency chooses to *coordinate with another jurisdiction* that is reviewing the same transaction, the investigation team may identify deadlines facing the other jurisdiction, plans for future discussions with the other jurisdiction, and any outstanding issues with respect to coordination.
- The investigative plan should include the consideration of *staffing needs* to complete the investigation within the appropriate time frame.

⇒ The investigation plan is a living product to be revised throughout the investigation.

- A key premise of the investigation plan is that from the outset, the investigation team’s theory of possible harm should be well-defined. As the investigation proceeds, however, it is critical to adapt and update the plan, for instance, by noting accomplished tasks, marking certain theories as irrelevant, or highlighting new working theories and unresolved questions.
- At an early point in the investigation, and at other appropriate points throughout an investigation, the investigation team should attempt to discuss their current substantive evaluation of the transaction with the parties and identify unresolved

issues. The investigation team should also build a *dialogue with third parties* into its investigation.

- The investigation team should revise the theories of harm to reflect the evidence as it is obtained. It is not enough to develop good candidate theories at the start of an investigation. It is equally important to test them against the evidence, and to change them if needed.
- An effective way to adapt a plan to the ongoing investigation is for the investigation team to hold periodic planning meetings to discuss what has been learned and reevaluate what needs to be done.

# Chapter 3 - Developing Reliable Evidence

## Executive Summary

Agencies evaluate many types of evidence from a variety of sources in merger reviews. The Developing Reliable Evidence Chapter discusses five categories of evidence:

- ⇒ pre-existing documentary evidence, such as corporate strategy documents, planning documents, and sales reports;
- ⇒ materials, such as surveys, reports, and compilations of information, that are created in anticipation of the merger or as part of the merger investigation and analysis;
- ⇒ descriptive evidence from market participants (*i.e.*, customers, suppliers, competitors, and employees of the merging parties);
- ⇒ written responses to inquiries and compulsory requests for information; and
- ⇒ expert and quantitative evidence, including industry and economic expert analysis and testimony.

Agency staff, counsel and experts must ensure that the evidence, whether documentary, descriptive or expert in nature, is tested for reliability throughout the process to ensure that the explanations provided to the decision maker are consistent with the evidence and not subject to other interpretations that are equally or more persuasive. Each type presents different reliability issues.

- ⇒ Because they were created before the merger was contemplated, ordinary-course of business documents tend to be viewed as reliable sources of evidence upon which analysis can be conducted and appropriate conclusions drawn.
  - Pre-existing documents that mainly contain analysis can provide pre-merger description and analysis of market conditions.
  - Pre-existing documents containing data are the most compelling. Documentary submissions containing data to be used for reports, analyses and surveys must be tested for reliability, must be compared to other evidence in the industry and must have been collected properly.
  - Both factual documents and analytical documents provide information to test assertions made by the parties during the investigation.
- ⇒ Merger negotiation documents (*i.e.*, reports, recommendations, maps, surveys, strategy documents, and analyses developed during the merger negotiation process) can be particularly useful if they give an accurate representation of the parties' analysis of the merger at that time.
  - Documents created contemporaneously with the merger review that contain self-serving statements or unverified data should be given little weight unless they can be fully corroborated.

- ⇒ Descriptive evidence from customers, suppliers, competitors, and the merging parties can be important for decisions to terminate a merger review or can provide early indications of concerns and identify relevant sources of additional detailed information.
- Descriptive evidence can be an efficient way of learning telling facts that show what is the market and how it works.
  - Descriptive evidence can provide powerful corroboration of expert and documentary evidence.
  - Further, descriptive evidence can add a qualitative perspective to the merger review process.
- ⇒ To obtain useful evidence through written requests, it is important, first, to identify what market participants are in the best position to provide the needed information and, second, to ask for information that the respondents can answer reliably. Questions should be as precise as possible to avoid loopholes or misunderstandings that could significantly reduce the evidentiary value of the information obtained.
- ⇒ Experts may be key interpreters and communicators of the meaning of the evidence. It is often useful to include both industry experts and economic experts at an early phase of the merger review process. Where expert analysis is properly founded on relevant factual and behavioural information, expert evidence is generally given substantial weight and may even be determinative of the issues. However, expert analysis presented by the parties to the transaction must be viewed with appropriate scepticism unless it is corroborated by the agency's experts.

Careful consideration of the value and possible reliability concerns of each category of evidence will enable the agency to be more confident of its decision.

# Chapter 4 - The Role of Economists and Economic Evidence in Merger Analysis

## Executive Summary

This chapter concentrates on the role of economists in merger analysis. An economist's contribution to merger analysis is to be attained first and foremost through his use of economic theory and understanding; Economics is a positive science, and the analysis should proceed in a scientific manner.

Typically, begin the analysis of a merger with a qualitative analysis, based on such things as conversations with competitors and customers, and an initial study of the firms' internal documents.

- ⇒ If further analysis is required, it will commonly require the acquisition of information from the involved firms and/or from other non-public sources (e.g., competitors or customers).
- ⇒ Quantitative analyses carried out in merger cases can assist in delineating the markets potentially at risk from the transaction and determining the potential for and magnitude of anticompetitive effects.
- ⇒ Quantitative evidence should be viewed as complementary to the qualitative evidence, and they are used in tandem to assess the competitive impact of the merger.

In preparing data requests, keep the following points in mind:

- ⇒ Plan ahead
  - Identify at the earliest stage possible the major competitive concerns arising from the merger (usually based on the qualitative analysis), and determine which analyses to carry out and what data are required for the analyses.
- ⇒ Find out what types of data are available
  - It would not be beneficial to request data that cannot be compiled by the involved parties. Preliminary meetings or telephone conversations with those responsible for data collection or analysis in the firms can be quite useful.
- ⇒ Ask for the minimum amount of data required to carry out the desired analyses.
  - The gathering and processing of the data is time consuming and costly, both to the firm and to the Authority's staff. It is best to keep the demands to a minimum, but be sure to ask for all needed data. Again, planning ahead is crucial. A useful approach is often to conduct simple tests early on without

sacrificing the ability to make a legitimate demand for more detailed information later on, if and when necessary.

⇒ Review presentations prior to meeting with outside experts.

- When presented with economic analysis by outside experts (white papers), it is quite useful to receive the data and programs used by the experts, and to carefully evaluate the reports and econometric results *before* meeting with the outside experts. This is true for both highly technical submissions as for low-tech submissions based on empirical assertions and theoretical arguments.

Quantitative analyses run the gamut from relatively simple data analysis to highly sophisticated econometrics. More complicated techniques can at times provide significant additional insight into the potential competitive impact of a merger than can simple techniques. However, the downside to such techniques is that they are frequently highly resource intensive and can be more difficult to understand and explain (particularly for non-economists).

⇒ Simple analyses can provide a wealth of information on the functioning of the industry and on the roles of the merging parties in that industry. Of course, legitimacy should not be sacrificed in search of simplicity, and one must be certain that the results from these simple analyses are not misleading.

⇒ As a general matter, starting with simple analyses and then determining whether more complex analyses are appropriate and worthwhile is a good way to balance these considerations.

- Upfront consideration of what complex analyses might be appropriate is important to ensure that the appropriate data are requested in order to provide sufficient time to conduct the analyses and incorporate the results into the decision-making process if during the course of the investigation it is determined that such analyses would be useful.

⇒ If possible, conducting multiple empirical analyses to address the key issues is useful to determine whether the conclusions from the analyses are robust to different tests. The need for robustness can also require the employment of alternative techniques; even if just to anticipate the analyses the merging parties and third parties will produce.

⇒ Even the most rigorous quantitative analyses present only part of the story, and the results must be viewed in light of the qualitative findings.

Analyses discussed in the Chapter

- Measuring Market Shares
- Demand Estimation / Estimation of Elasticities
- Actual Loss vs. Critical Loss

- Price Correlation/Variation Analysis
- Natural Experiments
- Other Tests for Unilateral Effects
  - Measuring Excess Capacity
  - Analysis of the possibility of relocation and new product introduction
- Other Tests for Coordinated Effects
  - Analyzing industry data
  - Most-Favored-Nations Clause
  - Analyzing competitor production reactions to price changes
  - Analyzing customer turnover - churning
  - Analyzing changes in market shares
  - Analyzing markets with Sealed Bids
  - Analyzing the stability of costs and demand
  - Analysis of new product introductions

# Chapter 5 - A Private Sector Perspective On Tools And Techniques Used In Merger Investigations

## Executive Summary

The merger review process can protect competition and thus benefit the global economy. Even while recognizing the benefits, however, the private sector experiences two primary concerns

- ⇒ the amount of time it takes for completion of the merger review process, and
- ⇒ the associated uncertainty and costs, which is exacerbated by multi-jurisdictional reviews.

Time is crucial to the parties as delay is often a “deal killer.” Delay – even the relatively short delay from a first-phase investigation – impedes the consummation of mergers that present no competitive concerns; second-stage delay is particularly significant. Merger reviews are costly for the agencies and the parties as they are resource intensive. The parties often bear significant out-of-pocket expenses, diversion of management due to their loss of employee productivity, and business deterioration due to delay and uncertainty.

The private sector believes that to the extent a merger raises questions, some information is needed to address those questions, but a full-blown investigation should be reserved for the most analytically complex mergers and those more likely to be competitively troublesome. Even in the case of a likely anticompetitive merger, information requests should focus on relevant, probative information and should be informed by a theory of anticompetitive harm. This focus minimizes the time and costs of investigations for the parties and the agencies. In addition, an early focus on possible remedies will help obtain necessary information that may promote an early resolution.

Drawing on their collective experience and in the spirit of working with enforcement agencies to ensure efficient merger review, in this chapter private practitioners offer their perspectives on how to streamline and expedite merger investigations by evaluating the strengths and weaknesses of the tools and techniques used in merger investigations, providing pragmatic tips about the use of these tools (while having the agencies receive the information they need), providing tips on when and how to engage the parties and on dealing with third parties, and discussing the need for confidentiality.

⇒ Effective Use of Investigative Tools, Engaging the Parties and Third Parties

- When determining which methods should be utilized, the agencies should balance cost versus effectiveness, the need to substantiate the decision, the need to provide parties with an opportunity to respond to the agencies’ concerns, and general administrative law principles the agencies are required to follow.
- To strike a balance, the agencies should combine various information-gathering tools, which are likely to be more effective in tandem.



- The agencies should also consider whether the source of the information is biased. For example, competitors may be concerned a transaction will make the market more competitive, so information from them may be biased.
- The first step in the information-gathering process is the pre-merger notification filing by the parties, typically accomplished by using standard forms or by briefing memo or letter.
  - Pre-merger notification forms are useful tools to identify competition issues early on, enabling the agencies to ask more specific questions later in the process.
- Beyond the initial filing, the information-gathering techniques used most often are:
  - written questions;
  - telephone interviews and other oral inquiries;
  - company presentations; and
  - documents requests.
- Written questions work best for securing very specific factual information and the contentions of the parties or third-parties. They also allow flexibility in responding. While written questions are useful, they prevent immediate follow-up by the agencies, and may be costly if not sufficiently narrow or where the information sought is not readily accessible to the party. When issuing written requests for information, the agencies should ask open-ended (not leading) questions -- who, what, when, where, and why -- to elicit non-judgmental fact-based responses, not legal conclusions.
- Telephone interviews provide the most direct means of gathering factual information and allow for immediate follow-up. They are also the least costly of all the tools used to access information. Telephone interviews should be used frequently, particularly early in the investigation. Designating a primary interviewer and being prepared are critical to success and efficient use of time. It is also important that the most knowledgeable person is providing information. An alternative to the telephone interview is inviting a company representative for oral questioning. This method allows the interviewee to be prepared in advance, but is more burdensome on all sides.
- Early in the merger review process, company presentations should also be utilized. These presentations provide the agencies with an overview of the industry and issues related to the transaction. Later in the process, company presentations assist in discussing market definition and competitive effects issues that may have arisen during the review process. These presentations are specific and generally cost-effective.
- Another means of acquiring information is a request for documents which allow the agencies to verify information submitted by the parties in the initial filing and responses to written questions. Documents such as market analyses, pricing

information, and business plans offer a party's perspective on the market and its most significant competitors. Requests should be narrowly tailored in subject matter, and limited as to time and the sources from which documents are sought. Translations should be limited to specific legal and factual information relevant to the issues in the transaction in the jurisdiction. Documentary information is generally more reliable when it pre-dates the merger negotiations, although reports and analyses developed during the merger negotiations may also prove useful and reliable. Although helpful, documentary evidence can be very burdensome and costly to the parties and must be evaluated by the agencies in context to ensure reliability. With respect to third parties, requests should be limited to market shares or extremely critical issues. The agencies should allow flexibility and be creative in ways to help eliminate the burden – samples, summaries and partial translations should be considered.

- Finally, dialogues early and often are one of the most effective ways to narrow issues and expedite transactions. At a minimum, conversations (on the telephone or at meetings) should occur just before or at filing, prior to issuing information requests, before going to the second stage of the investigation, before recommending an adverse decision to superiors, and before the agency makes an adverse decision.

# Chapter 1

## Investigation Tools Overview

### Introduction

This chapter provides an overview of the investigation tools typically available in merger investigations. The information in this chapter is based on a survey of ICN jurisdictions and thus reflects agency practice. It should help inform agencies on the practical advantages and disadvantages of the tools and techniques used in merger investigations around the world, enable them to make better use of the tools they currently have, and facilitate the adoption of those they find most useful. It is recognised that provisions in the general legal framework, *e.g.*, constitutional law principles, may limit the use or introduction of a certain tool in a particular jurisdiction.

The following tools are used in merger investigations by ICN member agencies (of course, not all tools are used by every agency):

- Notification/filing
- Compulsory requests for internal documents of the merging parties
- Compulsory written requests for information, addressed to third parties (competitors, customers, etc.)
- Voluntary production of information and documents
- Telephone interviews
- Sworn statements, depositions, affidavits
- Other forms of oral evidence
- Public invitation to comment published on web site, in official journal etc.
- Surprise inspections
- Scheduled site visits
- Outside experts and studies
- Public data
- Econometric analysis
- Accessory information technology tools

To conduct an effective investigation, it is not necessary to use all of these tools. Each case will differ in terms of complexity and likely competition concerns; not every tool is appropriate in every case. The more tools are available to the agency, the easier it will be for the agency to obtain information in the manner most suited to the case. The choice of a given tool and the way it is applied should be adapted to the case at hand. In that adaptation, the aim of conducting a thorough investigation and the proportionality of the burden imposed on the companies concerned has to be balanced.

In most agencies there is a high proportion of unproblematic cases that are normally cleared with no or very limited investigation, but which are nonetheless covered by pre-merger filing requirements, and therefore impose certain obligations on parties. This fact underlines the need for efficient procedures to process these cases without unnecessary burden on scarce

agency resources and on parties.

Due to the high proportion of cases treated with limited investigation efforts, accuracy when classifying a case as non-problematic is essential. If not, relevant competition issues could be missed. This risk is particularly relevant as the typical information source in these cases is information provided by the parties in filings and notifications. Thus, obtaining objective and verifiable information in an initial filing is important as is ensuring the merging parties have proper incentives to report fully and accurately and to provide any subjective information of a type that can reasonably be checked and evaluated.

Although most investigation tools are flexible in their use and intensity, certain groups of tools typically fit better with certain case scenarios. For cases that clearly do not raise competition issues, agencies should start with tools that are less burdensome for both the agency and third parties such as notifications/filings, public data and public invitations to comment. More intensive tools, such as surprise inspections, outside studies or sworn statements, should usually be reserved for problematic cases.

## **I. Merger Investigative Tools in Practice**

Similar tools work differently in different countries, not just because of differences in legal background and tradition, but also because market participants are more active and/or have a different level of understanding of merger review and competition law in some countries than in others.

### ***Notification/filing***

Notification, also known as ‘filing,’ is the submission of certain information (usually defined in a form or in guidelines) by the merging parties to the agency. Usually the notification initiates the merger investigation. The ICN Recommended Practice on Requirements for Initial Notification advocates that the filing “should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.” Because the duty to notify applies to transactions covering a wide range of possible competitive effects, no single set of initial notification requirements is optimal for all transactions. Many jurisdictions use one or more of the following approaches:

⇒ Alternative notification formats varying with the likely complexity of competitive analysis of the transaction. Examples include: advance ruling certificates, which enable the merging parties to use a simplified advance procedure instead of a formal notification; and short and long notification options, enabling the merging parties to elect to submit abbreviated information in transactions that do not present material competitive concerns.

⇒ Extensive initial notification requirements coupled with procedures that give agency staff the discretion to waive responses to information specifications that are not sufficiently relevant to the agency’s disposition of the transaction to justify the burden that the response would impose.

⇒ Abbreviated initial notification requirements coupled with procedures providing agency staff discretion to seek additional information during the initial review period.

In jurisdictions with notification obligations, the agency typically provides for the possibility of informal discussions upon the request of the merging parties prior to the formal notification and launch of the review process (often referred to as “pre-notification” discussions). Generally, the purpose of the pre-notification discussion is to advise the parties on whether their transaction will be subject to notification obligations and, if so, what information will be needed for their intended notification. The pre-notification discussions may, in practice, extend the time available for the investigation and enable the case team to acquire a reasonably good understanding of a transaction before any deadlines start to run.

For that reason many agencies believe that the pre-notification phase and the notification is an extremely useful tool because it is the first and most detailed source of information available at an early stage of the proceeding. It helps determine the potential competitive threats, and thereby allows sketching out some of the potential main investigation lines for further planning as well as screening out those cases that plainly raise no competition concerns. However, it must be borne in mind that information provided in the notification, particularly subjective information, should be evaluated carefully.

### ***Compulsory requests for internal documents of the merging parties***

Compulsory requests for internal documents are requests for specific types or categories of documents backed by a sanction for non-compliance with the request. This tool is predominantly targeted at the merging parties, because they typically possess internal analytical material and data directly related to the competitive relationship of the merging parties, the competitive environment and the rationale and impact of the transaction. However, this does not exclude that in specific cases it can usefully be applied to third parties and their internal documents.

In practical terms, the parties could, for example, be asked to provide all documents drafted by a specific business unit/person, or those dealing with a specific topic and/or drafted in a certain time period, or all electronic documents containing certain categories of data. Care must be taken in framing such requests so as to ensure that all the relevant documents are supplied without drowning the investigating agency in a mass of irrelevant paper. It should be borne in mind that the case team will have to wade through everything supplied to find material significant to the investigation and to make sure that no exculpatory material is overlooked. Producing these internal documents can mean a heavy burden for the parties. Therefore, proportionality should be respected in the use of this tool. Scope and terminology of the questions may be discussed with the parties prior to or after issuance of the request.

