

# RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES

## IV. Review Periods

### **A. Merger reviews should be completed within a reasonable period of time.**

#### WORKING GROUP COMMENTS

Original Comments (June 2003)

Amended (April 2018)

Comment 1: Merger transactions are almost always time sensitive, and the completion of merger reviews by competition agencies is often a condition to closing either by operation of law or contract. Merger reviews should therefore be completed within a reasonable time frame. However, merger transactions may present complex legal and economic issues. In such cases, competition agencies need sufficient time to properly investigate and analyze the transaction in order to reach a well-informed decision. A reasonable period for review should take into account, among other things, the complexity of the transaction and the competition issues raised, and the timeliness of the merging parties' responses to information requests.

Comment 2: Suspensive jurisdictions need to have timely review periods because parties are barred from proceeding with the transaction during the pendency of the agency's review. Completion of merger reviews within a reasonable time frame in non-suspensive jurisdictions also promotes effective enforcement because the passage of time likely renders it more difficult for the competition agency to conduct its investigation and to obtain effective post-closing remedies. Initial review periods should expire within six weeks or less, and extended review periods should be completed or capable of completion within six months or less following the submission of the initial notification(s). To facilitate multijurisdictional coordination, non-suspensive jurisdictions should consider conforming their initial review period to suspensive regimes.

### **B. Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.**

#### WORKING GROUP COMMENTS

Original Comments (June 2003)

Amended (April 2018)

Comment 1: Given that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such transactions to proceed expeditiously. Many jurisdictions achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period (and in some cases an abbreviated notification form), and subjecting only transactions that raise material competitive concerns to more extended review periods. In order for merging parties to anticipate the review time frame, jurisdictions should make eligibility criteria for abbreviated initial review periods publicly available.

Comment 2: In some merger review systems, the initial review period is referred to as “Phase I,” while the extended review period is referred to as “Phase II.” Other jurisdictions employ single phase or multi-phase review procedures that likewise permit transactions that do not present material competitive concerns to proceed expeditiously following an abbreviated review and/or waiting period.

**C. In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.**

#### WORKING GROUP COMMENTS

Original Comments (June 2003)

Amended (April 2018)

Comment 1: In suspensive jurisdictions, the parties' ability to lawfully consummate notified transactions depends upon the expiration of applicable waiting periods. Accordingly, initial waiting periods should be subject to definitive and readily ascertainable deadlines to permit transactions that do not present material competitive concerns or present concerns that can be readily identified and effectively addressed in the initial period to proceed with minimal delay. While certain transactions will require more extended reviews, waiting periods associated with such reviews also should expire within determinable time frames, whether measured from the date of the initial filing, the commencement of a distinct second phase or similar proceedings, or from the merging parties' submission of information the competition agency requires to complete the extended review.

Comment 2: Competition agencies should ensure that notifying parties are informed within a reasonable time frame as to whether the filing is complete or whether there are deficiencies in their submissions. In the latter case, competition agencies should inform the parties of the specific details of the deficiencies to facilitate the prompt submission of corrective filings.

Comment 3: Some competition agencies have the power to issue requests for information that have the effect of interrupting or suspending the waiting period. To avoid unnecessary uncertainty, these agencies should identify the circumstances in which they will use this power. If the review periods are suspended pending receipt of additional information, competition agencies should seek to consolidate information requests in order to increase the predictability of the anticipated duration of the waiting period.

Comment 4: Parties should be free to consummate properly notified transactions upon the expiration of specified waiting periods unless the competition agency takes formal action to extend the waiting period (for example, by initiating second phase proceedings), to accept or impose conditions to closing, or to prohibit or enjoin the transaction. In certain jurisdictions, the expiration of applicable waiting periods does not bar subsequent challenge by the competition agency, but parties are nevertheless legally permitted to consummate transactions following such expiration. In order to ensure legal certainty and predictability, the scope of the power granted to competition agencies to challenge a transaction after the expiration of applicable waiting period should be clearly defined and publicly available.

Comment 5: The existence of specified waiting periods should not preclude competition agencies from granting early termination once they determine that a proposed transaction does

not raise material competitive concerns. Accordingly, jurisdictions should have procedures that enable the competition agency to grant early termination of applicable waiting periods.

Comment 6: In certain situations, the specified waiting periods may not be sufficient for the competition agency to reach a determination. Additional time may be needed, for example, for particularly complex transactions or to finalize mutually acceptable conditions for clearance. To accommodate these situations, procedures should be sufficiently flexible to allow for a limited extension, with the consent of the notifying party(ies), of applicable waiting periods to avoid the initiation of second phase proceedings or an adverse enforcement decision where such a result might be avoided by a limited extension. Competition agencies should not invite or encourage such extensions unless they have reason to believe that the extension would avoid a more protracted, formal extension of the waiting period or an adverse enforcement decision.

**D. In non-suspensive jurisdictions, initial merger reviews should be completed within a specified period following notification and any extended reviews should be completed within a determinable time frame.**

WORKING GROUP COMMENTS  
Original Comments (June 2003)  
Amended (April 2018)

Comment 1: Although merging parties are not legally prohibited from consummating transactions following notification in non-suspensive jurisdictions, the pendency of review may nevertheless impact the parties' practical ability or willingness to close prior to competition agency clearance. As a consequence, many of the timing considerations applicable to suspensive jurisdictions also apply to review periods in non-suspensive jurisdictions.

Therefore, initial review periods should be subject to definitive and readily ascertainable deadlines to facilitate clearance of transactions that do not present material competitive concerns with minimal delay, and extended review periods should be subject to determinable deadlines.

**E. Jurisdictions should adopt appropriately tailored procedures to accommodate particular circumstances associated with non-consensual transactions and sales of companies in financial distress.**

WORKING GROUP COMMENTS  
Original Comments (June 2003)  
Amended (April 2018)

Comment 1: Notification procedures designed primarily to cover negotiated transactions may be ill-suited for non-consensual transactions such as public bids and tender offers. In such transactions, the acquired firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in a notification and review process.

These difficulties may be especially pronounced in jurisdictions where notifications must be filed by both the acquiring and acquired firms or where joint notification is required. Non-

consensual transactions may also be particularly time-sensitive due to company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids.

Jurisdictions should adopt appropriately tailored procedures to account for the particular nature of these transactions. For example, jurisdictions have adopted some or all of the following measures designed to address specific issues raised by non-consensual transactions: shortened review periods (or, where applicable, waiting periods); permitting the applicable initial review period to commence upon filing by only the acquiring party (where filings by both the acquiring and acquired parties are normally required); waivers of information requirements relating to the target company in hostile situations; and derogations permitting the implementation of the bid before or during the review period, provided that the acquiring party does not exercise voting rights or does so only to maintain the full value of the shares. In hostile situations, competition agencies may exercise the power to request core information directly from the target when the acquirer cannot access it. In any case, these tailored procedures should be based on predictable principles in order to ensure legal certainty and due process for the notifying parties.

Comment 2: Jurisdictions should consider adopting procedures for expedited review of transactions involving sales of companies in financial distress (e.g., bankruptcy or similar restructuring), which would be the notifying parties' burden to demonstrate. The risks associated with the potential deterioration of the assets of such firms suggest that expedited review and/or waiting periods should be considered, whether by particularized rules or discretionary early termination. In suspensive jurisdictions, such situations may warrant allowing closing before the adoption of the final decision. Non-consensual sales by trustees in bankruptcy also may raise the difficulties set forth in the preceding Comment.