International Chamber of Commerce
The world business organization

Prepared by the ICC Commission on
Competition

Comments on the reform of the Hart-Scott-Rodino premerger filing requirements

Highlights

- Changes to Item 4(d)
- Reporting revenue from non-US manufacturing operations
- Information requirements on “associates”

Document No. 225/673 – (18 October 2010)

Comments on the reform of the Hart-Scott-Rodino premerger filing requirements

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ICC appreciates the opportunity to comment on the Commission's proposed modifications to the requirements of the Hart-Scott-Rodino Premerger Notification & Report Form. Some of the FTC's proposed changes, standing alone, would slightly reduce the burden on filing parties, and we welcome those changes. However, ICC is concerned about (i) the significant impact of the FTC's proposed Items 4(d)(i) and 4(d)(ii); (ii) its proposal to amend Item 5 to require detailed breakdowns of revenues from non-US manufacturing operations of the filer and any entity it controls; and, (iii) its proposal to expand the groups of entities to be canvassed by a filer. These modifications would greatly and unnecessarily increase the burden faced by filers in *all* reportable transactions. The ICC respectfully submits that these additional burdens are not warranted, as the vast majority of transactions notified under HSR do not raise antitrust concerns. The FTC's proposed modifications would require 99 percent of HSR filers to gather and submit additional information that would only be useful in one percent of transactions – a demand that runs counter to emerging international norms.

The International Competition Network's Guiding Principles for Merger Notification and Review states:

"The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions."[1]

The ICN goes on to recommend that:

"A. Initial notification requirements 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.

B. Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns."[2]

Similarly, the OECD's Recommendation of the Council on Merger Review provides:

"Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws *avoid imposing unnecessary costs and burdens on merging parties and third parties*. In this respect, Member countries should in particular: . . . Set reasonable information requirements consistent with effective merger review." [3]

US agencies, in prior submissions to the ICN, emphasized the merits of the US filing process under HSR, which places the most comprehensive information requirements on the "back end" of the notification process (*i.e.*, reserving the most comprehensive information requirements for cases that have already been identified as possibly raising non-trivial substantive competition concerns). This

[1] Int'l Competition Network, *Guiding Principles for Merger Notification and Review*, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf
[2] Int'l Competition Network, *Recommended Practices for Merger Notification Procedures* at 11, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf
[3] Org. for Economic Co-operation & Dev. [OECD], *Recommendation of the Council on Merger Review*, § I(A)(1)(2), No. C(2005)34 (Mar. 23, 2005), *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False

contrasts with the substantial “front end” information requirements imposed by other merger control regimes. The proposed reforms seem to step away from the approach long advocated by the US in international antitrust policy dialogue by enhancing the “front end” information requirements of HSR notification. If and to the extent this signals a reversal of US policy on the proper timing of information filing requirements for merger notification, it would clearly undermine efforts by the US to persuade other jurisdictions to minimize “front end” filing requirements.

The ICC is principally concerned with the burdens associated with proposed Item 4(d), which would result in a dramatic increase in the volume of documents that filers would have to locate, collect and review to ensure compliance with the new rule. Notably, the requirements of Items 4(d)(i) and (ii) extend filers’ obligations to search for documents beyond those *created in connection with the transaction*. Accordingly, Items 4(d)(i) and (ii) necessarily require filers to extend the search for potentially responsive documents to custodians outside of the deal team, breaching what in many transactions is an important if not vital separation from the day to day operations of the company. In some transactions, Item 4(d) would potentially create dozens of additional custodians, thereby creating the potential for breaches of confidentiality that would violate domestic and international securities laws. Moreover, to the extent that documents located on servers outside of the United States must be searched, Item 4(d) may create numerous additional instances in which companies might be placed at risk of violating local data privacy laws to ensure compliance with the HSR rules. (Under present Item 4(c) such instances are usually easy to address as the 4(c) search is limited to members of the deal team.)

The ICC appreciates the FTC’s interests in these documents, but questions whether the benefits of early production outweigh the attendant risks and burdens described above. The FTC asserts that the limitation of Item 4(d)(ii) to documents prepared by bankers, consultants and other outside advisors within two years of the filing date would increase the yield of useful information while mitigating the burden of increased document production. Even assuming, however, that the FTC is correct in this regard, the two-year limitation does little to reduce the number of custodians whose files would have to be searched for potentially responsive documents if Item 4(d)(ii) is not limited to documents created for the notified transaction. Accordingly, the two-year limitation does not obviate the concerns about confidentiality and privacy discussed above. Likewise, ICC does not dispute the FTC’s assumption that, at least in some cases, documents prepared by outside consultants may contain useful descriptions of markets and the nature of competition in them. The question is whether this information is sufficiently important to warrant the attendant burdens and risks associated with its collection, review and production so early on in the HSR process. There is no question that the Agencies have the authority to request this information at a later stage, after the clearance process and once potential competitive concerns have been identified. The only reason to compel their production up front is if the FTC believes that this material would uniquely divulge potential competitive concerns not disclosed in either the HSR Form or the materials produced pursuant to Item 4(c). ICC respectfully submits that it is highly improbable that documents created for purposes *other than* analyzing the notified transaction would identify competition concerns not revealed by overlapping NAICs codes or in the 4(c) documents.