The scope of the information required typically varies according to the overall investigation regime and the specifics of the case at hand. Agencies use this tool as an additional and complementary source of information if the notification documents are not complete, detailed or specific enough.

On the other hand, especially in complex cases raising competition concerns, this investigation tool is used as a core, major source of information. In certain systems, the

parties have to submit a detailed set of specified documents and business records that relate to the critical issues in the investigation, leading to the production of hundreds of boxes of documents.

The main advantage of this investigation tool is that it obtains a first-hand view on the issues that have not been filtered by the merging parties, third parties or others. Internal documents and business records generally produce far more candid and probative evidence on key questions than parties would otherwise provide. Internal documents enable the agency to observe how the parties to the transaction view the competitive environment in which they operate. Data compiled and used by the company, in the normal course of business, may be the most reliable data for use by the agency in analyzing the transaction. The reasons for the very illustrative and high evidential value of internal documents are described in detail in chapter 3, Developing Reliable Evidence.

The potential disadvantage is that it is time-consuming and can require significant staff resources to efficiently use the documents produced. Agencies often use dedicated IT tools for document handling to maintain control of extensive documents.

***Compulsory written requests for information, addressed to the parties, competitors, customers or others***

These are compulsory written requests for specific information or data backed by a sanction for non-compliance with the request. The difference from document requests is that the information to be provided is normally pre-processed by the responding party and condensed from various internal sources. Examples are data tables to be filled in, lists of items established for the purpose of the reply that did not exist internally before, summaries regarding past business behaviour, etc. In practical terms, typically, the request will take the form of a list of questions and will provide the addressee with a deadline for the provision of the information sought. An advantage of data requests is that it requests data in a consistent form from the parties to the transaction and from third parties, thereby facilitating compilation of data across companies. A disadvantage is that the data submitted may be manipulated or massaged by the submitting company to suit its agenda. Data submitted by the parties to the transaction should be checked for accuracy and reliability by comparing the submitted data to corresponding data produced by the parties in response to the document request.

The most often used sources for such information are the parties to the transaction, competitors and customers. However, suppliers, financial consultants, associations, public authorities and any other persons who may be able to provide first-hand information about the market, or to verify information provided by the merging parties, should also be considered. Contact details for the addressees of such requests are typically obtained from the merging parties themselves, although other sources can be used, such as databases or publications available to the agency. The comprehensiveness or the representative value of the sample of addressees must be considered when relying on information obtained from third parties through this tool. (See chapter 3, Developing Reliable Evidence, for details).

Such information requests are typically considered to be an important and useful tool for verifying facts and figures, obtaining confidential data and collecting data in a convenient

written or electronic form. On the other hand, written questionnaires are not interactive and answers might be fragmented, inconsistent and self-contradictory. Therefore, in some cases it may be necessary to clarify the points at issue by telephone or in meetings. In addition, agencies should be aware of potential bias or fear of retaliation in responses provided by third parties. For these requests, as for all investigation tools, it is important not to put an unnecessary burden on the responding persons.

### ***Voluntary production of information and documents***

In some jurisdictions, agency staff will contact the merging parties and request that they voluntarily provide information and documents tailored to the specifics of the proposed transaction. Depending on the specific issues raised by a transaction and the agency's expertise in the relevant area, a request might include, for example, a list and description of all overlap and otherwise potentially relevant products, business and strategic plans, market studies, a list of competitors, suppliers or customers, or analyses or studies regarding the transaction.

This is an 'informal' request that specific information and documents be provided. The agency should make the decision regarding what material is to be submitted so that submission is not limited to material that the parties believe is supportive of their view of the transaction. This tool is particularly useful during the initial review period in jurisdictions that ask for only abbreviated information in the notification and for agencies that lack the power to compel production from certain responding persons. In general, it has to be borne in mind that due to the voluntary nature of compliance with such a request, the scope and depth of the information obtained is likely to be limited. The submitter should be asked to verify the completeness and accuracy of the response.

### ***Telephone interviews***

This is a telephone conversation that takes place between one or more members of the Agency staff and a person who may be able to provide information in connection with the investigation. Typically, the call is prearranged like a meeting in person to ensure availability and preparation of the participants.

Agencies use telephone interviews at various stages of the proceedings and use them for various investigation purposes: to verify claims, to get background information, to gather overview information quickly, or to identify persons who can provide evidence. The telephone is a good way to check or clarify a small but important point that came up, for example, in a reply to an information request. Telephone interviews can also be used to test the industry's reaction to a proposed merger in order to help determine the focus and scope of the investigation. Phone conversations may also afford (third) parties a less formal occasion to discuss views that they may be hesitant to express openly.

The more informal nature of a phone conversation can also have some drawbacks that should be taken into account. In some instances it can be time-consuming trying to get in touch with the right people; asking the merging parties to provide accurate contact details for their largest competitors and customers is a way to avoid this problem. There is also a risk that interviewees may be less well prepared in telephone interviews than in face-to-face

interviews and sometimes unwilling to give information. The telephone may therefore be less effective in obtaining the required information compared to written means. Furthermore, proper documentation and probative value of information received over the phone is a relevant issue in practice. One option is to require proper documentation in the form of agreed minutes if such interviews are to be used as evidence. Another way to address the issue is by obtaining statements under oath or the like later in the investigation.

### ***Depositions, sworn testimony or statements, affidavits, and declarations***

These are statements or testimony made under oath with the expectation that they are to be used in legal proceedings. Special or general legal provisions typically impose sanctions if the statements made are untruthful, misleading or incomplete.

Sworn and transcribed questions and answers are recorded through depositions or investigational hearings taken before a stenographer, court reporter, or transcribed electronically. The testimony must be taken in a form that satisfies the rules of evidence of the courts and tribunals of the jurisdiction in which the material will be used. Testimony taken in this form is most often that of officers and personnel of the parties to the transaction. The staff conducting the questioning should guard against self-serving or evasive answers to questions and should follow-up, as appropriate, to develop the factual record. Sworn testimony may also be taken of third parties and may be discoverable by the parties to the transaction in subsequent litigation between the agency and the parties.

Affidavits, declarations or sworn statements are prepared statements, by an individual, given under oath or affirmation. They generally take the form of sequentially numbered paragraphs containing narrative statements based on information known to or obtained by the individual making the statement. They may be prepared with the assistance of staff of the agency based on information obtained through a prior oral interview of the individual by the agency staff. They may also be submitted by the parties to the transaction or by third parties in response to an agency request for information or request for comments. The statement should be in a form that satisfies the rules of evidence of the courts and tribunals of the jurisdiction in which the material will be used.

Typically, these tools are used more often in likely intervention cases than in no problem cases. Countries that use these tools, very often in the likely intervention cases, typically have a system whereby a merger can only be prohibited in a court or tribunal proceeding.

The most important advantage of this tool is its probative value, based on the above-mentioned sanctions. Compared to requests for written information, these tools allow interaction with the respondent and thereby enable the authority to generate precisely the evidence it considers most relevant for the purpose of the case.

### ***Other forms of oral evidence***

This includes informal tools such as meetings and personal interviews with the parties or competitors, customers, suppliers or any other interested party. The selection of persons to be interviewed in practice is based on a wide range of considerations and is similar to the situation with telephone interviews described above. Sometimes third parties want to be



heard, or the information gathered through the written responses is not sufficient or requires clarification.

These tools make possible a reactive debate or discussion and are thus most appropriate for building up background knowledge and understanding of the functioning of the relevant markets. They can also be beneficial for discussion of certain aspects of the transaction (such as a confrontation of ideas about the possible effects of the operation), or for a clarification of certain aspects of replies to requests for information. However, if a deposition is expected, unrehearsed testimony is more likely to be elicited if the questions are asked for the first time at the deposition. For third parties informal interviews provide an occasion to openly discuss views on the transaction, and to point at the elements worth investigating. Most agencies use oral evidence on a case-by-case basis and not as a standardised step in the investigation. However, the willingness of an agency to meet with the parties and openly discuss issues is often perceived as a very positive feature in a merger regime.

The most common way of introducing oral statements into the procedure is by means of a written document signed by the witness or by means of affidavit. Statements recorded by officials only, without the signature of the witness, are sometimes used and are taken into account in the overall analysis. In addition, oral information may be taken as background information only and not formally introduced into the procedure. In practice, third parties may not wish certain of their candid statements to appear in the file, even in the form of confidential minutes.

#### ***Public invitation to comment published on web site, in official journal etc.***

This is a public request from the agency soliciting comments on the transaction in question. The efficacy of these tools can vary considerably according to the general environment in the jurisdiction concerned. Experience in practice ranges from the observation that it very rarely produces any useful information to the consideration that it has the advantage of making publicly known that a merger and its review are under way. In this way, the information can reach many market participants and it gives the interested parties an opportunity to contact the agency. This applies in particular to markets with numerous and dispersed actors.

#### ***Surprise inspections***

Inspections are surprise visits to a party's premises in order to review and copy internal company documents (including electronic data). This may be particularly useful if staff have the impression that the parties are not forthcoming with information or are not disclosing all the relevant information requested. However, inspections are typically very burdensome on the agency and the target. Therefore, while many agencies have this tool available, only very few actually take advantage of it. It is normally never used in no problem cases. Because of the burdensome nature of this tool, it is seen as an enforcement measure in case of non-compliance with notification rules and requests for information rather than a standard investigation tool.

#### ***Scheduled site visits***

Site visits planned with the relevant parties at their premises, which are often offered and

arranged by the relevant party, are used primarily in complex cases and very rarely in non-problematic cases.

They can give a very good insight into how the industry in general and a particular company operate. They are usually particularly useful when technical questions are an issue. Their main advantage is that they often provide the occasion to speak openly with business people and technical experts very close to the market. On the other hand, these visits mainly provide background information rather than documentation for the file and need to be followed up by agreed minutes, document and information requests, and formal interviews to produce documented evidence.

### ***Outside experts and studies***

Outside experts, such as economic consultants or industry specialists, may be necessary in the process to complement the knowledge and assessment capabilities of the agency. They can also provide a valuable independent view on the case under investigation. They are typically used in likely intervention cases only, particularly if there is a specific complex issue at the core of the analysis.

It has to be taken into account that outside experts may have very little understanding of the merger review process, so constant monitoring from the side of the agency may be needed. A potential disadvantage of using outside experts or studies is that it can be rather time-consuming, in particular in the case of complex studies. This disadvantage can, to some extent, be remedied with sound forward planning. Another element to consider is that experts are typically very costly, so that the relevance of the study/expertise for the assessment of the case should be carefully examined.

### ***Public data***

There is a great deal of information publicly available. These sources include sector publications, financial reports, brochures, corporate and trade association web sites as well as regulators' web sites such as the US SEC. They help to develop a background understanding of the sector concerned without draining limited resources. They provide public and non-controversial information about the companies and products, the major developments and challenges in the sector, market shares, costs, competitive strengths and weaknesses, etc.

Agencies normally use public sources more than any other investigation tool besides the notification/filing, regardless of the complexity of the case and particularly often in likely intervention cases. The tool is also considered very useful in systems without compulsory notification to discover the existence of a merger. However, the information from public sources requires some caution because it can be unreliable or biased; it therefore needs to be checked and complemented by other means.

### ***Econometric analysis***

Econometric analyses involve the processing of market data in order to quantify or make predictions about the impact of a merger. They can be valuable tools, in particular, for market definition. The main concepts here are price correlation and the elasticity of demand analyses

(for details see the Handbook chapter on the Role of Economists and Economic Evidence).

Econometric data are typically used in very complex cases only. It requires expert resources from within or outside the agency to collect and process the data. Time constraints and lack of sufficient and reliable data are the main obstacles to use of this tool.

### ***Accessory information technology tools***

Many of the tools listed above will produce considerable amounts of information and data that must be managed and processed. Specialised IT tools can help agencies to handle their investigation results. Most common are database and economics software and access to a law database. Database software, such as Summation, Concordance and JFS Litigator's Notebook, is used to manage the documents received and produced in a merger investigation. In the category of economics, software products such as Mathematica, e-views and SAS are examples. Law databases include OLIS, Judit and JUSTIS.

## **II. Procedural Issues**

### ***Enforcement powers***

Enforcement powers are essential to ensure the effectiveness of any investigation tool. The authority should thus have the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information. In most jurisdictions a system of fines has been put in place for incorrect, misleading or late information. In some jurisdictions, such behaviour is generally, or in addition to civil law, subject to criminal law prosecution. In these jurisdictions it is a criminal offence to intentionally withhold, misrepresent, conceal, destroy, alter or falsify any documentary material, answers to written interrogations and oral testimony.

Fines for failure to notify or to provide information may be calculated once for the breach as such and then on a daily basis until compliance. A distinction is made between private persons and companies in some countries. The level of the potential fine is also important in order to create a sufficient deterrent. Some members levy a flat fine whereas others impose turnover related fines, which allows the amount of the fine to be adapted to the size of the company.

### ***Protection of business secrets***

All investigation tools can result in collection of business secrets and other confidential information from merging and third parties. As recognized in the ICN Recommended Practice on Confidentiality

Public disclosure of business secrets and other confidential information received by competition agencies in connection with the merger review process may prejudice important commercial interests and may have adverse effects on competition. The prospect of potential disclosure may also discourage parties from submitting all relevant information to and fully cooperating with the reviewing agency. Confidential information that merging

parties and third parties submit in connection with the merger review process should therefore be subject to appropriate confidentiality protections.

ICN Recommended Practice for Merger Notification Procedures IX. Confidentiality (available at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html>.)

Typically there are specific statutory protections and/or policies and procedures that regulate access to business secrets and other confidential information. Usually this kind of information is not disclosed without the submitting party's consent – for example, disclosure to other competition agencies pursuant to a waiver from the parties. In some regimes competition agency procedures provide for public and non-public versions of certain documents. In prosecutorial systems, where this information can be disclosed before the court in filings or as evidence, there generally are procedures in place that permit a submitting party to take appropriate steps to seek to prevent or limit public disclosure of such information. These measures may include putting the submitting party on notice that public disclosure of such information is contemplated, submitting filings that contain sensitive information under seal, and affording the submitting party an opportunity to seek an appropriate protective order or in camera order from the reviewing tribunal.

In some jurisdictions, additional safeguards are provided for protection of third parties' identities, where a third party is willing to comment only on an anonymous basis or where the nature of the comment itself could serve to identify the party who has requested the anonymity. However, investigation procedures should be implemented to assure that the identity of third parties that fear retaliation from the merging parties can be protected in practice.

## Chapter 2

# Planning a Merger Investigation

### Introduction

An effective merger investigation is a well-planned investigation. The comprehensive legal and economic analysis needed to evaluate some mergers, the voluminous amount of data and numerous information sources often necessary to review, and the many sources of market information or perspectives on the merger can make merger investigation a complex endeavor. Add the tight deadlines under which merger investigations must be completed in most jurisdictions, and investigative planning becomes a paramount consideration.

The first step in an effective merger investigation is to develop a plan for conducting the investigation. The investigation plan then becomes a framework that can be used throughout an investigation to focus each subsequent step. Although each merger investigation will be different from any other, the investigation team should engage in basic planning to determine the scope and focus of its investigative effort, to allocate resources effectively, and to obtain useful evidence.

This chapter addresses planning merger investigations from their inception until their conclusion. The primary focus, however, naturally concerns those transactions that warrant in-depth review or appear to raise competitive concerns, often termed “second-phase” merger investigations, since these are the instances in which proper planning is crucial. After discussing the possible contents of investigation plans that can be used to guide any merger review, the chapter explores three concepts of effective investigative planning – focusing the investigation, managing evidence and other administrative tasks, and handling timing constraints.

### **I. Planning the Investigation**

#### *Planning in the Initial Stages of an Investigation*

In many instances, depending on filing requirements or a brief search of public information, it will be apparent at the outset that a merger raises no competitive concerns. These transactions should be cleared as quickly and efficiently as possible, freeing up resources in the agency, and allowing the firms to proceed with “business as usual.”

On some occasions, the initial information raises questions as to whether an in-depth investigation is appropriate. When the merger cannot be cleared immediately, but the available information is insufficient to determine whether to proceed to phase two, the investigation team should develop an initial plan. This initial plan should be focused solely on whether further investigation is warranted, and should be confined to a short period of time (often the set deadlines for phase one).

Where the main issue is whether to begin an in-depth review, an initial plan need not be written or elaborate, and it can be as simple as a single threshold issue; for example, defining the geographic reach of the parties' sales to determine whether they overlap. The initial plan should focus on a few discrete tasks or, where appropriate, limited information requests that are able to be accomplished without using many resources. Requesting information from the parties, either via a written submission or meeting, and contacting a few customers or a government agency with knowledge of the industry can be effective in obtaining timely information on threshold issues during the initial phase of an investigation.

In the initial phase of a merger review, consideration of the timing constraints is critical, and a balance must be struck in determining which task to pursue and how much information to request. Specifically, if large amounts of data are requested, compliance by the firms will take a long time, and the agency will have difficulty processing the data in the short period remaining. Requesting too little information, however, may leave the agency with too few facts upon which to make a sound decision. The greater the agency's expectation that an extended investigation will be necessary, the more appropriate is a detailed initial request, and the more important is detailed planning.

### ***Planning In-Depth Investigations – The Investigation Plan***

When the threshold that requires a deeper look is crossed, the investigation team should engage in purposeful planning. For its initial plan of action, the investigation team should focus on identifying the likely areas of concern raised by the transaction and determining factual issues for further investigation. Initial planning can include brainstorming on critical issues and all possible theories of harm, identification of possible sources of information to evaluate the theories, consideration of the required time to complete goals, consideration of resources needed, and development of a written plan.

At the outset of a merger investigation that appears to raise competitive concerns, the investigation team may find it useful to develop an investigation plan, in writing or at least in conceptual terms. The investigation plan is a living product to be revised throughout the investigation. An investigation plan sets priorities for the investigation and focuses the investigation on particular theories of harm. It guides the investigation team's strategy and fact-finding decisions. The investigation plan can be an ideal way to keep the investigation team focused and decision makers informed about the progress of an investigation.

The items included in the investigation plan may vary according to the stage of the investigation, and can range from the most important investigation strategies, such as the theories of harm, to some of the more mundane, such as daily tasks to evaluate evidence. When an investigation enters the decision-making phase, the investigation plan may also serve as a resource for final recommendations to decision makers.

