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Dear Sir

Comments of the Antitrust Committee of the International Bar Association regarding the Proposed U.S. Horizontal Merger Guidelines

The Working Group of the International Bar Association's Antitrust Committee ("IBA") hereby encloses for your consideration a submission regarding the Proposed U.S. Horizontal Merger Guidelines published by the Federal Trade Commission and the U.S. Department of Justice.

The IBA is grateful for this opportunity to comment on the Proposed U.S. Horizontal Merger Guidelines and appreciates the willingness of the Federal Trade Commission and the U.S. Department of Justice to listen to its comments and suggestions.

The Co-chairs of the Working Group and Officers of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail, should that be of interest.

Yours faithfully

Neil Campbell
Co-Chair
Antitrust Committee

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Encl 1

cc *William Baer - Co-chair - IBA Working Group*
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COMMENTS OF THE INTERNATIONAL BAR ASSOCIATION REGARDING THE PROPOSED U.S. HORIZONTAL MERGER GUIDELINES

The Antitrust Committee of the International Bar Association (the "IBA Antitrust Committee") welcomes the opportunity to submit its comments regarding the Proposed Horizontal Merger Guidelines ("Proposed HMG"). Established in 1947, the IBA is the world's leading organization of international legal practitioners, bar associations and societies. It has a membership of more than 40,000 lawyers and 197 bar associations and law societies spanning all continents. These comments draw on our members' diverse perspectives and focus on the implications these revisions are likely to have for merger control around the world. A list of the members of the Working Group are set out in the Annex to this submission.

The IBA Antitrust Committee commends the efforts of the United States Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") to update the Guidelines. The 1982, 1984 and 1992 Guidelines provided a useful analytical framework for merger analysis and that framework assisted in the development of more enlightened merger analysis in the U.S. and around the world. But as competition law, economic approaches to merger assessment, and enforcement practices have evolved in the 18 years since adoption of the 1992 Horizontal Merger Guidelines ("1992 HMG"), the business community and competition law practitioners need guidelines that make the agencies' current analytical framework transparent. Transparency not only benefits parties to a transaction, but also provides competition authorities across the globe with a better understanding of the analytics underlying enforcement decisions by the U.S. competition authorities.

The IBA Antitrust Committee generally supports the Proposed HMG. The Agencies' emphasis on the fact-specific nature of merger review is appropriate because every merger is different. The IBA Antitrust Committee also agrees that merger analysis should be flexible, not mechanical. The IBA Antitrust Committee believes, however, that defining markets in merger analysis is not inconsistent with the goal of flexibility. Market definition is a useful discipline for all competition agencies. It assists in grounding the competitive analysis, serves as a valuable reality check on the forward-looking predictions associated with merger review, and provides both a measure of predictability and substantiality to the analysis of competitive effects. For that reason, as the ICN put it recently, "[a]gencies generally should address the competitive effects of a merger within economically meaningful markets."¹ Indeed, the U.S. agencies regularly engage in the market-definition exercise in merger investigations and invariably plead a relevant antitrust market in subsequent litigation. Because the Proposed HMG are likely to influence merger analysis in other jurisdictions, the IBA Antitrust Committee urges the Agencies to further consider the role market definition should play in their merger review as reflected in their guidelines.

¹ See <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>. At the ninth annual ICN conference in Istanbul, the ICN recently adopted Recommended Practices for substantive merger analysis including one on market definition: "Agencies generally should address the competitive effects of a merger within economically meaningful markets. The hypothetical monopolist test is an appropriate test to determine the relevant market(s) in which to analyze the competitive effects of a merger." See the U.S. DoJ's Press Release of April 29, 2010 available at http://www.justice.gov/atr/public/press_releases/2010/258303.htm.

A section by section discussion follows:

Section 2. Evidence of Adverse Competitive Effects.

The IBA Antitrust Committee believes that this section will be helpful to parties and counsel by enhancing transparency regarding the evidence used by the Agencies to assess the likely competitive effects of a merger. The section could be improved, however, if the draft more clearly differentiated between *factors* relevant to the merger analysis and *types* of evidence considered by the Agencies. In Europe, for example, this differentiation is made by including in the Commission's Horizontal Guidelines only the factors, or standards, that the Commission uses to assess whether a proposed combination might lessen competition,² while leaving the discussion of the types of evidence mainly to the Best Practices document.³ Customer testimony, for example, is a *type* of evidence, as is regression analysis, pricing evidence, or documentary evidence of intent.