Proposed Item 4(d)(i) raises similar issues insofar as the request is not limited to documents prepared for the notified transaction. In addition, although it is purportedly limited to "offering memoranda", the rule also calls for the production of vaguely-defined “documents that serve [the] function” of offering memoranda. A generous view of this term might include a variety of documents, none of which were prepared in connection with the transaction being notified. ICC submits that the use of such ambiguous terminology creates the potential for compliance problems. As the FTC is aware, in the vast majority of transactions, none of which raise any competitive concerns, the parties’ primary focus is to comply with the HSR requirements as quickly as possible, thereby ensuring that the waiting period expire at the soonest possible moment. In such cases, and to avoid potential compliance issues, parties will necessarily have to search for a wide swathe of material to ensure that all potentially responsive materials are captured. This will impose needless compliance costs on transactions where such additional material adds nothing to the Agencies’ preliminary review. Again, ICC respectfully submits that such materials are more properly requested and produced after transactions have cleared to a case team and an investigation is opened.

Also troubling is the FTC’s proposal to expand revenues that must be reported to include detailed breakdowns from the non-US manufacturing operations of the filer and any entity it controls, and

classify those revenues by 10-digit NAICS codes. Currently, the HSR Form requires revenues by NAICS code only for US operations. Unlike US operations, non-US operations do not submit NAICS code revenues to the Bureau of Labor Statistics. Allocation of revenues by NAICS codes is typically not a familiar procedure for non-US operations and personnel, so determining the correct 10-digit code applicable to sales from foreign operations and allocating the revenues appropriately would be very time consuming and burdensome. Again, this burden would be borne by all HSR filers, not just by the parties to the small number of transactions that raise antitrust concerns. ICC therefore urges the FTC to reconsider requiring NAICS codes from non-US-based operations.

Finally, ICC is also troubled by FTC's proposed expansion of groups of entities to be canvassed by a filer to include all "associates". Currently, an HSR Form requires information about the "ultimate parent entity" of an acquiring entity and all entities it controls. The "ultimate parent entity" is the highest entity in the same chain of control as the entity involved in the acquisition that is not "controlled" by any other entity. For corporations control is defined as either (i) holding 50 percent or more of the voting securities of the corporation, or (ii) having the contractual power presently to designate 50 percent or more of the directors of the corporation. For partnerships and LLCs control is defined as either (i) having the right to 50 percent or more of the profits of the entity, or (ii) having the right to 50 percent or more of the assets upon dissolution. These rules have provided well-understood and easily-applied guidance as to the scope of HSR filings. Requiring filers to determine which entity may be an "associate" and whether the associate has either a subsidiary or a minority holding in an entity that derives revenues from the same NAICS code as the target would increase the complexity, burden and expense of HSR filings. For these reasons, ICC believes that the FTC should reconsider requiring information on "associates".

The recurrent theme of the FTC proposals with which ICC takes issue is that they would expand the HSR filing burden not just for parties to transactions that have raised antitrust concerns but for *all* HSR filers. In addition to the fact that this runs directly counter to international norms, imposing the very unnecessary costs and burdens on merging parties and third parties that the ICN and the OECD explicitly urge against, it also runs counter to the intent of the Hart-Scott-Rodino Act, which was to create an "effective preliminary antitrust review". The FTC concluded in 1978 that the criterion in item 4(c) of the HSR form, which require the inclusion of certain documents analyzing the competitive aspects of a transaction *only if created in connection with the transaction,* are "easily administrable and should yield a reasonable number of genuinely important documents." [4] Item 4(c) places far less significant burdens on HSR filers than would the FTC's proposed modifications, and it has generally proven sufficient to allow the FTC and the Department of Justice to identify those few transactions that raise substantive antitrust questions. Moreover, the agencies have always been free to obtain additional documents following receipt of the HSR filing, should a significant substantive antitrust issue emerge.

In light of the questions raised herein, it appears that the Commission may also wish to consider whether the additional information collection burdens to be imposed under the Commission's proposals trigger the requirements of the Paperwork Reduction Act, 44 U.S.C. §3501 *et seq*. It does not appear that the specific standards and procedures required by the Act are met with regard to these proposals.

These proposed changes to the HSR filing requirements create unnecessarily onerous burdens for companies, are not justified by agencies' experience in administering the HSR Act, and so expand document production that they are likely to hinder agencies' ability to conduct effective preliminary antitrust reviews, rather than enhancing the process. For all of the foregoing reasons ICC urges the FTC to modify these proposed changes.

[4] 43 Fed. Reg. 33525 (July 31, 1978).

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

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