Although the specifics of investigation planning will vary among jurisdictions and even specific transactions, generally an investigation plan describes what is to be done, how and when it will be done, and who will do each task. Any merger investigation plan should ideally cover items within three primary areas:

- 1) theories – developing and tracking various theories of harm;
- 2) evidence – identifying sources of evidence and pertinent facts to help evaluate the investigative theories; and
- 3) tasks – specifying administrative tasks and assignments, including careful scrutiny of available time.

### 1) **Candidate Theories of Harm**

The theories portion of an investigation plan should include the basic facts of the transaction, present candidate theories of competitive effects, and identify unresolved questions. This part of the investigation plan is a critical opportunity to test the consistency and reasonableness of candidate theories, and to educate and focus the investigative team on the central questions of the investigation.

The investigative plan should include a stated *reason for the investigation* – a concise description of the transaction being investigated, and a brief explanation why the investigation is necessary. This brief statement of purpose highlights why the transaction is worthy of scrutiny.

The investigative plan should include the *main issues to be investigated* by identifying the *working theory of harm* for the investigation and any *unresolved questions* critical to the investigation. The investigation team may also consider identifying *possible remedies* to be sought, should the agency raise objections to the transaction.

### 2) **Sources of Evidence**

In this element of the investigation plan, the investigation team should focus on how to develop the information necessary to test the theories and to evaluate the significance of possible effects. The evidence portion of the investigation plan should identify the *types of information needed* to resolve key questions, the *likely sources of information*, and the *method to gather the needed information*. The investigation plan should bring to light any gaps in the evidence or what information is needed to address critical questions and what information the investigation has developed to date that tends to prove or disprove the theory(ies).

The types of information needed are as varied as the types of products involved in merger investigations and are dependent upon the specific transaction. The candidate theory(ies) of harm under consideration will also affect the types of information needed. Sources of information during a merger investigation can include the parties, customers, competitors, suppliers, distributors, industry and economic experts, trade associations, industry analysts, and other government agencies with knowledge of the industry. The method to gather particular information will be jurisdiction specific, dependent upon available investigative tools (such as an interview, information request, deposition, or statement). When developing

evidence, the investigation team should keep in mind its ultimate use, possibly in support of a recommendation to block or challenge the merger before agency decision makers or a court. The investigation team should seek to develop and present evidence in an understandable and reliable form to the ultimate decision makers.

### 3) **Timing and Administrative Tasks**

During an investigation, it is critical not to overlook administrative needs that can accompany a fast-paced, fact-intensive merger investigation. The administrative portion of the investigation plan can go beyond the purpose and focus of an investigation to identify clear ways in which the investigation is to be accomplished.

#### ***Timing***

In many jurisdictions there may be numerous timing constraints. Thus, after an initial submission, the agency may have a relatively short period in which it must decide whether to expand the investigation (often known as phase one or initial period). Phase two may also be determined by set statutory deadlines, or deadlines dependent upon party compliance with information requests. The investigative plan should include an overall *timing plan* for completion of the investigation. The agenda should incorporate important upcoming dates. The key dates embodied in any timing agreement with the parties also should be included (if applicable), and expected days or times of especially heavy workloads could be identified.

The most important administrative aspect to include in the investigation plan is a schedule of tasks, or *agenda*, for the investigation. The agenda should help to identify specific tasks, assign responsibilities, and set deadlines. Such tasks include the evidence-gathering methods mentioned above, and other, more administrative items. Also, a consolidated investigation agenda can track overall progress and inform all members of the investigation team.

As early as possible, the investigation team should identify projects that inherently take more time to complete, such as obtaining data from a range of third parties. If such tasks are not properly anticipated and planned, there may not be enough time later in the investigation.

Include timing for lawyers to establish the legal framework, for economists and experts to analyze data, and for the translation of documents. The agenda may take the form of a calendar or a to-do list, or use aspects of both.

#### ***Other Tasks***

The investigative plan should identify specific *analytical economic projects* contemplated or underway and identify data or information needed to complete such projects and an estimated timetable for them. Both economists and lawyers can help in maintaining the focus of the investigation and integrating new ideas into the investigation strategy.

If the agency employs experts in evaluating mergers or for litigation, the plan should include the investigation team's thinking on the need for *experts* in the matter, by identifying the type of expert(s) envisioned, along with desirable qualities or background, and consideration of the timing of when to hire the expert.

If the agency chooses to *coordinate with another jurisdiction* that is reviewing the same transaction, the investigation team may identify deadlines facing the other jurisdiction, plans



for future discussions with the other jurisdiction, and any outstanding issues with respect to coordination.

The investigative plan should include the consideration of *staffing needs* to complete the investigation within the appropriate time frame. The investigation plan should include a realistic projection of the number of investigators needed. The agency should pay particular attention to staffing needs early in an investigation, as many investigative tasks are difficult to complete during later stages where the focus is on reaching a final conclusion on the transaction. Where feasible, a section on *technological tools* also might be considered.

There is no single model for an investigation plan. Its structure should be based on the specific facts and issues involved in the investigation. An investigative plan might include the following:

- the reason for opening the investigation;
- the working theory(ies) of potential competitive harm;
- unresolved questions critical to the investigation;
- possible remedies that resolve the theory of harm;
- the types of information necessary to evaluate theories of harm and resolve key questions;
- the sources of information to be explored;
- the information that supports the theory(ies) of potential harm;
- the information that refutes the theory(ies) of potential harm;
- an agenda, or schedule, that prioritizes and assigns tasks such as interviews to be conducted or information requests to be made;
- key deadlines for the investigation;
- analytical economic projects;
- expert projects;
- coordination with another jurisdiction;
- staffing needs.
- 

A key premise of the investigation plan is that from the outset, the investigation team's theory of possible harm should be well-defined. As the investigation proceeds, however, it is critical to adapt and update the plan, for instance, by noting accomplished tasks, marking certain theories as irrelevant, or highlighting new working theories and unresolved questions. Investigative planning is a fluid, continuous process driven by the course of the investigation. At its best, the investigation plan serves as a guide for the investigation, not a burden.

## **II. Focusing the Investigation**

An integral part of investigation planning is the development and refinement of theories of harm, and the tailoring of evidence gathering and evaluation. Developing and revising the description of possible competitive effects gives vision and purpose to an investigation, providing a framework in which to view all that is learned.

Each merger investigation presents unique challenges. Given timing constraints, focus is crucial in any merger investigation – both in terms of theories and evidence. In order to focus an investigation, the investigation team should develop and prioritize candidate

theories early in the investigation, discuss the theories with the parties and others, and evaluate theories based upon evidence, abandoning unlikely theories and reevaluating more viable theories of the case.

### ***Develop and Prioritize Candidate Theories***

As part of the investigative plan, the investigation team should identify as early as possible the issues that will be relevant to the investigation. It is often useful for the investigation team to brainstorm to identify potential issues at the outset, and periodically share ideas to further develop new theories or refine initial ones according to the evidence. Knowing the key issues in an investigation will inform decisions to develop potential theories and evidence and what types of information to request from the parties or from third parties. When the investigation team has a thorough understanding of the concerns posed by the transaction and the information necessary to evaluate them, all aspects of the investigation will be faster and more productive.

Beyond identifying candidate theories at the outset of an investigation, the investigation team should prioritize the theories. The investigation team should weigh the importance of different lines of inquiry and focus its efforts on those with the greatest likelihood to reveal competitive effects. This is particularly crucial if time constraints are such that a decision whether to continue the investigation must be made based upon a single limited data request.

### ***Discuss Theories***

At an early point in the investigation, and at other appropriate points throughout an investigation, the investigation team should attempt to discuss their current substantive evaluation of the transaction with the parties and identify unresolved issues. The parties' arguments and responses to the investigation team's theories can help focus the investigation team's thinking and uncover gaps in evidence to pursue. While the parties likely will present arguments favorable to their transaction, they can expose the investigation team's arguments to critical analysis and reveal weaknesses in any potential objections to a transaction. A more transparent discussion between the agency and the parties can lead to a quicker and more effective process of arriving at the ultimate enforcement decision.

The opportunity to check investigative theories of harm with the experience and view of third parties is a critical exercise to help focus and refine any explanation of potential competitive effects. At appropriate points in an investigation, the investigation team should consider discussing (or soliciting views on) their substantive evaluation of the transaction with third parties. Their responses also can help refine theories of harm, particularly the views of customers to be affected by the transaction and those of other government agencies with information about the industry. The views of competitors are also of interest; however, the incentives of competitors may be ambiguous – they may not want to help competitors but may realize that increased market power ultimately may help them. Therefore, the investigation team should be aware of possible bias. Third parties can be good resources for understanding an industry or for obtaining history of industry behavior (i.e., previous acquisitions, price increases, entry).

### ***Test with Evidence, Reevaluate and Revise***

The investigation team should revise the theories of harm to reflect the evidence as it is obtained. It is not enough to develop good candidate theories at the start of an investigation. It is equally important to test them against the evidence, and to change them if needed. The focus of the investigation should change according to the facts that are learned. This exercise should include the valuation of which facts are weak or strong and how they affect the candidate theories. Time and resources are always limited. Thus, unproductive theories should be abandoned so that the staff can focus on promising theories.

An effective way to adapt a plan to the ongoing investigation is for the investigation team to hold periodic planning meetings to discuss what has been learned and reevaluate what needs to be done. The investigation team should consider such discussions at important points during the investigation, such as after meetings with the parties, after completing an evaluation of information submissions, or after a series of customer interviews. Periodic evaluation and revision allows the investigation team to quickly identify critical legal, factual, and economic issues regarding the proposed transaction; to facilitate more efficient and more focused investigation; and to provide for an effective process for the evaluation of evidence, in an effort to deploy the agency's investigative resources more efficiently.

### ***Focus the Facts***

Accompanying theory refinement is the identification and pursuit of critical market information. The investigation plan should include the types of information needed to test theories of competitive effects and likely sources of such information, but it is also critical to spend time focusing and narrowing the search for relevant information, particularly in the initial stage of the investigation.

Investigative plans and strategies should be appropriate to the specific proposed transaction, in lieu of exclusive reliance on standardized procedures or models. While refining the investigative theories, the investigation team should refine its tools for soliciting the information to test such theories. The investigation team should prioritize information, seeking the most critical, most determinative information first. For example, the investigation team should develop outlines that focus on the most critical issues before interviewing witnesses and focus information requests on the specific issues most important to the transaction. As appropriate, the investigation team should review information requests, with specific input from supervisors, to ensure that requests are appropriate to the investigation. The thought and time invested in creating and tailoring information requests or fact-finding of any kind, will help to reduce the investigative burden upon all concerned.

Key factors in tailoring an investigation will include the complexity of the transaction under review; the nature and magnitude of the competitive concerns at issue; the agency's expertise in the markets and issues under investigation; and the volume, types, and availability of information required to make an appropriate decision.

### ***Quick-Look Approach***

One conceptual approach to focusing some in-depth investigations is to identify a specific

dispositive issue that has a clear path toward resolution. Known as a “quick-look” approach, this may be appropriate for matters in which the investigation team’s inquiry is focused on a limited number of issues or markets. Dispositive issues are investigation specific, but generally are open issues, such as ease of entry or possible product substitution, the resolution of which would determine the outcome of the review by convincing the agency that no further investigation is required.

In a quick-look investigation, the investigation team identifies a potentially dispositive issue, focuses its discussion and information requests on such issue, and makes a determination on the issue within a specific period of time. If the quick look does not resolve the investigation team’s concerns, then the agency follows its broader investigative framework. The possibility that the quick-look approach may end the investigation more quickly creates an incentive for the parties to consider and cooperate with this option. At an early point, the agency should clearly articulate the dispositive issue and make clear that the results of the quick-look may not be decisive enough to close the investigation.

Even if such an approach is not used by an agency, the basic concept of focusing on dispositive issues, within the broader investigative framework, can be useful in investigations with a limited number of primary issues in question. Parties may be willing to produce specific information and documents more quickly to address such issues in a priority order requested by the investigation team. The investigation team then can receive and review the most critical documents first, which may permit an expedited resolution of the competitive concerns. Focusing on the critical issues and discussions with the parties will enable the investigation team to identify such information.

### **III. Manage the Investigation and Evidence**

The administrative aspects of a merger investigation can be just as vital to its success as theory development and evidence gathering. Indeed, a focused effort at managing the daily tasks of an investigation can better integrate the theories, facts, evidence, and people into a seamless effort towards the appropriate resolution within the timing constraints.

Sound merger investigation is a fact-intensive undertaking. The investigation team can obtain detailed information about the structure and operation of the markets being investigated from many sources – from the parties to a transaction, as well as from their customers and competitors, and from many public sources of information. In order to evaluate the amount of information available during an investigation, the investigation team should plan the *organization of the information*, and *maintain effective communication* throughout the investigation.

#### ***Organize the Information***

As the information learned in an investigation grows, the investigation team should pay attention to organization in order to track relevant information and integrate it into an effective explanation of the competitive effects. One way to do so is to develop a document in which the information can be organized. Such a document may be organized by product and by issue (*e.g.*, product market, geographic market, competitive harm, etc.)

and is a convenient form in which to record relevant facts from the filing, other submissions by the parties, public information, third-party information, and interviews. Legal research also may be included. An outline of the evidence not only is a useful tool to summarize the factual information relating to the transaction, but it also can reveal the points on which evidence is lacking. It also may form the starting point for any recommendation to decision makers.

With the increasing use of e-mail and electronic information, agencies may benefit from an awareness of ways to handle and benefit from widely used technology. In requesting and reviewing electronic information from parties and third parties, the investigation team should consider compatibility issues to ensure the information is usable in a timely fashion and does not create unnecessary burdens.

Where feasible, incorporating technology into investigation planning and work habits can yield efficiency. Management software can help develop and implement investigation support plans that assist an investigation team to effectively and efficiently manage an investigation. Determining factors for the use of technology include the resources available, the investigation timetable, and the volume of electronic information and tasks. The investigation team may consider the use of technology in such tasks as document acquisition, database creation, electronic data acquisition and production, database utilization, investigation support, and specialized project management, such as economic modelling.

### ***Communications***

An important aspect of managing the investigation is to maintain communications with the various participants in the investigation process – the parties, third parties, interested government agencies, and decision makers. Any discussions of theories, facts, or investigation procedure with the parties or third parties should be done so within the framework of the agency's confidentiality practices. While Section II addressed the importance of discussing theories with parties and third parties, it is important to keep in mind the broader point that such a dialogue can cover all aspects on an investigation.

The investigation team should build a *dialogue with the parties* into the investigation process. The dialogue with parties should provide a regular opportunity to discuss progress made on both sides, as appropriate, and can include both telephone contacts and meetings. In discussions with the parties, the investigation team may wish to cover any outstanding issue in the investigation, from timing to significant facts or investigative theories. The investigation team also should inform the parties about major investigative events to which the parties appropriately can provide a response, in particular, the decision to recommend that the agency challenge or block the transaction.

The investigation team should also build a *dialogue with third parties* into its investigation. Third parties can provide crucial factual market information as well as perspectives on the impact of the merger. Where appropriate, the investigation team should seek out third-party viewpoints and maintain contact with third parties who may have meaningful insight into the effects of the merger (for instance, in prosecutorial systems, those third parties that may act as potential witnesses in any hearing or litigation to challenge the merger).

The investigation team should keep agency *decision makers* informed as to the progress of the investigation, and coordinate major actions with their input. As an indicator of the direction of the investigation, the investigation plan may be an appropriate document to use as a possible way to update decision makers on the progress of the investigation.

#### **IV. Timing – Keeping An Eye On the Clock**

The investigation team should put particular emphasis during the initial phase of an investigation on attempting to clear transactions that are not candidates for further investigation, and to narrow and refine issues for transactions likely to progress to a second phase inquiry. For investigations that are likely to progress to more in-depth review, the investigation team should use the initial phase to frame issues for inquiry and quickly identify issues (such as specific products in a multi-product investigation) that are not of concern and thus do not require further scrutiny.

In an in-depth investigation, the investigation team may confront timing issues in three contexts: statutory periods, their own internal timetable and goals, and negotiated timing agreements with parties (where applicable). The first is a known external constraint, the second an internal planning technique, and the third a potential mutually agreed framework to balance investigative needs with the pressure to consummate a transaction.

##### ***Statutory Periods***

The first and foremost timing concern for any merger investigation is that imposed by statute. The laws of some jurisdictions establish definitive time periods for a review, whereas others make time periods dependent upon certain actions, such as party compliance with information requests. One commonality of all statutory periods is that they are likely to limit what is possible in a merger investigation, making effective and efficient planning essential.

Investigative planning should account for all necessary tasks within the prescribed statutory period, as extending the deadlines may not be an option. In some jurisdictions, deadlines can be extended by agreement with the merging parties. The plan should be made as if such extensions were not possible, however.

##### ***Internal Timetables***

Effective planning includes setting internal deadlines for specific investigative tasks to ensure all aspects of the investigation are accomplished within the prescribed statutory period. The investigation agenda should cover all tasks to be accomplished, prioritizing for the most critical items. Internal timetables should provide for sufficient time for decision-maker evaluation and internal processes such as creating, reviewing, and issuing information requests or other contingencies. The internal timetable also should account for the possibility of a remedy, as appropriate. If the parties have introduced the possibility of a remedy, the investigation team should consider discussing a time line and setting deadlines for any remedy agreement. Once the merging parties propose a possible settlement, the investigation team should provide for sufficient time to evaluate and approve the remedy before the deadline for a final agency decision.

Internal timetables, divided into specific tasks and stages of the investigation, help to fill

in the steps between the statutory begin and end dates, setting out a realistic progression of investigation that builds upon small tasks to accomplish the whole. Best endeavors should be made to include data analysis delays, other technological impediments, and witness availability.

### ***Timing Agreements***

Whether the timing for a review is set or subject to some flexibility, discussions with the parties on timing are helpful. Even in jurisdictions with set deadlines, such discussions may be useful to alert parties to the specific timing constraints of the investigation and to help identify ways in which the parties can address issues in a way that leads to a timely resolution. Where procedural provisions allow for timing flexibility, early in the investigation, the investigation team should engage the parties in discussions about the timing of the investigation. Merging parties generally have an interest in an expeditious review of their transaction and typically prefer that the investigation not be delayed. They usually recognize, however, that investigations involving particularly complex transactions or industries may require a lengthier review.

In jurisdictions where appropriate, the investigation team may consider entering into more comprehensive written timing agreements with the merging parties at the beginning of an in-depth investigation. Such negotiated investigative frameworks can commit the agency to procedural and timing agreements in exchange for specific commitments from the parties. These commitments might encompass all aspects of the investigation, from the timing of the transaction to the timing of document submissions, witness interviews, and meetings.