On the other hand, whether the target is a "maverick" is a factor to be taken into account by the Agencies for purposes of establishing whether significant adverse competitive effects are likely to result,⁴ and it is therefore surprising to see maverick considerations listed as a *type* of evidence used by the Agencies.⁵

² See, e.g., EUROPEAN COMMISSION, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, para. 24 *et seq.*, available at http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#hor_guidlines. Compare also AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *Merger Guidelines (November 2008)*, paras. 7.1–7.70 (listing certain key "merger factors" and examples of the evidence used to assess the role, if any, played by that factor in a given case).

³ See DG Competition Best Practices on the conduct of EC merger proceedings of 20/01/2004, available at <http://ec.europa.eu/competition/mergers/legislation/legislation.html>. See also the Commission's Notice on the definition of relevant market for the purposes of Community competition law which discusses certain types of evidence used for purposes of defining the relevant markets (available at http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#relevant_market).

⁴ Cf. e.g., EUROPEAN COMMISSION, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, paras. 37–38, which treats elimination of a maverick as such a factor. One of the first cases in which the Commission had to deal with this factor under the new SIEC-test was *T-Mobile Austria/tele.ring* in 2006. See COMP/M.3916 (*T-Mobile Austria/tele.ring*). This case illustrates the Commission's investigation techniques and the difficulties faced in substantiating theories of harm on grounds of the elimination of a maverick (as well as the likely far-reaching scope of any remedy solution the parties will have to commit to in order to fill the "competitive gap" that results from the elimination of the maverick). See Luebking, *T-Mobile Austria/tele.ring: Remediating the loss of a maverick*, COMPETITION POLICY NEWSLETTER, No. 2 [2006] 46 *et seq.*

⁵ Maverickness is structural, based on a firm's size and cost structure relative to its rivals, rather than behavioral. See, e.g., Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. Rev. 135, 175 (2002) ("A variety of structural characteristics might give a firm a greater economic incentive to prefer a lower coordinated price than do its rivals or otherwise deviate from terms of coordination when its rivals would not."). It is this structure that could give a firm the incentive to initiate price cutting or resist price increases, or the ability and incentive to expand production rapidly using available capacity. This evidence section could usefully set out the types of evidence that would establish such a structure.

The IBA Antitrust Committee also has the following specific suggestions regarding Section 2.2.1 of the Proposed HMG:

- The Proposed HMG state that “if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its customers are not highly sensitive to price.” The IBA Antitrust Committee believes such attention to margins overstates the relationship between margins and likely anticompetitive effects. Prices may exceed true short-run marginal cost but not lead to an accurate measure of elasticity because of high fixed costs, for various reasons, including research and development. At the very least, to help avoid improper application of this statement, the Proposed HMG should make clear that references to “margins” means “economic margins” that account for fixed costs, and not simply marginal costs.
- “Reduction in product variety” does not belong with the other examples of anticompetitive effect. Reductions in variety often occur in mergers without any adverse economic effect. At a minimum, the Proposed HMG should clarify the circumstances where such an inference might be appropriate, as a reduction in product variety, without more, is not necessarily anticompetitive and may signify efficiencies.
- This subsection should make clear that intent evidence will be considered more probative, the more closely it is tied to the merger.
- The IBA Antitrust Committee recommends deleting the last two sentences of this section which suggest that a high acquisition price can evidence a premium capitalizing the creation of market power. Not only do the Proposed HMG fail to provide guidance on what is meant by a high price, but in fact most deals involve a premium and do not result in competitive issues, making this point potentially misleading.

3. Targeted Customers and Price Discrimination.

The IBA Antitrust Committee recognizes that the concepts set out in this section have long influenced market definition and competitive effects analysis. But, because price discrimination deals with what is actually a special case with respect to market definition and shares, and in the evaluation of competitive effects, this discussion would be best set forth after the Proposed HMG’s discussions on these specific topics (i.e. after Section 7).

4. Market definition.

Section 4 of the Proposed HMG state that market definition is “not an end in itself,” and that while the market definition exercise is “useful to the extent it illuminates the merger’s likely competitive effects,” the Agencies’ analysis “need not start with market definition” if other analytical tools illuminate the ultimate question of whether the merger is likely to lessen competition. This more flexible effects-based approach to market definition is to be welcomed

to the extent that it reflects the Agencies' practice and focuses the merger control process on economic effects rather than formalistic distinctions.⁶

Other jurisdictions, at least under certain circumstances, have embraced this more flexible approach. In Europe, for example, the UK⁷ and the Dutch⁸ merger control authorities each decided not to apply the usual market definition framework in two cases in 2008. While the decisions not to apply the standard market definition framework was highly fact-specific and based on factors intrinsic to the economic activity under investigation, it demonstrates the need for a flexible and fact-specific approach to merger analysis.