As with any discussions with the parties, the investigation team should memorialize in writing important conversations with counsel, confirming the substance of the conversations. This practice limits misunderstandings and provides useful documentation should the need arise later to reconstruct the history of communications with the parties.

# Chapter 3

## Developing Reliable Evidence in Merger Cases

### Introduction

Agencies evaluate many types of evidence from a variety of sources in merger reviews, including: (1) pre-existing documentary evidence, such as corporate strategy documents, planning documents, and sales reports; (2) materials, such as surveys, reports, and compilations of information, that are created in anticipation of the merger or as part of the merger investigation and analysis; (3) descriptive evidence from market participants (*i.e.*, customers, suppliers, competitors, and employees of the merging parties); (4) written responses to inquiries and compulsory requests for information; and (5) expert and quantitative evidence, including industry and economic expert analysis and testimony.

Evidence can be obtained from a variety of sources with varying degrees of reliability at the different stages of the merger review process. Standing alone, however, none of the categories of evidence are conclusive. All the evidence must be considered together, but each type presents different reliability issues.

Documentary evidence varies in type and reliability. Pre-existing documents containing data are the most compelling. The information contained in ordinary-course-of-business documents provides the observations of the firm or the author at a time when there was reason to give accurate assessments. Documentary submissions containing data to be used for reports, analyses and surveys must be tested for reliability, must be compared to other evidence in the industry and must have been collected properly. Documents created contemporaneously with the merger review that contain self-serving statements or unverified data should be given little weight unless they can be fully corroborated.

Descriptive evidence from customers, suppliers, competitors, and the merging parties can provide early indications of concerns and identify relevant sources of additional detailed information. Descriptive evidence can provide powerful corroboration of expert and documentary evidence. Further, descriptive evidence can add a qualitative perspective to the merger review process.

Experts may be key interpreters and communicators of the meaning of the evidence. It is often useful to include both industry experts and economic experts at an early phase of the merger review process. Where expert analysis is properly founded on relevant factual and behavioral information, expert evidence is generally given substantial weight and may even be determinative of the issues. However, expert analysis presented by the parties to the transaction must be viewed with appropriate scepticism unless it is corroborated by the agency's experts.

Agency staff, counsel and experts must ensure that the evidence, whether documentary,



descriptive or expert in nature, is tested for reliability throughout the process to ensure that the explanations provided to the decision maker are consistent with the evidence and not subject to other interpretations that are equally or more persuasive. Careful consideration of the value and possible reliability problems of each category of evidence will enable the agency to be more confident of its decision.

### ***General***

The review of mergers generally requires making a prediction about future competitive effects. This is because most merger reviews are conducted prior to the merger, and thus the issue is the likely competitive effect if the merger goes forward. This need to look into the future is an important reason that merger review can be challenging. Some merger reviews, of course, are conducted after the merger has occurred, and these are challenging in their own way. In particular, in looking at what has happened in the market after the merger, one question is always what would have happened without the merger. Merger reviews, thus, may present difficult issues. For this reason, it is important to obtain reliable evidence to use in merger reviews.

This chapter discusses the main types of evidence used in merger reviews. It examines principles for the value and reliability of each type. Then it provides a series of suggestions for testing and evaluating the reliability of each type of evidence; these suggestions are drawn from the experience of many competition agencies.

### ***Procedural context – evidence available***

As discussed in the chapter on Investigative Tools employed by member agencies in the area of merger review, competition agencies have a range of different tools to gather evidence from the merging parties. The laws in many jurisdictions require companies to provide premerger filing notification and give the agency authority to issue requests for documents, data, and answers to questions. In some jurisdictions, the agency also can compel sworn testimony from executives of the merging firms. In many jurisdictions, parties cannot close their merger until they have substantially complied with the requests for information.

Some ICN members also have powers to gather information from third parties. In such jurisdictions, agencies may compel production of documents, data, or sworn testimony from third parties, such as competitors, customers, and others in the industry, in connection with a merger.

An agency may also have a practice of obtaining information on a voluntary basis. Such voluntary requests may seek interviews, documents, data, or written responses to questions.

### ***Reliable evidence important at every stage***

Developing reliable evidence is an exercise that spans all stages of merger review, although the amount of evidence that an agency requires to evaluate a merger depends on the apparent competitive risk of the matter. Some mergers clearly will have little or no impact on competition and the agency will be able to reach its conclusions with a small amount of information (e.g., with relevant and probative evidence that there is no

competitive overlap). In contrast, an agency will require substantially more evidence to assess a merger that appears to have a more significant impact on competition.

The level of evidence required to convince a decision-maker to block a proposed merger is substantial. In administrative systems, where the agency is both investigator and decision-maker, the investigative staff would need substantial evidence to convince the head of the agency, the deciding body, or other decision-maker to block a merger. In judicial systems, the agency would need substantial evidence to prove to an independent judge that a merger is anticompetitive and therefore should not be permitted. In some countries, the agency must defend its decision to clear or approve a merger (as well as to oppose one). Satisfying an agency's burden is challenging in merger cases because of the difficulty of establishing what amounts to a prediction about the future.

In any system, and at each stage, the evidence that is used should be subjected to careful scrutiny to determine its reliability. Evaluating reliability is the topic of this chapter. Five categories of evidence are discussed.

### **I. Pre-Existing Documentary Evidence**

“Pre-existing documentary evidence” (pre-existing documents) means ordinary-course-of-business documents, that is, documents prepared and used in the normal, day-to-day and year-to-year operations of the business. It includes such documents as sales reports, production reports, strategic plans, and budgets. Pre-existing documents that were prepared before the merger was under consideration are especially useful. Pre-existing documents are valued by agencies for the opportunity to see how the parties acted and how they viewed competition and markets before they had the merger in mind. In some jurisdictions, at an early stage of the merger review, the agency relies on pre-existing documents from the parties, together with customer and supplier interviews, to check the parties' assertions. Agencies usually value pre-existing documents for two key things that they contain: facts and analysis.

*Documents that mainly contain facts* can provide basic factual information on ordinary-course-of-business operations. Examples include customer lists, competitor information, sales and marketing reports, geographic sales information, contractual terms and conditions of supply or sale, shipping/transport information, summaries of sales transaction information, plant and warehouse location information, and facility capacity utilization information. These ordinary-course-of-business documents show the parties' actual behavior and their responses to competitive forces in the industry. For example, shipping cost information can help define a geographic market. Sales reports can reveal competitors to which sales have been lost. These documents are also useful in that they provide corroborating (or conflicting) information to descriptive evidence (discussed below) and, as indicated above, enable the agency to make initial assessments about the facts concerning the proposed merger.

*Documents that mainly contain analysis* can provide pre-merger description and analysis of market conditions. Examples include strategy documents, pricing documents, business plans, marketing plans, sales and marketing reports, short- and long-term projections, and other competitive assessments. Such documents can reveal how the merging parties assessed the competitive situation. Because they were created before the merger was

contemplated, such ordinary-course-of-business documents tend to be viewed as reliable sources of evidence upon which analysis can be conducted and appropriate conclusions drawn. These documents can provide valuable and reliable information regarding competitive behavior in the market generally. Analytical documents may contain important information regarding market structure and competition within the market, including information relating to potential competitive threats and responses, competitive products, alternative product uses, logistical information relevant to geographic market definition, and maturity of the market. For example, strategic plans may reveal which firms are regarded as significant competitors. Some documents, such as periodic reports, may contain elements both of factual reporting and competitive analysis.

Both factual documents and analytical documents provide information to test assertions made by the parties during the investigation. This is particularly true if the documents were written prior to merger discussions. Further, documents of this nature are useful to shape and support conclusions regarding the competitive effects of a merger and to determine whether to recommend continuation of the merger review. Statements against interest or 'smoking gun' documents tend to be most persuasive in corroborating the anticompetitive nature of a proposed merger, but must be used with caution because they could be overstatement or exaggeration.

Parties may produce pre-existing documents (1) because the merger notification law requires them, (2) voluntarily, or (3) in response to mandatory orders for production of documents. Compelled document production is a powerful tool for gathering evidence. Compelled production helps ensure that the agency gets a complete picture, particularly if the parties are required to produce all requested documents and to certify the thoroughness of the search, and/or if they face substantial penalties for withholding relevant documents. Voluntary production of pre-existing documents carries the risk that the parties provide only carefully selected and vetted documents, rather than a comprehensive production. Even when production is voluntary, an agency may ask that the party confirm in writing that all requested documents, or all responsive documents from one or more file locations, were produced.

## **II. Documents Created in Connection with the Merger**

This category includes documents created during merger negotiations or the merger review. It includes documents created during the process of deciding upon the merger: reports, analyses, drafts, and strategy documents. It also includes documents created as part of the merger review process: white papers, reports, surveys, and compilations of information. The relevance and probative value of such documents vary widely. All documents of this type are subject to the same caution: they are prepared at a time when the parties may already have an interest in advancing their arguments through their documents. Often, merging parties retain experienced competition law counsel early in the merger negotiations; they may vet merger documents to ensure that they are consistent with the parties' arguments. For this reason, agencies may give little weight to documents that are created at the time of the merger negotiation or review and that are self-serving and promote the parties' arguments without significant corroborating evidence.

Merger negotiation documents, (*i.e.*, reports, recommendations, surveys, strategy documents, and analyses developed during the merger negotiation process) can be particularly useful if they give an accurate representation of the parties' analysis of the

merger at that time. Such documents often discuss the benefits, costs, and risks of the merger, at a time when the parties are in the process of deciding whether to do it or not. Documents used in making the decision may be especially useful.

Ordinary-course-of-business documents created during the time of the merger negotiation, and especially during the merger review, may have been influenced by the arguments that the parties expect to make to the agency. Thus it is important to be cautious in relying on them, especially if they have a different view of a market, or a different analytical approach, from pre-existing documents. Thus, if the agency plans to rely on ordinary-course documents prepared during the merger review (*e.g.*, a strategic plan), it is important to compare the documents to similar pre-existing documents to see if there are differences. If so, consider carefully and cautiously the logic and factual basis of the most recent documents. Strategy documents, in particular, are more reliable to the extent that they are based on credible underlying surveys, reports or other bases. It may be good practice in such situations to rely on the underlying source as evidence, rather than the conclusory statement in the strategy document.

Documents prepared for the merger review are, naturally, intended to present the parties' arguments. These documents are valuable because they are likely directly to address the issues that the agency must address in its review. Of course, the agency must check the logic and factual basis of the arguments presented. Typically, during a review, both the agency and the parties will rely on surveys, reports, analyses, and economic studies to support their cases. The development of surveys, expert reports, and analyses must be based on reliable information about the facts, the market participants' prior behavior – often obtained from the pre-existing documents discussed above.

### **III. Descriptive Evidence from Market Participants**

This category includes information obtained from market participants, *i.e.*, customers, suppliers, and competitors, as well as the merging parties. This information may be obtained in several ways. The agency may conduct interviews over the telephone or in person. In some cases, the agency may require a market participant with relevant information to testify under oath. In other cases, a market participant may give a written statement to the agency, voluntarily or pursuant to a legal obligation.

Many types of information may be obtained in these ways. For example, the information may include (1) simple factual reporting (*e.g.*, number of units purchased by a customer in the most recent year; cost of inputs to a competitor), (2) descriptive factual reporting about past behavior (*e.g.*, whether competitors always follow a leading firm's price increases), (3) analysis (*e.g.*, why a customer chooses to purchase one product and not another; reasons for past price increases); (4) predictions of one's own behavior (*e.g.*, what a customer would do if price increased 5-10%); (5) impressions of how the market is likely to react (*e.g.*, merging party predicting that there would be entry if it increased its price; customer predicting how other customers would react to a price change); (6) opinions and conclusions (*e.g.*, customer conclusions that the merger would harm it, benefit it, or be neutral; competitor support or opposition to a merger). As is clear from this list, there can be wide variation in the reliability of such information. In general, simple factual reporting can be checked and is likely to be reliable. For information that is more evaluative or conclusory, it is important to consider the possible motive of the source. It is also important to seek – and evaluate -- the underlying logical and factual

basis for any prediction, opinion, or conclusion. It is particularly valuable to obtain evidence of past behavior of market participants that helps to predict how they would likely respond to future changes in competition. Such evidence also helps to test their current predictions, opinions, or conclusions.

In the early stages of a merger review investigation, descriptive evidence is useful to identify and frame legal, factual, and economic issues to pursue during the investigation. It also can be important for decisions to pursue or terminate a merger review. For example, customer interviews frequently are the quickest and most reliable way to learn of potential competitive problems. But, if none of the acquired firm's major customers express any concern about a merger, it could be that the merger poses no significant competitive risk, or that those customers pass on any price increase to their customers, or that the customers are dependent on maintaining a favorable relationship with the merging parties and thus do not want to make statements adverse to the merging parties. Whether or not a customer predicts that prices may go up as a result of a merger, it is important to determine the facts that a customer knows, as well as what the customer believes its options would be and what action the customer would take if, following the acquisition, the merged firm increased price unilaterally or increased price in combination with other firms in the market. In some cases, the agency may develop initial views of a proposed merger at a relatively early stage in reliance on evidence obtained during customer, supplier, and competitor interviews.

Descriptive evidence is also useful to identify the views, strategies, and behavior of market participants or to identify what a particular market participant has done or would do in response to a change in competitive market conditions, such as a price increase. Descriptive evidence indicating perceptions of alternative sources of product supply and barriers to entry into the market can be helpful in assessing, from a qualitative perspective, the significance of any potential lessening of competition. For example, to evaluate alternative sources of a product and possible entry barriers, the agency could obtain descriptive evidence about reputation and loyalty considerations reflecting likelihood of switching to other sources of supply. Descriptive evidence of actual or attempted entry into a market also would be relevant and probative to the assessment of the merger.

Descriptive evidence, however, may not necessarily constitute a representative sampling of the evidence of market participants. For example, when there are a large number of customers with different needs, it is often difficult or impossible to identify a representative customer or set of customers. In such circumstances the agency should exercise caution in relying on the evidence of any particular customer as indicative of widely held experiences, views, and practices in the market. Where, however, the evidence relates to the market participant's own experiences and perceptions, it can provide useful corroboration of quantitative, documentary, and expert evidence.

### ***Evidence from different types of market participants***

When developing descriptive evidence, it is important to consider the ways in which the different types of witnesses/respondents are likely to be reliable. Three categories are discussed.

#### ***Customers***

Customers benefit from competition. Thus, in general, customers' interests are very close to the interest in the competitive process that the agency is trying to protect. For this reason, customers can be a very useful source of information.

An acquired firm's customers usually have the most to lose from an anticompetitive merger because they may lose their preferred supplier and may lose their preferred product after the merger. Often they are the strongest complainants, are most likely to oppose the merger, and are most likely to cooperate with the agency. Frequently, they are able to provide important testimony about how they benefited by playing the acquiring and acquired firms off against one another and whether they expect to be harmed by the loss of rivalry between two important suppliers.

The acquiring firm's customers may be less likely than the acquired firm's customers to be concerned or complain about a merger because they are not losing their preferred supplier or product. They may be satisfied by the acquiring company's representations concerning prices and service levels. On the other hand, if they have benefited from the rivalry between their supplier and the acquired firm, their experience may provide insight regarding possible harm from a loss of competition. In any event, they should be able to provide significant evidence about the marketplace.

In many markets, there are too many customers to get statements from all customers. Often there are good reasons, however, to believe that the largest customers are the customers least likely to be harmed by an acquisition because they are the most sophisticated and may have some monopsony power. Under these circumstances, testimony that even the largest customers expect to be hurt by the merger may be very informative about the threat facing all customers.

Where the customers of the merging parties are not the final consumers, it may be useful to examine the general mark-up practices of these intermediate sellers. Where standardized mark-ups are used, the customers (who are retailers or other middlemen) may be primarily concerned about horizontal equitable treatment by manufacturers and may have less concern about the wholesale price level itself, as long as all retailers/middlemen face the same prices. In such situations, lack of "customer" complaints (by, for example, supermarkets or distributors) may not be a good indicator of whether a merger threatens anticompetitive harm. Indeed, distributors may even welcome a price increase if their mark-up is a percent of the price.

## **1) Competitors**

Competitors may provide important information about the market and how competition works in the market. Competitors usually are uniquely situated to provide important evidence on most significant issues in a merger case, such as the identity of competitive alternatives, entry conditions, market shares, former market participants, and contacts at large customers. Complaints from competitors must be analyzed critically, however, because the competitor is likely focused on the effect of the merger on its interests rather than its effect on customers and competition. Indeed, competitors' incentives generally are to favor an anticompetitive merger and oppose a pro-competitive merger. Complaining competitors may be motivated by a concern that the merged company will be a more formidable competitor, rather than a concern that the merger will harm competition. On the other hand, a complaint by a competitor, standing alone, is not a

reliable indicator that a merger is procompetitive.

## 2) **Merging Parties**

Parties obviously want to consummate their merger, so they are advocates for the position that the merger poses little or no competitive risk. Their statements, therefore, must be considered in this light. (In the unusual case of a hostile takeover, the unwilling takeover target's statements must be evaluated for bias against the merger, of course.) To the extent they are providing industry facts, executives for the parties and their counsel often provide reliable, straightforward, objective information—e.g., descriptions of product lines and major customers. On critical issues and at an advanced stage of the investigation, staff usually need to question party executives on the record and under oath to determine if their positions are reliable and to develop evidence in areas where the parties may not be voluntarily forthcoming. Pre-existing party documents, particularly those written by key executives, can be useful mechanisms to test the assertions of the parties' executives during the merger review. Assertions by parties offering alternative interpretations of documents or otherwise attempting to explain away the documents should be evaluated for credibility.

### *Descriptive evidence – written or oral form?*

In the process of merger review, the agency is constantly confronted with the question of whether to obtain descriptive evidence in written or oral form. The answer is informed by the stage of the review process, the agency's available investigative tools and resources, and the apparent competitive risk of the merger. At early stages of review, and often for the initial contact with third parties, some jurisdictions rely on oral descriptive evidence through phone interviews memorialized in notes. Other jurisdictions make only written requests of the merging parties and other third parties.

Oral interviews with market participants can provide input from a large number of market participants in a short amount of time, with relatively little burden. Oral interviews can be useful as an initial contact with third parties to help identify issues for further investigation. Additionally, written questionnaires are less interactive than oral interviews and do not allow for immediate clarifications of questions or answers. (Written questionnaires, by contrast, may require subsequent follow-up, either orally or in writing, to obtain comprehensive responses.) Oral interviews may be the best way to ask open-ended questions and ensure that the market participant has an opportunity to fully present views in areas that may not have been fully anticipated by the agency.

An advantage of evidence produced in written form is that the information received is automatically documented and ready for the file without having to prepare minutes and to verify with the source. Depending on the assertions of the responding company, a written reply may be taken as the official position of the company to whom it is addressed. Written replies to requests for information allow the addressee time to consider the questions posed, to consult with other knowledgeable persons in the firm and thus often provide a comprehensive response to the questions asked. A disadvantage of evidence produced in written form may be that it may have been so carefully screened by lawyers that it provides less useful information than an oral interview.

#### **IV. Written Responses to Inquiries and Compulsory Requests for Information**

In some jurisdictions, after the initial stage of the merger review process, the agency may prepare requests for written responses from market participants. These written requests for information are mainly addressed to (1) the merging parties to complement and expand information provided in a filing or to (2) third parties (competitors, customers, suppliers, public authorities, etc.). The purpose of requests to third parties is (a) to obtain a better understanding of the markets involved in the merger, (b) to gather evidence, or (c) to check the information provided by the merging parties. Such requests often accompany requests for documents discussed in sections 1 and 2, or can be used in place of, or to complement, interviews described in section 3.

To obtain useful evidence through written requests, it is important, first, to identify what market participants are in the best position to provide the needed information and, second, to ask for information that the respondents can answer reliably. Identifying the appropriate third-party respondents will ensure meaningful and efficient responses. For instance, if verification of the capacity utilization rate in the market is needed, requests have to be addressed to a substantial proportion of producers. If, for example, an agency is seeking data in a bidding market with very few, large customers (*e.g.*, information on number of bids, who bid, who won, who lost, the prices offered by each bidder and so on), it may be useful to address requests to these customers rather than to each competitor.

Special care should be applied to the exact wording of the requests. Written responses can suffer from the same limitations as documents created contemporaneously with the merger investigation, discussed in section 2, notably that they may be self-serving and used to promote the respondents' objectives. Questions should be as precise as possible to avoid loopholes, ambiguities, or misunderstandings that could significantly reduce the evidentiary value of the information obtained. It may be useful to invite the recipient to ask the agency for clarification if uncertain about any question. Although opinions of market players can be helpful in gaining an understanding of the relevant market mechanisms, hard data constitute better evidence than mere opinions, and this fact must be reflected in the way the requests are written. Requests for written responses should therefore focus more on verifiable facts and figures and less on eliciting opinions and conclusions.

Sufficient response time should be granted to addressees to obtain a high rate of comprehensive answers. Replies that have to be prepared hurriedly may be superficial or may lack sufficient detail, and thus may be less reliable.

Responses to the requests must be checked carefully to determine the need for follow-up. In cases where written replies to requests are fragmented, inconsistent or lack explanations, a follow-up by phone or meetings, and perhaps ultimately in written form, may be necessary. In particular, when answers state pure opinions (*e.g.*, market entry is "difficult"), it is important to follow up and request explanatory data and examples to better explain these statements. It is also important to verify whether the replies represent a sufficient proportion of the market (in terms of demand/production, etc.), and cover a representative sample of market participants (in terms of size, geographic location, etc.)



## **V. Expert and Quantitative Evidence**

Expert evidence is very useful in a merger review. Experts most commonly are either industry experts (such as a consultant or accountant with experience in the relevant industry, an academic who has done considerable research, or a former company executive) or economic experts.

The function of experts is to interpret the behavior of the merging parties and other market participants as well as other facts obtained in an investigation and to draw logical inferences from this information. Experts often develop and analyze quantitative data in performing this function. Experts should maintain this function during the entire process of the merger review.

It is important that expert analyses and opinions developed from the evidence be based on reliable underlying factual and behavioral information. If an expert's evidence is based on erroneous information, that evidence will not be reliable and will not be useful to a decision maker.

When involved early, experts can help identify the key questions and ways to find reliable answers to them. Moreover, the involvement of economic experts at an early stage of the merger review can be important for the proper design of data questionnaires and information requests. An agency seeking survey information or other data from market participants for subsequent agency analysis must devote care and attention to questionnaire design, data collection, and quality control procedures. If the methodology for collecting and compiling the data is unsound, the conclusions based upon that evidence should be afforded little or no weight.

In engaging the services of an industry expert, an agency is best served by an expert who has relevant experience in the same industry, and, if possible, in the same market. An expert with relevant market experience is likely to be better situated to draw on experience applicable or relevant to the market and market conditions under consideration in the merger review. Industry experts can provide persuasive evidence about appropriate market share calculations (*i.e.*, what measure to use, whether value of sales, unit sales, production capacity, or natural resource reserves), the significance of competitors, barriers to entry, change and innovation in the market, and the applicability of any rules relating to the regulation of the market. Further, industry expert evidence will assist in defining, and corroborating evidence relating to, relevant product and geographic markets. However, an industry expert's acceptance of an industry practice as routine does not mean that the practice may not evidence market power or non-competitive behaviour. This assessment should be guided by an economic expert.

Economic analysis, often including use of quantitative (statistical) information, is typically important in merger reviews. Experts typically provide economic analysis critical to the definition of relevant product and geographic markets through the application of economic principles, theories, and statistical estimates to help evaluate the substitutability of products in defining relevant markets and in projecting the likelihood of anticompetitive effects. Direct statistical evidence relating to price sensitivity and product substitutability, where available, particularly studies of prior significant competitive events, is valuable. Indirect, descriptive evidence may be persuasive if corroborated.

Both industry expert and economic expert evidence and analysis also is helpful to the evaluation of any claimed efficiencies. Industry experts can evaluate the plausibility of efficiency claims and whether a merger is needed to achieve them. Economic theories and measures relating to consumer welfare or total welfare may be used to identify, test, or quantify potential efficiencies.

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Below are some tips and techniques for developing reliable evidence.

### **Obtaining *Reliable* Documentary Evidence—A Few Suggestions**

- 1) **Plan in order to efficiently find the important, reliable evidence.** In countries with broad power to gather documents from the merging and third parties, major merger investigations may involve review of hundreds of boxes of documents. It is inescapable that review of such large quantities of material is time-consuming, tedious, and difficult. The challenge is to find and recognize the most important documents. Prioritizing review can make best use of limited staff resources. For example, to understand issues of the extent of competition and product substitutability, documents from the marketing and sales departments are often most useful and should be reviewed immediately. To understand the firm's view of the market, documents such as strategic or business plans are often most useful. Document review criteria should be determined in consultation with an economic expert.
- 2) **Consider using an appropriate system (e.g., database software) to track documents.** If a substantial number of documents is to be reviewed, a systematic way of identifying and retrieving the most important documents must be developed. It is not always clear early in a merger review what topics will become most significant. But early, tentative evaluation of issues and theories can make the document review more likely to identify documents that will become relevant later. Some system, simple or complex, for identifying relevant documents must be used. A number of different database software products are available on the market today. Information about each potentially significant document—including objective information such as date, author, recipients, and document type (e.g., memorandum, invoice, e-mail, handwritten notes) and subjective information about the document's significance may be input into a database. The databases are often invaluable in allowing the agencies to identify and analyze the key documentary evidence related to the critical issues in the investigation.
- 3) **Pay close attention to pre-existing documents.** The parties' business documents that were created before the merger was considered are likely to be a reliable source of how competition works in an industry. Documents that are inconsistent with the parties' position in the merger review may be particularly important.
- 4) **Exercise caution when relying on historical information to ensure that the information is representative.** Information that is not representative for some reason, e.g., because conditions have changed significantly, is not reliable, and opinions and analysis conducted based on that information will not be of much value in the merger review.

- 5) **Documents that the parties create in anticipation of the merger and agency investigation must be carefully scrutinized.** Because the parties want to persuade the agency that their merger poses no competitive risk, anything that they write during or in contemplation of the merger review—e.g., white papers, answers to written questions, filings—should be reviewed with appropriate caution. The agency should try to corroborate the parties’ important assertions with independent evidence before relying on them.
- 6) **Inquire about the scope of voluntary productions of documents.** Voluntary productions may include only carefully selected and vetted documents. It is important, therefore, to specify (in advance) the documents that the parties are asked to produce and/or to ask the parties to describe the scope and nature of the search for documents (and possibly to certify that description in writing).
- 7) **Pay appropriate attention to electronic documents, including e-mails.** It is possible that electronic records may never appear in paper form, and therefore could not be discovered by production of paper records alone. Prepare document requests or demands with this fact in mind. In some corporate cultures, e-mails may be useful because they reveal important and candid information that is never found in more formal memoranda.
- 8) **Do not assume you can understand any document standing alone.** A “hot” document may not be so hot when put into context. Often an agency cannot assess the significance of a document without reviewing other related or similar documents to put the document in context. It may also be necessary to question the author or recipients of a document to understand its significance fully.

**Developing *Reliable* Oral and Written Evidence from Witnesses/Respondents—A Few Suggestions**

- 1) **Consider the competence of any person serving as a witness/respondent.** Ask if this witness/respondent is qualified to address this topic, i.e., has sufficient knowledge and responsibility. Be sure to learn the witness/respondent’s level of direct involvement in and responsibility for the relevant product. Was the witness/respondent a hands-on participant with detailed, day-to-day involvement with the product or was she just a supervisor of those with direct responsibility for the product? Did she have practical decision-making authority for the product or did she just rubber-stamp others’ decisions? No witness/respondent is likely to be qualified to address all of your issues. Focus on the issues that each witness/respondent is best situated to discuss.
- 2) **Remember that actions speak louder than words.** If the witness/respondent says she would switch from Product A to Product B in response to a 5% price increase, find out if she ever took any actions consistent with that view. Get the details. Similarly, if the witness/respondent is a potential competitor discussing entry, get details about any efforts he made to assess possible entry. For example, did his firm actually do a study of entry? If so, how extensive was the study? Did the firm actually try to enter? If so, seek detailed information about the attempt to enter. If the firm has not tried to enter or studied the question, find out the witness’s/respondent’s

basis for his view about possible entry.

- 3) **Do not accept conclusory statements alone.** It is impossible to know how much weight to give unsupported conclusions. Always push the witness/respondent to give detailed support for her views. Or prepare requests to obtain the relevant supporting information. For example, before asking a witness/respondent if she would switch from Product A to Product B in response to a 5% price increase, determine how and why Product A is used instead of alternative products. What advantages does the customer realize in using Product A? If it is an intermediate product, what is its cost share in the products in which it is used and how would the quality or quantity of the end product be affected if Product A were not used? How would the price and demand for the end product be affected if a change in the price of Product A were passed through? After asking such questions to obtain a basic understanding of relevant facts, then test demand elasticity by asking how customer would respond to a 5% price decrease.
- 4) **Open-ended questions usually are best: who, what, why, when, where, how.** Non-leading (open-ended) questions are most likely to obtain the witness's/respondent's positions in his or her own words, as well as to develop important information about the basis for the witness's/respondent's views.
- 5) **Consider requiring a witness's/respondent's relevant documents and data.** In the interview/request, ask about business records or data that would be the basis for the witness/respondent's evidence (and thus could support or undermine it). If the witness/respondent is important, you should consider compelling production of documents relevant to the testimony, including documents that the witness/respondent herself prepared or received. A witness's/respondent's credibility may be undermined by previous writings that are inconsistent with her present testimony. Conversely, a witness's/respondent's credibility may be enhanced by previous writings that are consistent with the present testimony.
- 6) **Determine if the witness/respondent speaks for the company.** Different persons or groups within any large business may hold different views. It may be risky to assume that, because one employee said something in an interview, you have a reliable statement of that company's position.
- 7) **Consider bias.** Does the witness/respondent have an "agenda" that may be affecting his response? Of course, the parties to the merger have an obvious bias—to convince the government that the merger poses no competitive risk. Other witnesses/respondents may have other biases that may affect their credibility.
- 8) **When in doubt about oral evidence, get a sworn or signed statement or sworn testimony.** A witness's/respondent's superficial and confident position during an interview may become tentative and qualified when delivered in a more formal way.
- 9) **Make sure that the witness/respondent is aware of the potential sanctions for supplying incorrect information.** Where possible, consider applying measures that would trigger/increase these sanctions (e.g., statements under oath, questions probing further) in case of doubts about the reliability of the information provided.

## **Reliable and Unreliable Quantitative Analyses – A Few Suggestions**

- 1) **Use quantitative analysis when appropriate.** As computing power and the quantity and quality of available data has grown, quantitative analysis has become increasingly important in merger investigations.
  - For example, in cases involving differentiated consumer products, economists may attempt to estimate potential effects of the merger on consumer prices by analyzing scanner data to estimate retail demand elasticities.
  - But useful quantitative evidence does not always involve complex statistical or economic analysis. It may involve something as simple as sorting customer databases by customer size, location of customer, or types of products sold, by customers, to reveal important customer characteristics.
  - Quantitative analysis is most useful when its conclusions are corroborated by documentary and oral evidence. Do a “reality check” on quantitative analysis.
- 2) **Use an economist.** It is impossible for a layperson to do an adequate analysis of data or to assess the reliability of the parties’ analysis in a merger investigation. On any matter in which quantitative analyses may be at issue—most significant matters these days—use an economist with appropriate expertise and experience.
- 3) **Do not blindly accept the parties’ or third parties’ representations.** Do not accept without verification the parties’ or third parties’ representations about any analysis they have done. If the parties want you to accept and rely on their analysis, require them to produce their data, programs, and results in full. Your economist should be able to understand and replicate the parties’ analysis before you rely on it.
- 4) **Maintain a healthy skepticism about the reliability of numerical analysis.** If statistical or econometric evidence is plainly inconsistent with basic economic theory, the great weight of other evidence, or common sense, that may mean there are serious problems in the data or the techniques applied to it or, especially, the assumptions involved.
- 5) **Carefully scrutinize the assumptions underlying any study and the reliability of the data.** No set of data is perfect, and no economic analysis is better than the assumptions from which it proceeds and the data on which it is based. Be careful if you do not know how the parties generated the data for their analysis. Make sure you are aware of any limitations in the data. For example, price data may be based on only a few transactions or may not reflect rebates or discounts and thus may not reflect the true prices that customers pay.
- 6) **Remember that it is difficult to beat something with nothing.** If the parties are performing an econometric analysis, it is critical that you have your own economic staff look at the available data. Even if your economic staff does not produce a study, it should participate in determining whether the parties’ study is reliable. In litigation

and often in judicial review, if the parties produce a study, the agency must produce its own study or be positioned to explain very persuasively any disagreements with the parties' study.

7) **Be wary of unsound data analysis.** Shortcomings may include:

- Failing to gather or use available and pertinent market data;
- Undocumented or unjustified data transformations and arbitrary elimination of extreme observations;
- Ignoring or failing to account for alternative hypotheses and explanations for market conditions;
- Applying antitrust guidelines in an overly mechanical manner;
- Applying an accepted methodology in an unacceptable manner or in a way that has not been subjected to scholarly comment and peer review;
- Applying methodologies that are simply improper or unsound;
- Failing to adequately define important factors, such as the relevant market; and
- Making assumptions or conclusions that are inconsistent with the other evidence or with the demonstrable economic reality of a market.

### **Reliable Expert Economists – A Few Suggestions**

- 1) **External economic experts may be important or even crucial in merger cases.** Given the value of economic evidence in merger cases, it is important to have capable and persuasive economic experts.
- 2) **Be critical about what you consider to be reliable economic expert testimony.** Review aggressively all aspects of economic testimony to identify potential flaws. Do not hesitate to exclude from evidence an economist's testimony found to be of insufficient reliability.
- 3) **Use care in selecting your expert.** Hire experts with the training and experience to handle the specific economic tasks you need them to do. For complex data analysis and modeling, you should look for an econometrician. If industry expertise is important to your case—for example, in a highly regulated industry such as telecommunications—hire an economist with experience in your industry. Consider using two specialized experts, each of whom could deliver a strong economic report or testimony on a portion of the case, rather than using one generalist who could address all issues, but none in sufficient depth.

**Make sure that your expert has substantial direct involvement in any economic analysis on which he relies for his opinions.** Your expert must personally do or supervise the analysis required to support the opinion about which she is to testify. Any

expert that simply adopts the work of others risks having his evidence excluded altogether. A serious time commitment from the expert may be required as a result.

## Chapter 4

# The Role of Economists and Economic Evidence in Merger Analysis

### Introduction

The practice of Antitrust is in essence both a legal and an economic exercise. This truism is widely recognized, and, indeed, in most countries, legal and economic experts combine to analyze antitrust issues. Nowhere is this as true as in the case of mergers – in most countries with merger policies, economists and lawyers work in tandem to evaluate the potential pro- or anti-competitive effects of a proposed merger, and to conclude whether particular mergers should be prevented.

This paper abstracts from the legal perspectives of merger analysis, and concentrates on the role of economists. An economist's involvement throughout a merger investigation is useful in ensuring that the correct theories are considered, that the appropriate data are collected, that the data are analyzed properly, and that economically sound decisions are reached. The paper is divided into two parts. The first part presents a short survey of administrative practices in various countries, based on survey results. The second part discusses economic analyses that are potentially available, and when, how and why such analyses are used.

### I. Results of Survey on Current Use of Economists

In preparation for the ICN Workshop that took place in Washington in November 2002, questionnaires were distributed to competition agencies in numerous countries pertaining to various aspects of antitrust enforcement. Thirty-one responses were returned that shed light on how economists are integrated into the merger review process. This Section presents a short summary of the responses that pertain to these questions (parts of questions 4, 5 and 23, and questions 11 and 12). For a more detailed analysis of the survey results, see the ICN Report "Compendium of Investigative Tools".

#### *Intensity of Economist Involvement*

The use of economists in merger analysis in different countries spans the range of possibilities, from the almost complete absence of economist input to economists being team members (and sometimes even the sole members) in every merger examined. In many countries the inclusion of an economist in the merger review process is mandatory. In those countries in which it is discretionary inclusion tends to occur in the more complex cases. In a small number of countries, economists undertake the initial review of the merger, and in a minority of those mergers (those that cause the least competitive concerns) they determine policy without involving legal staff members<sup>1</sup>. Such instances,

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<sup>1</sup> In this respect, it may be useful to distinguish between countries with a litigation system and countries with an administrative approval system. In an administrative approval system, in each case a legal document



however, are relatively rare, and for the most part economists and lawyers combine their respective expertise in an effort to reach the correct decision.