At the same time, the 1992 HMG have served as a model for enforcement practice around the world by providing an organized structure for analysis, and market definition may be especially useful to less experienced agencies, as it was to the U.S. agencies following the 1982 and 1984 Merger Guidelines. In this context, the Agencies must be mindful that an overly flexible approach to merger analysis in general, particularly untethering merger review from market definition, may send the wrong message to other jurisdictions and lead to unintended consequences—a less predictable, less consistent and less transparent approach to merger review, with adverse consequences for parties to mergers requiring notification in those jurisdictions. Thus, the Agencies may wish to emphasize that whether the market definition is an appropriate analytical starting point is highly dependent on the particular facts of a specific transaction.

In addition, the IBA Antitrust Committee urges the Agencies to consider whether the inclusion of supply side considerations in defining markets, as done by other jurisdictions, more appropriately captures the competitive market dynamics. For instance, the European Commission, the Australian Competition & Consumer Commission, and the German Bundeskartellamt all reserve a role for supply-side substitutability in the market definition process under certain clearly defined circumstances.⁹ As the EC merger control rules explain, if

⁶ The U.S. Supreme Court recently reaffirmed the desirability of focusing on economic effects, rather than legal formalisms, in antitrust analysis. *American Needle, Inc. v. National Football League*, 2010 LEXIS 4166 (May 24, 2010).

⁷ In 2008 the UK's Office of Fair Trading (OFT) cleared the acquisition of GCap Media plc by Global Radio UK Limited, noting that in markets where products of different firms are highly differentiated, "it may be more probative to test the validity of unilateral effects theories of harm by considering real world evidence relating to the direct competitive constraint actually exercised by one party on the other, and removed by the merger, rather than embark upon an analytical exercise featuring hypothetical monopolists in an effort precisely to define what may be fuzzy market boundaries [...]."

⁸ The Dutch competition authority (NMa) did not perform a standard market definition exercise in a case involving the merger of the Netherlands' only two nationwide printed telephone directories (*European Directories/Truvo Nederland*), and rather based its assessment on an effects analysis. The market investigation found that in the event of a price increase by all directories, many customers would stop advertising in the directories without switching to an alternative medium. Under these circumstances, the NMa judged that the 'market definition instrument' would not be a meaningful aid to the overall assessment.

⁹ EUROPEAN COMMISSION, *Commission notice on the definition of relevant market for the purposes of Community competition law*, paras. 20–23, available at http://ec.europa.eu/competition/mergers/legislation/notices_

“suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices,” then the “additional production that is put on the market will have a disciplinary effect on the competitive behavior of the companies involved . . . equivalent to the demand substitution effect.”¹⁰ The IBA Antitrust Committee suggests that the Agencies further examine the appropriateness of supply considerations in defining relevant markets.

5. Market Concentration.

The IBA Antitrust Committee supports the Proposed HMG’s revision of the market concentration index thresholds. The thresholds of the 1992 Guidelines no longer accurately describe enforcement practice, if they ever did.

While the IBA Antitrust Committee appreciates that market concentration thresholds are used by the courts to create a rebuttable presumption of the competitive effects of a transaction and believes that presumptions are a useful means to provide merging parties with an indication of the difficulty for clearance where market concentration and the change in concentration are high, the IBA Antitrust Committee does not believe that the Agencies should incorporate such presumptions for less-concentrated markets for two reasons:¹¹ (1) the highly fact specific nature of merger review articulated in the Proposed HMG and (2) the recent economic literature that questions whether the correlations between market concentration and risks of anticompetitive effects is as significant as once believed.¹²

Further, the IBA Antitrust Committee notes that the conclusion reached with respect to HHI increases of more than 100 points in moderately concentrated markets is identical to the conclusion reached with respect to an increase in HHI of between 100 and 200 points in highly concentrated markets. Whether or not these conclusions are appropriate, an identical conclusion in these two situations seems illogical. A more consistent approach would be to indicate that moderately concentrated markets which involve an increase of HHI of more than 200 points would potentially raise significant competitive concerns and often warrant further scrutiny.

Moreover, the IBA Antitrust Committee believes this section highlights the continued role for market definition in merger analysis. For market concentration to have meaning, it presupposes a defined market. Thus, even under the more flexible approach described in the

on_substance.html#relevant_market; AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *Merger Guidelines (November 2008)*, paras. 4.23–4.26, available at <http://www.accc.gov.au/content/index.phpml/itemId/809866>.