Hence, it is not surprising that the reported percentage of economists involved in merger cases out of the number of staff members *dedicated to* merger analysis ranges from 0 to 85%. Dividing the countries into low (0%-19%), medium (20%-49%) and high (50%+) intensity of use of economists in merger analysis, 8 of the 30 countries that supplied this statistic, were in the low category, 13 in the middle and 9 in the high category. Note that this refers only to the percentage of economists and not to their absolute number. Thus, for instance, both the U.S. and the E.U. are located in the low intensity category, but both have a large number of economists actively involved in merger analysis.

### *Intensity of Use of Economic Analysis*

The actual analyses carried out in the different countries also vary greatly. While some countries claim to make no use of economic analysis of any kind, in most countries simple market studies are conducted in order to determine market shares and concentration levels (generally using a measure such as the HHI). This requires, of course, a definition of the “market” (product and geographic), which is mostly determined through qualitative information such as conversations with market participants (customers as well as competitors).

Some countries use more advanced economic and econometric analyses for market definition, and competitive effects analyses. The analyses reported in the survey include, but are not limited to:

- Elasticity estimation;
- Price correlations;
- Case studies (natural experiments);
- Critical loss analysis; and
- Cross-sectional analysis.

These, and other analyses, will be discussed in more detail in the next Section of this paper.

With respect to the use of outside experts, 24 of the 31 countries use outside experts in some instances. However, it was not clear from most of the responses whether these experts were economists, industry experts, lawyers or others. Only a few countries claimed to use experts (albeit with low frequency) even in “no problem cases.” In cases raising significant competitive concerns, however, the practice of using outside experts is much more common.

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has to be drafted (where, e.g., the jurisdiction of the competition authority has to be established, and issues of control relationships are resolved), and lawyers are more likely to be involved by default, also in the simpler cases (from a competition viewpoint).

## **II. The Economist's Quantitative Toolbox**

The objective of this Section of the paper is to present a non-exhaustive list of the types of quantitative analyses carried out in merger cases in some agencies. These analyses can assist in, for example, delineating the markets potentially at risk from the transaction and determining the potential for and magnitude of anticompetitive effects, e.g., in assessing the likelihood of an increase in price or a decrease in quality following a merger. The list is, per force, long, but it must be noted that most of the listed analyses are used in only a small minority of cases. In many cases, qualitative information is the most readily available information, and is deemed sufficient to resolve the concerns being addressed. Quantitative evidence should be viewed as complementary to the qualitative evidence, and they are used in tandem to assess the competitive impact of the merger. For example, one may check on the consistency of the quantitative results with reliable qualitative evidence. Different decision-makers may put different weights on different types of evidence. For information on the types of qualitative information that can be of use in merger analysis, see the ICN paper "Report on Developing Reliable Evidence in Merger Cases".

Typically, the authority will begin the analysis of a merger with a qualitative analysis, based on such things as conversations with competitors and customers, publicly available industry analyses, and an initial study of the firms' internal documents. If the Authority concludes that further analysis is required and that it wants to undertake some type of quantitative analysis, it will commonly request information from the involved firms and/or from other non-public sources (e.g., competitors or customers). At this same time, additional collection and review of qualitative evidence is likely to occur. In preparing such data requests, it is useful to keep the following points in mind:

- Identify at the earliest stage possible the major competitive concerns arising from the merger (usually based on the qualitative analysis), and determine which analyses to carry out and what data are required for the analyses. One of the recurring complaints from firms is that the data requests never seem to end. This is often viewed as harassment, and additional consideration of the issues at hand before the initial data request is sent will often dispel the need for additional requests. That is not to suggest that additional data requests may not become necessary; often investigations take unexpected turns, and additional or different data are required. The economist should always keep an open mind to alternative theories, and let the data convince him.
- Find out what types of data are available. It would not be beneficial to request data that do not exist, or that do not exist in the form (or level of aggregation) requested. Preliminary meetings or telephone conversations with those responsible for data collection or analysis in the firms can be quite useful.
- Ask for the minimum amount of data required to carry out the desired analyses. The gathering and processing of the data is time consuming and costly, both to the firm and to the Authority's staff. It is best to keep the demands to a minimum, but be sure to ask for all needed data. Again, planning ahead is crucial. Note that in some cases asking for more data

can be less costly to the parties than asking for less. This is the case when it is easier for the firms to provide an entire data set than to go through it to select the requested pieces.

- When presented with economic analysis by outside experts (white papers), it is quite useful to receive the data and programs used by the experts, and to carefully evaluate the reports and econometric results *before* meeting with the outside experts. In this way, the discussions with these experts are better informed and more productive. In addition, it allows the Authority to request any additional data that are needed to establish or refute the conclusions reached by the experts even before engaging in dialogue with those experts.

Quantitative analyses run the gamut from relatively simple data analysis – e.g., trends in sales or market shares – to highly sophisticated econometrics. More complicated techniques can at times provide significant additional insight into the potential competitive impact of a merger than can simple techniques. However, the downside to such techniques is that they are frequently highly resource intensive and can be more difficult to understand and explain (particularly for non-economists). In addition, they often rely on a large number of implicit assumptions, which need to be checked against reality. Note that the most complicated empirical techniques to obtain valuable insights are not always needed. Simple analyses can provide a wealth of information on the functioning of the industry and on the roles of the merging parties in that industry. As a general matter, starting with simple analyses and then determining whether more complex analyses are appropriate and worthwhile is a good way to balance these considerations. However, upfront consideration of what complex analyses might be appropriate is important to ensure that the appropriate data are requested in order to provide sufficient time to conduct the analyses and incorporate the results into the decision-making process if during the course of the investigation it is determined that such analyses would be worthwhile. If possible, conducting multiple empirical analyses to address the key issues is useful to determine whether the conclusions from the analyses are robust to different tests. Let us emphasize that even the most rigorous quantitative analyses present only part of the story, and the results must be viewed in light of the qualitative findings.

Each type of analysis presented below contains a discussion of the various stages of the merger review in which it might be appropriate. For a guide to, and explanation of, the various stages of a merger analysis, see the ICN papers by the Merger Notification and Procedures subgroup. The discussions below also describe the function of the analyses, the minimum data necessary to conduct the analyses, some possible pitfalls in applying the analyses, and the data that can assist in avoiding these pitfalls. The order of presentation is not perfectly correlated with any specific measure of usefulness; rather, it reflects a combination of functionality, incidence, generality, and simplicity.

### ***Measuring Market Shares***

The purpose in measuring market shares is usually for the indication they give with respect to the ability of the post-merger firm, *as a result of the merger*, to profitably take steps (either unilaterally or collusively) that harm consumers (such as to raise prices). Generally, the estimation of market shares is the starting point of the competitive effects analysis and does not by itself show whether a particular merger is likely to be

anticompetitive (although, *ceteris paribus*, the higher the combined shares, the more likely that the merger would have an anticompetitive effect). Such estimation requires a definition of the product and geographic markets, and when these are not immediately clear, analyses such as those described below can be used to help delineate the appropriate market. Once the market definition has been settled upon, the data needed to calculate market shares are generally readily accessible, since they relate to aggregate value figures. There are, however, alternative values that can be used to calculate these shares, each appropriate in different instances. Thus, for instance, when dealing with homogeneous goods, the use of units sold tends to be sufficient. However, for differentiated goods, sales are often preferred to physical quantities. If the ability to serve the market is the basis for future competition, capacity measures are important, and if customers are small or move freely between producers, and there are no capacity constraints, each firm can be given an equal share. In this latter case, it is the number of firms that determines concentration. Imports into the country should be included in the analysis, and, *ceteris paribus*, the smaller the country, the more important it is to pay attention to the import market.

Some countries are content with information on the number of competitors in the market and the market shares, and if there are “enough” competitors, and the market shares of the merging firms are “sufficiently” small, the merger will not be challenged. This analysis is often carried out by calculating the HHI (Herfindahl-Hirschman Index, the sum of the squares of the market shares), and using this measure as the main competition indicator. This measure has the benefit of giving a super-proportionate weight to larger firms, which is appropriate because larger firms, indeed, tend to have a more than proportionate effect on the market.<sup>2</sup>

### ***Demand Estimation / Estimation of Elasticities***

Estimation of a demand function is data and resource intensive, but yields a more complete picture with respect to the likely effects of a merger than do partial analyses, such as price correlations (discussed below). The results of such estimation are useful for almost all stages of merger analysis, from defining the product or geographic market, to evaluating the likelihood of post-merger price increases.

When the product market definition is not obvious, it becomes necessary to identify which goods, if any, are sufficiently close substitutes for the goods under consideration to warrant their inclusion in the relevant market. If goods are substitutes, the increase in the price of one good will lead to an increase in the quantity purchased of the other good, all else held constant. Thus, cross-price elasticities should be positive. While estimation of the cross-elasticity of the demand for good A with respect to the price of good B would seem to require data on these variables alone, such an estimation procedure suffers from shortcomings. Finding a positive correlation between the two variables does not guarantee that the products are, indeed, in the same market, for the following reasons.

First, there are alternative reasons why these values might “follow” each other, which can make a correlation spurious: for instance, an increase in disposable income would lead to increasing prices and quantities for all “normal” goods. To correct for this, and to generate reliable cross-elasticities, a demand system can be evaluated, controlling for cost and

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<sup>2</sup> The U.S. has specific thresholds for HHIs, whereby if the post-merger HHI is over 1800 and the increase in the HHI is over 50, or the HHI is between 1000 and 1800 and the change is over 100, then the merger may be problematic. HHI levels below these thresholds are unlikely to raise antitrust concerns.

demand shifters. In addition to the data on prices and quantities for all relevant products, this procedure requires measures of these cost shifters (e.g., factor prices) and demand shifters (e.g., income figures). In collecting these data, one should consider the timing at which prices are set, i.e., if prices are set monthly, then the shifters need to be available monthly. Proper estimation of such a demand system requires the use of simultaneous equations systems. This also allows for conducting meaningful statistical significance tests.

Second, simply finding positive cross elasticities is not enough to conclude that two products are in the same relevant market. In fact, cross elasticities are not really the issue at all – it is the own-price elasticity that is of the greatest consequence (as discussed below). If cross elasticities are to be used, they must be large enough to make a price increase non-profitable (economic significance test). A test that formally captures this idea is the hypothetical monopolist test, also known as the SSNIP test. In considering and testing whether good A defines a product market, assume that good A is produced by a monopolist. The question then is, what type of constraint does the presence of other goods place on the producer of good A? If this hypothetical monopolist can profitably institute a significant and non-transitory increase in price (SSNIP) despite the existence of these other goods, then A defines a market. If not, the next best substitute is added to the market definition (requiring an understanding of what substitutes the lost sales go to) and the process is repeated. Thus, a finding that the own-price elasticity of the narrowly defined market (good A) that is less than one (in absolute value) is a sure indication that no additional goods need to be included in the market definition. An own-price elasticity greater than one (in absolute value) will require a consideration of costs, which can be carried out via a critical loss analysis, as presented in the next Section.

One particular benefit from demand estimation is realized when analyzing the increased ability of the merged firm to unilaterally raise prices when goods are differentiated. In such a case, the key issue is how close a competitive constraint the merging parties placed on each other prior to the merger. If the goods produced by the merging firms are close substitutes (in the extreme case, the two goods may be closer substitutes for each other than other goods in the market), the merger removes the competition between those two goods and may result in higher prices. This will depend on how “close” is the competition between the merging parties (e.g., what is the cross elasticity of demand) and how important is the competition with other goods in the market (including how readily can firms reposition their products through changes to existing products or new product introductions). Again, own elasticities and cross-elasticities between the goods of all the competing firms can be measured by estimating the demand function. Own elasticities are important in order to know the effect of a price increase pre-merger, and cross elasticities give an indication of whether the merging firms’ products are close.

### ***Actual Loss vs. Critical Loss***

This test can both be used to help define the extent of the product or geographical market, and to evaluate whether the merged firm will be able to raise prices unilaterally.

When used for market definition, the test can be used in the context of the hypothetical monopolist test. To carry out this test, the critical loss and the actual loss from a hypothetical price increase of some magnitude are compared. Critical loss is the level of lost sales at which the hypothetical monopolist is indifferent about raising price. If the

actual (expected) loss resulting from a price increase is expected to be greater than the critical loss, then the hypothesized price increase will be unprofitable and the market definition (good A) is too narrow.<sup>3</sup> In order to calculate critical loss, data regarding the contribution margin— i.e., incremental revenues and incremental costs over the relevant output range – are required. Actual loss estimation requires an estimate of own-price elasticity (which may require estimation of a demand system). If a demand function is to be estimated, the difficulties discussed above are relevant.

When considering the ability of the merged firm to raise prices unilaterally (rather than market definition), a number of adjustments to this analysis must be made. Since unilateral effects are considered, it is not a hypothetical monopolist we are concerned with, but rather a (dominant) firm with a fringe (possibly competitive). While the calculation of critical loss is much as it was above (requiring the measurement of contribution margins), the calculation of actual loss is more involved. The increase in price by the dominant firm will generally result in the fringe firms increasing production, so the residual quantity demanded from the dominant firm falls with an increase in price both because of the decreased quantity demanded (a shift along the demand curve) and because of the increase in the quantity supplied by the fringe firms. Thus, in order to get an estimate of whether such actions would be profitable, an estimate of the reaction curves of the remaining fringe firms to a price increase is needed in addition to the estimate of demand elasticity (this is of less interest with differentiated products). At least in the short-run, this will depend, among other things, on the amount of excess capacity available to the fringe firms (see point 6 below). To estimate the expected expansion by the fringe firms, data on prices, production, and excess capacity of the competitive firms are required. However, production depends on more than just prices, and there may again be variables that affect both prices and production levels. To solve this problem demand and supply shifters are needed, as above.

### *Price Correlation/Variation Analysis*

When the data necessary for demand estimation are not available, one can still potentially test whether different products (or different geographic areas) are in the same market by testing whether their price paths “follow” each other. This is suggestive because, if these products are in the same market, shifting of purchases between the two types of products as relative prices change will tend to cause prices to move together. Testing this hypothesis necessitates data on prices over time for all of the relevant products (geographic areas) that are viewed as potentially being in the same market. Note, in particular, that transaction prices are more informative than list prices. However, it must be reemphasized that finding a positive correlation does not conclusively guarantee that the products are, indeed, in the same market, since, as above, there are alternative reasons why prices may be spuriously correlated: for example, a common inflationary trend, common exchange rate volatility, and common demand and cost shocks. In the former cases, inflation and exchange rate adjustments may be required for the price series. To correct for the latter factors, demand estimation again becomes necessary.

For market definition purposes, a comparison of price levels may suggest the level of substitutability of heterogeneous goods, although this is by no means certain. If two

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<sup>3</sup> Note that it may be important to test the sensitivity of different hypothesized price increases because it is possible for a larger price increase to be profitable where a smaller price increase would not be.

similar goods are priced vastly differently, the price difference may reflect real or perceived quality differences, and many consumers (both those who buy at the low end and those who buy at the high end) may not consider them good substitutes. This is particularly true if there are no middle-priced goods. Of course, the real question is whether, holding quality constant, an increase in the difference in pricing between products would induce customers to substitute to the different quality good so as to make the price increase unprofitable. If a change in relative prices attributable to a SSNIP in one product causes sufficient substitution to render the price increase unprofitable, then, even though there is a gap in the price levels, the different quality products are in the same market. Thus, simply comparing prices has inherent limitations that the analyst needs to keep in mind.

Price correlations can be used to investigate the potential for unilateral price increases by the merged firm in the case of differentiated products. As in market definition, price correlations may help identify whether the products are close substitutes, since the prices of close substitutes tend to move together. If the prices of the products of the merging firms are more highly correlated than are the prices of either firm's product and other substitutes, there is more likely to be an anticompetitive effect from the merger. Analyzing this issue requires data on prices for each product, and all the caveats regarding controlling for demand and supply shifters discussed above are relevant here. Note, however, that it is the relative size, and not the absolute size, of the correlations that are of concern, so these omitted-variables concerns may be less pronounced unless there is reason to believe that they systematically affect the sizes of the correlations. However, it is at times difficult to assess what is a meaningful difference in correlations.

Price variations can also be used to negate (but not to establish) the presence of coordination among competitors. For successful coordination, the prices of the coordinating firms should move together, particularly if goods are homogeneous. If there is a cartel agreement, prices will tend to either change in tandem, or there will be one clear leader, with other firms following the lead. With tacit collusion, on the other hand, an increase in price by one firm will serve as a signal to the others to also raise prices, but the identity of the first mover may not be fixed. An analysis of price changes by firms can yield information about the relationships between the firms' price changes, and can tell us who led, who followed, and who did not change prices (and is thus not part of the collusive agreement). If many firms do not react as predicted to price increases, collusion is likely not be a factor. In particular, a study of pricing may uncover one or more firms that act as "mavericks" in the industry, being particularly aggressive in pricing or other factors (like quality), and making successful collusion more difficult. Note that prices moving together are not necessarily indicative of successful coordination, since prices can be expected to move together in a competitive market also. However, observing price movements that bear no relationship to each other suggests that there is no coordination. Thus, this is a negative test and not an affirmative test. This analysis necessitates frequent observations on prices for each firm.

### *Natural Experiments*

A careful study of the history of the industry can often yield useful information about various aspects of the merger and its expected effects. Before presenting a few illustrative examples, we note that some "natural" experiments may be of dubious value. Thus, for example, the decisions to enter and exit an industry are endogenous, and any analysis of

such an occurrence must be careful to take this into account.

Consider, for example, product market definition. If the facts show that there was an increase in the tariff charged on imports of good B, one result of this increase is that there would almost certainly be an increase in the market price of good B, and domestic B firms would increase production. Another result, if A and B are in the same market, is that there may be an increase in the price of good A (depending on the elasticity of supply of A), and A firms would increase production. Alternatively, if the issue is whether the imported good is in the same market as good B, it can be instructive to see the effect a tax on B has on import flows. Other exogenous changes could be analyzed similarly.

Similar observations could be made regarding geographic market delineation. Say we see entry into one area, and, as a result, similar price falls occur in both that area and in an adjacent market. We may conclude from such evidence that the two areas are as one from the consumer's perspective.

If data on concentration (or the number of competitors) and prices in different geographic regions or over time are available, they can be utilized to study the effects of concentration on prices. Thus, if the agency finds significant effects of concentration on price, it can estimate how the expected change in concentration from the merger will affect prices in the industry. This requires data on concentration and prices in different areas or times. However, the same pitfalls exist as in estimation of market demand, since there are factors that can affect concentration and prices simultaneously, and these should be neutralized. This same type of analysis can be used to assess whether the particular competition between the two merging parties matters if the presence of the two parties differs over time or over geographic areas.

Changes that occurred in prices and quantities after a previous merger in the industry could be quite illuminating with respect to the expected effect of a merger. In addition, entry or exit from the industry changes market concentration, and a study could be made of how such a discrete change in concentration affected prices and quantities. Finally, changes in the legal regime, tariff rates, quotas, and so forth can provide a natural experiment regarding market reactions to disturbances. In all cases, it is important to control for other factors that may affect the market (which is easier said than done).

Instances of entry can be scrutinized to evaluate the market conditions that led to such entry. They allow one to understand not only the ease of entry into (and exit from) the industry, but also to identify the market conditions that led to entry. For instance, one could test whether, in response to price increases, imports increased or local firms entered the market. If they did, they place a constraint upon the merged firm. Thus, studies of past entry behavior can lead to a better understanding of why the merger is taking place (e.g., the optimal size of the firm has increased over time), and of the effect such entry or exit had on market performance.

### ***Other Tests for Unilateral Effects***

The points discussed below are in addition to those already mentioned above. The first point is relevant for both homogeneous and heterogeneous goods, while the second deals specifically with differentiated products.



## 1) Measuring Excess Capacity

As stated above, when considering unilateral price increases, the ability of the merged firm to increase price depends on the supply elasticity of the fringe firms. This, in turn, depends, at least in the short-run, on the amount of excess capacity available to the *remaining* fringe firms. Say, for instance, there is one firm with substantial excess capacity. If the other firms are unable to expand production substantially because they do not have much excess capacity, and increased capacity is a costly investment, the purchase of the firm with substantial excess capacity can allow the merged firm to profitably increase price, while such an action may have been impossible in the absence of the merger. The data needed to evaluate this concern are excess capacity figures and information on the ease of capacity expansion. If there is much excess capacity in the hands of non-merging firms, or if it is easy to acquire, unilateral effects in the case of homogeneous goods are less likely to be significant.

One must ask why firms would choose to have excess capacity. There are many reasons excess capacity could exist, and its presence is not an indication of non-competitive behavior. This said, excess capacity could also be used to assist in the enforcement of a cartel agreement. If firms cannot expand production easily, a firm with excess capacity can increase production and not fear retribution from other cartel members. However, if all firms have excess capacity, no firm will have as large an incentive to cheat on the cartel agreement, since all firms will increase production, triggering a large price fall. It is also possible that companies may not always want to use their excess capacity in a non-collusive market environment, namely when this would depress market prices too much. Another reason to maintain excess capacity is to maintain a dominant position. Thus, a dominant firm might invest in excess capacity as a threat to any firm considering entering. Such entry could bring about a flooding of the market by the firm. Firms in a competitive environment, however, would have little incentive to invest in excess capacity. Thus, excess capacity not justified by historical changes (e.g., a large fall in the quantity demanded or lumpiness in production), could be indicative of non-competitive behavior.

## 2) Analysis of the possibility of relocation and new product introduction

As discussed above in the section on demand estimation, when the merging firms produce goods that are “close” to each other from the consumers’ perspective, the degree of competitive effect is dependent upon the ability of other firms to “fill the gap” created by the merger. If existing firms can easily spatially relocate (change the properties of their goods) or create a new differentiated product in response to a price increase by the merged firm, this will limit the firm’s incentive to raise prices. Testing this requires information about the characteristics of the goods, and the flexibility of the production process. If there were new product introductions in this industry, it can be quite illuminating to see how consumers reacted to such changes. In particular, how many shifted from the existing products to the new products.

### *Other Tests for Coordinated Effects*

Coordinated effects (collusion) require the ability to reach terms of agreement, to monitor the agreement, and to enforce the agreement. The focus should be on whether the merger enhances the likelihood of collusion or the magnitude of its effects. Certain market conditions are conducive to such collusion while others are not. History is very important,

and it can be most enlightening to check whether there were signs of collusion in the past. If there is no evidence of collusive behavior, and market conditions do not favor the formation and enforcement of collusive agreements, there may be little reason to expect coordinated effects to result from the merger. In addition to the analyses discussed above, the following tests can be conducted to see whether coordination exists and/or is a likely outcome of the merger.

### **1) Analyzing industry data**

Summaries of industry data are useful for learning whether the underlying market conditions are conducive to coordination. Details about industry sales patterns (do total sales vary greatly over time, or are they fairly stable), customer sales patterns (are customers large with relatively infrequent purchases, or small with regular purchasing habits), and pricing patterns (are prices highly volatile, or stable) will help determine whether collusion seems likely.

### **2) Most-Favored-Nations Clause**

One manner in which collusive agreements may be enforced is to use most-favored-nations clauses, which have the potential dual effects of lessening the variability in pricing across customers than might otherwise occur, and lessening the incentive to give discounts. The result of such clauses can be that, since firms have less incentive to lower prices, collusive agreements are more stable. Analysis of this potential effect can be done by (1) analyzing contracts across customers and suppliers to determine the prevalence of such contracts; (2) analyzing prices to assess the variations in price across a single supplier's customers, controlling for observable differences; and (3) analyzing negotiations with individual customers to determining the prevalence of offering individual discounts.

### **3) Analyzing competitor production reactions to price changes**

Competitors can be expected to react to price changes by a firm in more dimensions than price alone. Thus, an increase in the price of an important competitor can be expected to lead to an increase in price by the firm, and, if the firms are not colluding, to an increase in quantities (and market shares). In a collusive agreement, however, quantities are not expected to increase. Thus, an analysis of quantity reactions to price changes is also relevant. To conduct this test, data on quantities need to be gathered with the same resolution as the price data discussed above. Of course, prices may go up because costs increased, and this must be considered in the analysis – one would anticipate prices of competitors to generally move together as cost and other conditions change.

### **4) Analyzing customer turnover – churning**

If customers are large, each firm has an increased incentive to try to lure competitors' customers. If, in addition, orders are infrequent, such actions will be more difficult to detect and will make cheating more attractive as retaliation may not be possible in the short run. An analysis of customer turnover among different suppliers can shed light on this issue.

### **5) Analyzing changes in market shares**

Collusive agreements generally rely on firms getting fixed market shares. If a member of a cartel suddenly finds its market share falling, it is likely to react by cutting prices. Thus, fairly constant market shares over time would be consistent with (but do not prove) coordination, while frequent changes in market shares suggest that collusion is less likely to be occurring. The required data are unit or dollar sales for each firm.

### **6) Analyzing markets with Sealed Bids**

When contracts are relatively large (but relatively frequent) and are awarded via sealed bids, firms might coordinate by taking turns winning auctions, thus maintaining high prices and market shares. Government sealed bids often become transparent and deter cheating on a collusive agreement. Such collusive methods may be simpler to establish and enforce after a merger. Analysis of this issue requires a careful study of winning patterns and prices of winners and losers and the role of the merging parties.

### **7) Analyzing the stability of costs and demand**

Coordination is likely to be easier when the market is stable, and when firms are similar. Frequent changes in suppliers' costs or demand over time will cause instability in private incentives, and, thus, in production quantities and prices, making coordination difficult to maintain (partly because it will make cheating on a cartel agreement appear to be simply "noise"). In addition, if the cost structures of the firms differ, and/or changes in factor prices are different across suppliers, coordination would be difficult to maintain. This analysis necessitates data on the cost structure of the firms, and on input prices over time for each firm as well as estimates of market demand.

### **8) Analysis of new product introductions**

Changes in products by existing firms, changes the status quo in an industry, and can make coordination difficult to maintain. Analysis of these issues would ask: Are such changes common? How important are new products to sales?

# Chapter 5

## A Private Sector Perspective On Tools And Techniques Used In Merger Investigations<sup>4</sup>

### Introduction

The merger control process can protect competition and thus benefit the global economic system. Both private practitioners and the global business community increasingly accept this proposition. Even while recognizing the benefits, however, the private sector expresses two primary concerns regarding merger review: (1) the length of time for the reviews and the uncertainty in their duration, and (2) the direct and loss-of-productivity costs. These concerns are present in reviews by a single jurisdiction, and are magnified in the context of multi-jurisdictional reviews. Because, ultimately, it is the consumer and taxpayer who pay the costs of merger review, it is essential that firms and enforcement agencies work together to ensure the most efficient merger reviews possible by eliminating undue delays and burdens, particularly in multijurisdictional reviews. In this spirit, this chapter is intended to provide merger review agencies with the benefit of the private sector's experience and an understanding of its concerns regarding timing concerns and costs.

The importance of time to merging parties cannot be overstated. Indeed, the passage of time, particularly when uncertain in duration, is often cited as the primary "deal killer." All transactions subject to premerger notification and waiting period requirements are delayed by at least the time incurred for a first phase investigation, which may range from 15 to 45 days. Second phase investigations generally add at least four months, but possibly over a year, to the period during which a transaction is delayed. Time delays stemming from first phase investigations, while relatively short, are nonetheless significant, because they impede immediate consummation of transactions that present no competitive concerns. Time delays stemming from second phase investigations are significant because of their lengthy duration. Indeed, when private parties express concern about the time the merger review process takes, it is the second phase that is the focus. And ultimately litigation or appeal, while rare, adds significant time to the process, while its prospect adds significant uncertainty.

Multi-jurisdictional reviews generally increase the uncertainty in the duration and often increase the actual duration. Naturally, it takes more time to prepare and make multiple

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<sup>4</sup> Drafted by William Blumenthal of King & Spalding LLP; John Davies of Freshfields, Bruckhaus, Derringer; Brian Facey of Blake, Cassels & Graydon LLP; Calvin Goldman of Blake, Cassels & Graydon LLP; Deborah Majoras of Jones, Day; Thomas Mueller of Wilmer Cutler Pickering LLP; Mark Nicholson of Blake, Cassels & Graydon LLP; Constance K. Robinson of Kilpatrick Stockton, LLP; and David Tadmor of Caspi & Co. The Non-Governmental Advisors ("NGAs") to the Investigative Techniques Subcommittee of the Merger Committee of the International Competition Network thank the ICN members for this opportunity to present the views of the private bar. One of the ICN's particular strengths is its willingness to hear the views of all interested persons.

filings, even if the filings are prepared, respectively, by separate lawyers in each jurisdiction. Even coordination among jurisdictions takes time. Filings in multiple jurisdictions rarely occur simultaneously, and even when they do, review timetables and production requirements vary among agencies, potentially increasing the duration and uncertainty.

Competition enforcement agencies can assist in minimizing the duration of merger review by agreeing, formally or informally, to schedules for review, where merger regulations permit, in particular investigations; by engaging in open discussions about issues of competitive concern throughout the process, so that, where possible, some issues can be eliminated efficiently, while others can be clarified; by engaging the parties in productive discussions regarding production requests, so that firms can produce necessary information quickly and efficiently, and neither the reviewing agency nor the firms wastes time on needless production; by engaging the parties in remedy discussions at the earliest appropriate opportunity; and, in multijurisdictional reviews, by working to minimize duplication and seriatim reviews through cooperation and, where possible, one-stop shopping.<sup>5</sup>

Merger reviews are resource-intensive. While certain costs are inevitable in order to achieve the benefits of merger review, it is important that the agencies have a complete understanding of the direct and indirect costs in an effort to eliminate unnecessary costs and reduce others. Where jurisdictions' filing requirements are broad, more transactions that are not anticompetitive, such as financings or changes of corporate control, are exposed to merger review and may have to be abandoned as the costs associated with review and interest costs become uneconomic. Out-of-pocket costs include the preparation of the notification filing; fees for lawyers, economists, translators, paralegals and clerical personnel; costs of document review and copying; costs associated with answering interrogatories and with interviews and depositions; and, very often in global mergers, travel expenses. Significant costs are also incurred in the diversion of management time and loss of employee productivity, as time and attention is directed to the merger review instead of to the business. And, of course, the business deterioration associated with delay and uncertainty, as discussed above, is also costly. After a merger has been announced and while it is pending, key relationships with customers can be harmed and key employees may be lost. Not only merging parties face these costs; customers and competitors are interviewed, have oral statements taken and receive requests for information or documents.

Not surprisingly, merger review by multiple authorities increases the costs. Firms subject to multijurisdictional merger review often must pay multiple filing fees; must engage attorneys and possibly economists in multiple jurisdictions and ensure coordination among them; and must incur information and document production costs associated with each review. Management and other employee time spent responding to merger review inquiries may increase with each additional jurisdiction that reviews the transaction.

The agencies also suffer consequences when investigations are overbroad. They have limited resources, and those resources are stretched when information is not focused.

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<sup>5</sup> In addition to the actions that staffs are able to implement, there are also actions that individual member countries can undertake to help eliminate burdens, such as legislating as many definite time periods as possible; permitting the merging parties to control the duration of variable time periods; and instituting a process for early termination. Each of these has been proposed as recommended practices by the ICN.

Time is wasted as tangential issues are explored, taking away resources from more critical issues. Then, too, the public suffers when a competitive issue is not spotted and resolved.

Thus, it is in the interests of all participants of merger reviews to work together to focus investigations on the key issues, to examine the evidence pertaining to those issues, and to seek early resolutions. Obviously, there will be some times when the parties and the agencies disagree, but, by working together, the issues on which there are disagreements can be identified, and either a resolution or a conclusion can be achieved more efficiently.

This chapter has three parts. First, it evaluates strengths and weaknesses of the various tools of investigations. Second, it discusses cooperation and the need for confidentiality, because of the importance to the parties that any information they provide to an investigation be treated in the strictest confidence. And finally, because competition enforcement agencies can greatly assist the parties in minimizing costs, from the private sector perspective, it provides pragmatic tips about the use of various tools of investigations (while still ensuring that the agencies receive the information they need) to help streamline and expedite merger investigations and also provides tips on when and how to engage the parties since good communication between the agencies and the parties is one of the best ways to streamline and expedite merger investigations.

### **I. Information Gathering Techniques In Competition Authorities' Merger Investigations**

Merger enforcement necessarily requires agencies to obtain information. Proper fact gathering provides an agency with the market information necessary to evaluate the competitive impact of a proposed merger with reliability and consistency.

The vast number of mergers are either pro-competitive or competitively neutral, and only a small number are anticompetitive. To the extent that a merger raises questions, some information is needed to address those questions, but a full-blown investigation should be reserved for the most analytically complex mergers and those more likely to be competitively troublesome. Even in the case of a likely anticompetitive merger, information requests should focus on relevant, probative information and should be informed by a theory of anticompetitive harm. This focus minimizes the time and costs of the investigation for the parties and the agencies. In addition, an early focus on possible remedies will help obtain necessary information that may promote an early resolution.

From the perspective of the NGA authors, proper information gathering requires a balancing of costs versus effectiveness. In choosing between alternative instruments, the public interest is best served if an agency takes into account both the specific benefits and practical effectiveness that each such technique may have, and the financial costs and time entailed for both the companies required to collect and provide the information, and for its own staff to review and process it. In addition to the balance of cost and effectiveness, the agency also needs to take into account issues of timing, the need to substantiate its decision, providing parties the opportunity to respond to the agency's concerns and the general principles of administrative law an agency is required to follow. The balancing act that results will often entail combining several information gathering techniques, each for its own purposes and each with its own advantages and disadvantages. As discussed below, the various techniques are often more effective in tandem.

The information gathering techniques that are described below can and will generally be used to gather information from a variety of sources, including the parties to the transaction, competitors, customers, and perhaps even suppliers, industry consultants or other third parties. The first instrument of data gathering, however, is the notification of the transaction by the merging parties themselves. Most authorities will use a notification form or standard questionnaire, which the parties complete in order to notify the authority of their intent to engage in a transaction. Some jurisdictions do not have a standard form or only require very minimal information in their form, but have developed practices in which additional information, in the form of a briefing memo or letter, is provided for transactions that raise more significant competition issues. Requesting the right information in the initial notification form or procedure is a crucial step in the information gathering process. Executed properly, this first step can put the agencies several steps ahead at an early stage in the review. Again, achieving a proper balance is critical so that routine transactions are not burdened with unnecessary demands for information in the notification form, while review of significant transactions is accelerated. For the latter, the initial filings can identify the competitive issues and the potential sources of information, so that more pointed inquiries can be made using a variety of investigative techniques. To gather additional information beyond the initial filing, competition agencies may have several techniques at their disposal: (i) written questions; (ii) telephone interviews and other oral inquiries or testimony; (iii) company presentations; and (iv) document requests.

### *Written questions*

From the private practitioners' viewpoint, a written request for information is particularly effective in obtaining very specific factual information. Written questions allow the addressees time to look for the requested data and to consider their answers carefully. In general, they are best used for securing two types of information: hard facts and the contentions of the parties. With respect to the first use, written questions can be used for specific data or information, such as pricing or bid data or a list of customer names and contact information, that the agency may use to assess a particular competitive issue, but that may not be readily available in a single set of documents. Facts that answer the questions: who, when, where and how much are the best as they elicit non-judgmental information. With respect to the second use, written questions can be used to obtain the views or contentions of the parties or third parties on such issues as market definition, the economics of the deal, or the efficiencies gained through the transaction. The parties may not have expressed or explained their views on these issues fully in the notification form, and for third parties it may be an easier way to make their views known.

Although written questions tend to work well for gathering specific factual information, they have the disadvantage of not being particularly interactive, because they do not allow for immediate follow-up or adjustment when it appears that the responder misinterprets or avoids the question. Thus, it is very important to ask precise questions and to formulate the questions clearly.

It is critical that agencies avoid leading questions that suggest the answer or call for legal conclusions. While it may seem interesting to hear the views of 300 customers on the definition of the "relevant market," such questions are unlikely to be informative, because most customers will have very different conceptions of what constitutes a market, and these views may bear little relation to a properly defined antitrust market. The more

productive approach is to ask precise, factual questions that underlie the legal assessment. For instance, such questions as “If the price of widgets increased by 10% would you switch at least part of your purchases to non-domestic manufacturers? Please explain why or why not” or “In your view as a toy manufacturer, can you use plastic A or plastic B for making your blocks? What costs would you incur in switching plastics?” will be far more probative in determining the scope of the market. Asking a series of precise questions that elicit fact-based assessments that business people need to evaluate in running their businesses will likely result in answers that more closely reflect reality and are less subject to misunderstanding and misinformation. If those assessments are backed up by documents, they become even more probative.

Asking companies for forecasts or non-fact based opinions, without additional corroboration, is generally not very productive. The question, “what do you think your market may look like five years from now?” cannot be answered incorrectly and therefore is easily subject to bias, subjectivity, and speculation, and may have a weak factual basis. An agency will get more informed market predictions through documents that pre-date the current transaction. Most companies will have business plan and strategic plans, and some (especially the larger ones) tend to also produce rolling forecasts, three-to-five year projections, or even future scenario-studies. If the forecast suggests dramatic change, then authorities should look to see what action the companies are taking to address the expected change. If the company is not acting on the forecast, it may reflect company doubts about the forecast.