¹⁰ *Id.*, para. 20. This can be the case for a supplier of a wide range of qualities or grades of one product; different qualities may not be substitutable for certain customers, yet suppliers may be able to offer and sell the various qualities immediately and without the significant increases in costs. *Id.*, at para. 21.

¹¹ For instance, the Canadian Competition Act states “the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.” Canadian Competition Act § 92(2).

¹² See, e.g., Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, Competition Policy Center, Institute of Business and Economic Research, UC Berkeley (November 25, 2008).

Proposed HMG, the Agencies appear to accept the premise that market definition is a predicate to other elements in the analysis.

6. Unilateral Effects.

The IBA Antitrust Committee commends the Agencies for their updated and more extensive discussion of unilateral effects. The IBA Antitrust Committee believes that the Proposed HMG's inclusion of specific economic tools for analyzing the level of competition between differentiated products, such as "diversion ratios" and "merger simulation," provides greater transparency as to the analytics employed at the agencies. The IBA Antitrust Committee, however, believes that further development of the concepts in the guidelines would be useful to merging parties.

In particular, the Draft could be much stronger in providing specific guidance as to when certain models may be applied and how relevant considerations may be balanced. For example, Section 6.1 of the Proposed HMG summarize the principal considerations in upward pricing pressure ("UPP") analysis, but offers no insight into what levels of diversion and margin would lead to competitive concerns. The Proposed HMG could be strengthened by providing, subject to certain assumptions, that unilateral effects will be regarded as likely when the shares and margins are above certain levels.¹³ Similarly, Sections 6.2 - 6.4 identify factors relevant to other theories of competitive effects, but the levels at which these factors trigger competitive concern are either not expressed or are expressed in terms too general to provide meaningful guidance (e.g., "relatively high" or "relatively low"). Exclusionary unilateral effects are mentioned twice in the Proposed HMG (see Sections 1 & 6) but are neither defined nor explained by reference to the considerations relevant to their analysis.

Broader recognition should be given to the importance of repositioning and other forms of dynamic response. By limiting the discussion of repositioning to Section 6.1, the Proposed HMG leave the misimpression that repositioning is of no relevance to other unilateral effects theories. The IBA believes that repositioning is equally relevant to other unilateral effects theories.

7. Coordinated Effects.

The Proposed HMG state that the Agencies may challenge mergers in moderately concentrated markets that "in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how this will happen." This proposes that intervention may be possible without a substantiated theory of harm, even in markets where there might be several competitors and where there is coordinated interaction that does not amount to a tacit understanding between rivals. The IBA Antitrust Committee respectfully submits that intervention without a fully articulated and developed coordination case is out of

¹³ See Bailey, Leonard, Olley and Wu, Merger Screens: Market Share-Based Approaches Versus "Upward Pricing Pressure," Antitrust Source 9 (February 2010).

step with other jurisdictions¹⁴ and could potentially encourage other jurisdictions to take too expansive an approach under a coordinated effects theory.

8. Powerful Buyers.

The IBA Antitrust Committee welcomes the specific reference to buyer power as an element of the competitive analysis. Buyer power, indeed, can represent an important countervailing factor to limit the merged entity's ability to raise prices post-merger. The Proposed HMG will in this respect also reflect an approach closer to that of other jurisdictions (e.g., the EU and Australia).

The IBA Antitrust Committee believes, however, that the Proposed HMG would benefit from a discussion of the specific ways in which countervailing power can be exercised such as the buyer's ability to: (1) switch to other suppliers should the merged entity decide to increase prices;¹⁵ (2) credibly threaten to vertically integrate;¹⁶ or (3) sponsor new market entry by persuading a potential entrant to enter by committing to place large orders with the new entrant.¹⁷ A buyer's exercise of leverage by refusing to buy other products from the merged entity may be particularly potent when the merged entity sells a range of products.¹⁸

9. Entry.

In general, the IBA Antitrust Committee considers dynamic response (be it "rapid entry" considered in Section 5, repositioning considered in Section 6, or entry considered in Section 9) as an important factor in the competitive interaction of many markets and encourages the Agencies to appreciate the often significant competitive pressure that a likely dynamic response can have on the combined entity, irrespective of its market share.

As to the absence of historic entry, the IBA Antitrust Committee believes that the discussion in the Proposed HMG should distinguish between non-dynamic markets and dynamic ones. The absence of historic entry is much less meaningful in dynamic markets.¹⁹ In these markets, the lack of historic market entry may show that the existing companies have prevailed in heavy competition based on their R&D efforts and innovation, and does not prove that the market entry is difficult. Further, in innovative markets characterized by dynamic competition it may be difficult to differentiate retrospectively whether entry has actually occurred or if markets have evolved rapidly to render a new market (e.g., whether the introduction of netbooks is best

¹⁴ See, e.g., Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala*; OJ C 223, (Aug. 30 2008) (The European Court's judgment considered that the Commission would need to elaborate its theory of harm and its evidence in order to intervene on the basis of coordinated effects).

¹⁵ See EU Horizontal Merger Guidelines at paragraphs 64 & 65; ACCC Guidelines at paragraph 7.49;

¹⁶ See EU Horizontal Merger Guidelines at paragraph 65; ACCC Guidelines at paragraph 7.48.

¹⁷ See EU Horizontal Merger Guidelines at paragraphs 65 & 66; ACCC Guidelines at paragraph 7.51.

¹⁸ See EU Horizontal Merger Guidelines at paragraph 65; ACCC Guidelines at paragraph 7.49.

¹⁹ See, e.g., Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010) ("In any nascent market there will be uncertainty about the path of competition and the durability of early leads in market share")

characterized as entry into the laptop computer market or creation of a new “netbook” market). The IBA Antitrust Committee therefore believes that the HMG should not give “substantial weight” to the absence of historical entry in all types of market but only in non-dynamic ones.

The IBA Antitrust Committee believes that it would be useful to discuss in the Proposed HMG certain typical forms of entry barriers since this would provide practical guidance as to the circumstances contributing to the difficulty of entry. In this respect the IBA would like to refer to the European Commission’s Horizontal Merger Guidelines, which include a description of entry barriers such as regulatory obstacles, technological advantages of incumbents or particularly strong position of the incumbents due to, *e.g.*, excess capacity.²⁰ On the other hand, a market entry may be particularly likely in some circumstances; *e.g.*, where the markets are expected to experience high growth or where suppliers in other markets already possess production facilities that could be used to enter the market in question.²¹

The IBA Antitrust Committee is also concerned with the focus on margins in the entry section. It is unclear that margin evidence alone is meaningful, without consideration of changes in the products sold in the relevant market over time. The IBA Antitrust Committee therefore recommends that this discussion be supplemented appropriately.

The Proposed HMG laudably abandon the uncommitted/committed formulation of the present HMG in favor of rapid entrants (Section 5.1) and an unnamed group of entrants that are apparently “less rapid” entrants (Section 9). However, no guidance is given as to how to distinguish the rapid from the less rapid or as to the role of sunk costs. Without some identifiable demarcation between rapid and less rapid entry—the one-year threshold having been abandoned—the Proposed HMG offer less meaningful guidance they could or should. The IBA also believes that the detailed calculus of sales opportunities available to entrants as opposed to minimum viable scale in Section 3.3 of the 1992 HMG should not have been eliminated and replaced with a less helpful reference to “sales opportunities realistically available to entrants.”

12. Mergers of Competing Buyers.

The IBA welcomes the addition of a section on mergers of competing buyers. It agrees with the Proposed HMG that a merger of competing buyers can be found anticompetitive regardless of the effects on the downstream market. The IBA Antitrust Committee believes, however, that this section would benefit from an express recognition that, as a matter of reality, a merger of competing buyers will rarely have an anticompetitive effect in the upstream market unaccompanied by an anticompetitive effect in the downstream market. The IBA Antitrust Committee believes that most monopsony cases will also involve such effects.²² The section

²⁰ EUROPEAN COMMISSION, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, para. 71.

²¹ EUROPEAN COMMISSION, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, para. 72 - 73.

²² This can be seen, for example, in a recent case from the United Kingdom called *Stonegate Farmer Limited/Deans Food Group* (April 2007), involving a merger of egg distributors. The merger was condemned on the ground that it would give the merging parties the ability to extract lower prices from egg producers through

should acknowledge that as a practical matter in most monopsony cases the upstream and the downstream effects will be difficult to separate.

13. Partial Acquisitions.

The IBA Antitrust Committee welcomes the addition of a section on partial acquisitions and in general agrees with the analysis proposed therein. The IBA Antitrust Committee believes, however, that this section would benefit from an express recognition that the ability of a minority shareholder to influence decisions also depends on the structure of the remaining shareholding. For example, a minority stake could confer significant influence over a firm if the remaining shareholders are numerous and unorganized.

increased market power, but also on the ground that it would reduce the volume of eggs produced in the U.K., thereby raising prices to retailers and to final consumers. It was also feared that the merged entity could limit entry from other suppliers through long-term contracts.

ANNEX

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