The costs for companies in answering written questions will vary widely. Much will depend on how broad and demanding the list of questions is, whether the company keeps the information in a manner that will allow it easily to retrieve the information in the form requested, and how quickly the response is required. Companies have different practices about the extent of information they keep and have different capabilities for generating information, which should be considered when negotiating requests for information. In order to maintain the cost effectiveness of written questions, it is important to permit flexibility in responding to the questions when other reasonably similar data/information is available more readily and cheaply.

### ***Telephone interviews and other oral inquiries or testimony***

Telephone interviews are arguably the quickest, most direct and least costly way to get access to information through all stages of the investigation, both from the parties’ and the authorities’ perspective. They are mainly used to gather information from the parties, and from third parties, such as customers, suppliers and competitors.

In the view of the NGA authors, in a telephone interview, it is important to ensure that the right person is answering the questions. While it is exceedingly useful to have notifying parties provide contact information for the principal industry participants in their initial notification, the agencies must assess the background of the individuals and the basis of the information that they are providing to determine whether alternative persons could provide more reliable information.

Telephone interviews afford third parties a less formal occasion to discuss views on issues on which they may be hesitant to respond openly, and help them understand exactly what the agency is looking for. A key advantage of telephone interviews is they allow for



immediate follow-up. It may be, however, that the probative value of this technique is not as strong as written questions, because it is not always clear that the person contacted is the most knowledgeable, and respondents may be less well-prepared or unwilling or hesitant to provide information. By contrast, when responding to written questions, a company will generally have the opportunity (and the time) to consult a larger number of people in various departments and be better able to address the questions. An alternative to telephone interviews is to invite a company's representatives for oral questioning at the authority's premises, a technique which allows better preparation, but is more burdensome for all involved.

Another limitation on oral questioning is the ability of the agency to rely on it under its evidentiary rules. At a minimum, the agency staff should make notes of the interview or meeting. If, however, it becomes clear that the interviewee's statements will be relied on in the eventual decision, a good practice is to request the interviewee's written statement later in the process. Given the limited probative value of ordinary oral evidence in many jurisdictions, another alternative is to opt for formal testimony that is recorded or transcribed. While such recorded or transcribed testimony is certainly of more probative value and protects the rights of the parties better, securing it is more expensive than telephone interviews.

More improvised and informal telephone interviews thus remain a useful tool, particularly early in the investigation or as follow-up to provide clarification to written responses or documents produced. If, however, the authority feels it requires more in-depth questioning and if it feels the information is central to its analysis, the additional costs of formal testimony are often justified.

### ***Company Presentations***

During pre-notification contacts or early in the review process, presentations by employees of the merging parties are a particularly useful, and generally fairly cost-effective way of providing the competition agency with a first understanding of the business issues related to the transaction. Later in the investigation, more focused meetings and personal interviews with employees of the merging companies and third parties can also be useful to discuss openly market definition and competitive effect issues that have been raised and framed through prior information gathering. These sorts of presentations and discussions allow for an exchange on the appropriate interpretation of the data and information and to expose misconceptions and flawed theories on both sides. Of course, the technique will be all the more effective if both the parties and the agency staff are well prepared and ready to interact, and approach the exercise in a spirit of cooperation rather than hostility.

### ***Document Requests***

Competition agencies request documents in an effort to verify the factual basis of parties' assertions and arguments provided in the initial filing and responses to written questions, as well as to test the agency's own analyses and theories. Factual documents can take a variety of forms including strategic market analysis, pricing documents, business plans, marketing plans, short- and long- term projections, as well as customer lists, competitor information, sales and marketing reports, bid and sale data, capacity and cost of production data.

Documentary evidence provides useful information on how the parties perceive the market and which firms are regarded as significant competitors, and is helpful to support conclusions regarding the competitive effects of the merger. These documents represent a more reliable source of evidence if they pre-date the merger negotiations. However, even reports and analyses developed during the merger negotiation process can be credible and provide useful evidence. Indeed, documentary evidence is some of the most reliable evidence that an agency will obtain.

Nevertheless, documents cannot merely be taken at their face value. The NGA authors' view is that the investigating authority must evaluate documents in the right context. The most obvious example where skepticism needs to be exercised is the overblown statement by a manager about past performance or the presentation by the investment banker to sell the transaction to the board of directors. However, even less opinionated documents can raise issues about reliability. For example, in many companies that require sales people to write reports on their major deals once these have been finalized or lost, most sales people will not see the completion of the reports as a priority. The report ends up at the bottom of the pile, and by the time the sales person gets to it, it will be completed quickly and possibly incompletely. In addition, the sales person may want to boast about or downplay the major competition that was faced depending on the particular circumstances and how it might affect the sales person's career path. Even the "raw data" from documents may not be quite as objective and useful as one might think.

The major disadvantage of document discovery is the cost. If the requests are not narrowly tailored, the costs can quickly escalate and easily exceed the cost of all the other investigative techniques. In the view of private practitioners, agencies should limit their requests to those documents needed that the agencies can reasonably process during the investigation. The costs include the search costs (which are labor-intensive and therefore expensive), the reviewing costs, the copying and document control costs, and in some cases the translation costs. Limiting the number of sources to be searched is one of the best ways to reduce the overall costs of an investment. As a rule of thumb in the United States, it costs \$1,000 to review a box of documents, during which irrelevant documents are removed; it then costs another \$1,000 to copy each box of relevant documents (two copies of each page must be made, one for control and one for production); and it costs an additional \$100 per page to translate documents or approximately \$100,000 to translate an entire box of documents in a common language. Thus, on a per-page basis, the most significant of these costs are the translation costs. All of these costs can easily multiply if the request extends to electronic documents. In addition to the monetary costs, the document search and review costs can also be enormously intrusive and disruptive of the business activity of the company. Overall, the cost of document production in a significant transaction can easily cost \$4-5 million.

Thus, while documents provide a unique and often reliable insight into a company's business and the market dynamic, if over- or indiscriminately used, they can quickly become an enormous and unwarranted burden.

## **II. Cooperation And Confidentiality In Merger Investigations**

### ***The Importance of Confidentiality to the Process and to the Parties***

From the perspective of both government agencies and private parties, enhanced inter-agency cooperation can reduce the cost and time associated with merger review, avoid unnecessary duplication of efforts, improve the data gathering process and eliminate unnecessary conflicts. At the same time, the exchange of confidential information among government agencies raises real issues for the business community, including parties and third parties. Confidential business information is among a firm's most valuable assets. And, from the agency's point of view, it is not generally appropriate for firms to share such information with competitors. Yet, without adequate safeguards, confidential business information could be disclosed to competitors (including, but not limited to, state-owned competitors) and/or to third party litigants through access to information statutes, or through court-compelled disclosure. In addition, if confidential information were to be released to certain sectors of the public in one jurisdiction, that release could violate insider trading laws that exist in other jurisdictions. And such disclosures could occur without the owner of the information even being aware of it.

In recognition of the benefits of international regulatory cooperation, parties are generally prepared to accept information exchanges among agencies from whom which they must obtain clearance for a proposed merger, provided that adequate confidentiality safeguards are in place. Agencies, too, benefit from ensuring that confidential information is adequately protected because parties will be encouraged to provide full disclosure of information and to consent to interagency information exchanges. Thus, the adoption of a common set of basic protocols and safeguards facilitates the exchange of information between agencies, thereby greatly enhancing the efficiency and effectiveness of multi-jurisdictional merger review.

From the private sector perspective, parties are more likely to agree to exchange information in jurisdictions where confidential information is not exchanged without the consent of the parties, and parties to a proposed merger are notified of proposed exchanges. In addition, private practitioners believe information exchanged should be subject to conditions of confidentiality in the receiving jurisdiction, including legal safeguards that ensure that information will not be disclosed to third parties, and that all information exchanged should be used by the competition agencies only in connection with the merger review or its subsequent proceedings or other authorized law enforcement purposes. Additionally, private practitioners prefer that the receiving regulator should agree to take all available legal measures to prevent the disclosure of the information to third parties, and that the parties receive notice as soon as any third-party attempt to access information is made.

### ***Waivers***

In practice, parties consent to the release of confidential information through the use of waivers. Waivers can take a number of forms. At the one extreme, a blanket waiver permits full, unfettered discussion and document exchange (generally with the exception of privileged documents). At the other end of the spectrum, a partial waiver may only permit discussions between government agencies, with no document exchange. In between, a partial waiver could permit discussions on specified subjects or with respect to certain classes of documents, with the documents to be provided by the parties themselves. Examples of these types of waivers are presented in the Final Report to the Attorney General and Assistant Attorney General for Antitrust of the International Competition Policy Advisory Committee of the Antitrust Division (*see*

<http://www.usdoj.gov/atr/icpac/chapter2.htm> at 69 and Annex 2-D at <http://www.usdoj.gov/atr/icpac/2d.htm>). It would be helpful for jurisdictions to adopt model blanket and partial waivers, so long as each enforcement agency retains the flexibility to tailor a waiver to address the specific circumstances of the proposed merger.

In deciding whether to grant a waiver, a party needs to know certain fundamental information: generally, what is to be exchanged, to whom, when, how and the manner in which the exchanged information will be returned. Additionally, the parties need to understand any risks of disclosure in the jurisdiction, such as whether any other laws of the jurisdiction could affect confidentiality. The parties will also want to ensure that all available privileges will be maintained.

To maximize efficiency in each investigation, the agencies should carefully consider the breadth of the waiver needed. An overbroad information exchange necessarily leads to duplication of effort and delay and also increases the risks that confidential information will be improperly revealed. Consequently, waivers that are tailored to the information and documents needed in the requesting jurisdiction for its decision-making are best. This means limiting the information to the extent possible to issues relevant to the receiving jurisdiction and eliminating those where serious *prima facie* issues are not raised in the requesting jurisdiction.

Moreover, because parties have no legal obligation to grant a waiver, to encourage parties to do so, it is important that the use of waivers be voluntary, and that no negative inference be drawn from a party's declining to provide a waiver, or penalty be imposed. It should not be necessary for a party to justify why it has decided not to grant a waiver, because the party is required to provide each enforcement agency with all the information that each is entitled to under its laws. Having a policy that clearly states that no adverse consequences will arise if a waiver is not adopted will help ensure that companies will be willing to cooperate voluntarily to the maximum extent possible. Otherwise, there is a risk that companies may decide as a general matter they are better off not granting waivers in any case.

### ***Tips For Ensuring and Maintaining Confidentiality***

#### **1) Statutory Obligations**

The exchange of information between government agencies in the context of merger review should comply with all applicable national laws. If a jurisdiction does not have statutory protections for confidentiality, the enforcement agency should develop policies and procedures to protect information. Similarly, all information exchanges should be conducted in accordance with all applicable cooperation treaties/agreements.

To encourage parties both to provide agencies with confidential information and to consent to the exchange of such information between agencies, the receiving agency should undertake to protect the information in accordance with the most stringent statutory requirements applicable to either the providing or receiving agency. The adoption of a "highest common denominator" approach to the protection of confidential information will promote the willingness of parties to consent to the exchange of such information between agencies, thereby furthering the goals of inter-agency cooperation while simultaneously alleviating the concerns of businesses in this regard.

## **2) Developing Policies and Procedures**

Business confidence in the merger review process will be enhanced if the process is clear and transparent. Publishing a clear, concise policy that sets out practices on seeking, using and exchanging confidential information in the context of a merger review is, therefore, desirable. This policy should include any limitations on protecting the confidentiality of information imposed on the agency (e.g., freedom of information legislation); whether and how legal privileges will be respected and maintained; and the rules and protocol for dealing with requests for confidential information from third parties.

Similarly, where two or more agencies routinely exchange information in the context of the review of trans-border mergers, binding bi- or multi-lateral procedures, treaties or agreements should be implemented to address the treatment and exchange of confidential information. Finally, where two or more agencies conduct coordinated merger reviews on a recurring basis, formal agreements or protocols for inter-agency information exchanges should be developed and made public.

## **III. Investigative Tips From The Private Sector**

### ***Tips on how to streamline and reduce burdens of investigations***

#### **1) Written questions**

- Use focused questions designed to elicit facts.
- Ask open-ended questions—who, what, when, where and why -- to elicit facts; leading questions tend to stifle information.
- Ask for facts rather than legal conclusions.
- Use when specific information or data is needed that is not likely to be readily available in document form.
- Use to obtain positions on the legal issues of the investigation.
- Allow flexibility to permit reasonable requests for modifications.
- Allow flexibility in responding to permit substitution of information in a more readily available and less costly form.
- Avoid questions that will result in speculative, subjective answers.
- Address requests for modifications promptly to avoid the costs of delay.

#### **2) Telephone interviews and other oral inquiries or testimony**

- Be prepared so that interviewees' valuable time is not wasted.
- Designate one attorney as primary interviewer, rather than bombarding the interviewee.
- Use frequently, particularly at early stages of the investigation.
- Consider using telephone interviews instead of written questions for third parties, so that follow-up questions can be asked; a written statement can be used later.
- Ask open-ended questions—who, what, when, where and why -- to elicit facts.
- Ask for facts rather than legal conclusions.
- Express appreciation to third parties for taking time to respond to questions,

- but avoid giving the impression that agency is “on their side.”
- Avoid questions that will result in speculative, subjective answers.

### 3) **Company presentations**

- Use early in the investigation to learn about the industries.
- Use later in the investigation on specific competitive issues.
- Do not adopt a hostile tone during company presentations.
- Use the opportunity to follow-up questions of business people.

### 4) **Document Requests**

- Tailor the request precisely to the transaction and parties before one agency, rather than using a standard request.
- Limit the time period of the request.
- Limit the files, offices, or databases that need to be searched.
- Focus on high-yield files.
- Permit search terms to select electronic documents.
- Request “documents sufficient to show” wherever possible instead of “all” documents.
- Be creative in thinking of ways to eliminate burden—sampling may be an option; reviewing one type of file to see if it can be ruled out is another.
- Limit translations to these documents relevant to specific legal or factual issues in the transaction affecting the jurisdiction.
- Do not require translations of documents if the agency has the capability of reviewing the original language.
- Consider summaries instead of translations of each page of a document.
- Permit partial translations to be initially reviewed.
- Permit production that is “rolling,” where documents are produced over time in a particular order.
- Streamline instructions given.
- Allow flexibility to provide reasonable requests for modifications.
- Address requests for modifications promptly to avoid the costs of delay.
- Provide a mechanism for review of requests where disagreements between the staff and the parties about unreasonableness or undue burden arise.

### ***Tips on how to engage the parties***

Having a dialogue between the agencies and the parties is one of the best ways to develop the facts and to analyze the issues in a merger investigation, as well to focus the investigation. It is important that such a dialogue begin early and continue often as the investigation progresses. The following are some suggestions from the private sector perspective for when and how to do this.

#### 1) **When to engage the parties to ensure meaningful interaction and disclosure**

- Just before or after a notification, engage the parties about their view of the products, the industry and the relevant markets. This will provide a head-start to the investigation.
- Once key issues are identified, discuss them with the parties so that necessary

information can be supplied and the parties have the opportunity to provide any counterarguments.

- Prior to issuing information requests, discuss with each party the nature and kind of information sought and where it can be found most easily and cheaply.
- Before deciding to go to a second stage or second request, discuss competitive concerns and give the parties an opportunity to respond.
- Before making a recommendation for an adverse enforcement decision on the merger to superiors, discuss concerns and the nature of evidence (to the extent possible) with the parties.
- Before the agency makes an adverse enforcement decision, the parties should be able to discuss the concerns and nature of evidence (to the extent possible) with superiors.

## **2) Whether to permit pre-notification meetings**

- Pre-notification meetings can be useful to help inform the agencies about the product market(s) and industry, as long as the deal is certain enough to justify agency involvement.
- Pre-notification meetings can be helpful to focus and streamline the filing.
- Pre-notification meetings can be productive where the parties are able to provide significant information prior to the notification to permit the competition agency to formulate preliminary views.

## **3) Telephone Calls**

- Telephone calls can also be a useful way to dialogue with the parties. There will be times when meetings are not possible, and other times when it is more efficient to have a telephone call.
- Consider designating one person to be responsible for such calls. This will assist in developing a rapport and will help ensure that information is conveyed in a consistent manner.
- Prior to any meetings, consider a telephone call to lay out issues of concern. The agency will more likely get responsive information if the parties understand the concerns.
- In early stages of the investigation, consider telephone calls with key personnel to learn about the industry and markets.

## **4) Meetings**

- Invite the parties to a meeting as soon as possible after the investigation is opened to learn about the industry. Ask them to bring some of the company's personnel to describe the products made and the markets in which those products compete.
- If competitive concerns develop, discuss those with the parties. Knowing their responses will help to decide whether some issues can be eliminated or whether additional evidence is needed.
- Let the parties know when conclusions are tentative and what additional information is needed to reach more firm conclusions.
- Consider, where appropriate, organizing meetings with the parties and interested third parties to test the arguments of the parties/third parties.

### ***Tips On Dealing With Third Parties***

Obtaining information from third parties is a crucial step in the investigation as they can provide important facts about the market and information to test what is provided by the parties. Competitors often have useful information, but may have a point of view about a proposed transaction so a critical evaluation is necessary. Customers and industry experts can also provide valuable information about how the market operates.

- Consider carefully requests to third parties so that they are not unnecessarily burdened. Limit third-party document or information requests to market share information or extremely critical issues.
- Objective facts are the most reliable information from third parties. Asking for forecasts or non-fact based opinions is generally not productive, although forecasts used in the regular course of business and relied upon by a company can be instructive. But generally, focusing on the facts that underlie any opinions is the most effective and probative.
- Interviews by telephone with third parties can provide an effective, low-cost and informal means of getting information that can be very useful.
- Written questions can be useful to obtain the views or contentions of competitors on such issues as market definitions, the economics of the deal, or efficiencies that can be gained.
- Competitors may have a bias with respect to a transaction. For example, they may be concerned that a merger will make the market more competitive. Thus, it is particularly important to review critically any of their opinions and to test their theories in the same way the parties' theories are tested. Maintaining neutrality with third parties just as is done for the parties is important for ensuring that the process is a fair and objective one.
- If the interviewee's statement is sufficiently critical for decision-making, it should be corroborated by documents or by sworn testimony.
- Back up significant facts with documents.
- Documents that pre-date the merger announcement are the more reliable.



ANNEX 1

INVESTIGATIVE TECHNIQUES SUBGROUP MEMBERS

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