



September 27, 2023

Via email

United States Federal Trade Commission and United States Department of Justice – Antitrust Division

Attention: Mr. Robert Jones, Assistant Director, Premerger Notification Office, Bureau of Competition,
Federal Trade Commission

Ref. 16 CFR Parts 801–803 – Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project
No. P239300 - Public consultation regarding the proposed changes to HSR Form

Dear Mr. Jones and agency officials,

We are enclosing a submission prepared by the Mergers Working Group of the Antitrust Section of the International Bar Association.

The Co-chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the FTC and the DOJ Antitrust Division.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Samantha Mobley".

Samantha Mobley
Co-Chair Antitrust Section

A handwritten signature in black ink, appearing to read "Janet Hui".

Janet Hui
Co-Chair Antitrust Section



IBA ANTITRUST SECTION COMMENTS TO THE UNITED STATES ANTITRUST AGENCIES ON THE PROPOSED CHANGES TO THE MERGER PRE-NOTIFICATION FILING FORM

I. INTRODUCTION

This submission is made to the United States Federal Trade Commission and to the Antitrust Division of the United States Department of Justice (“FTC” and “DOJ”, respectively, and collectively the “Agencies”) on behalf of the Antitrust Section of the International Bar Association (“IBA”). The Section commends the US Agencies’ decision to undertake public consultations (the “Consultation”) regarding the proposed changes to the *Hart-Scott-Rodino Antitrust Improvements Act* pre-merger filing form (the “HSR Form”) and welcomes the opportunity to provide comments.

The IBA is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at <http://ibanet.org>.

The IBA’s Antitrust Section includes antitrust and competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. The extensive and varied experience of its members places the Section in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. These comments have been prepared by the Section’s Mergers Working Group (“MWG”) which includes members from the United States as well as other jurisdictions in the Americas, Europe and the Asia-Pacific region. Further information about the Section, including the submissions of the MWG and other working groups, is available at

We offer general comments as well as more detailed comments on certain specific elements of the proposals in the hope that they will assist the FTC and DOJ in their ongoing efforts to refine the antitrust review of mergers in the United States.

II. GENERAL COMMENTS

The IBA's Antitrust Section commends the FTC's and DOJ's solicitation of comments in connection with the proposed changes to the HSR Form, particularly in light of the substantial nature of the changes contemplated.

The Agencies have indicated that the proposed changes “would enable the Agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period, which is typically 30 days.” The Agencies have highlighted as key proposals revisions relating to provision of information regarding: (a) “transaction rationale and details surrounding investment vehicles or corporate relationships,” (b) “both horizontal products or services, and non-horizontal business relationships such as supply agreements,” (c) “projected revenue streams, transactional analyses and internal documents describing market conditions, and structure of entities involved such as private equity investments,” (d) “previous acquisitions”, and (e) “labor market issues by classifying employees based on current Standard Occupational Classification system categories.”¹ The Agencies acknowledge that the additional requirements will increase substantially the time and effort required for companies to file HSR, with the Agencies estimating that it will now take on average 144 hours to complete the form as compared to 37 hours under the current form.² The MWG believes that these estimates likely substantially understate the time that would be required to prepare filings that would contain the proposed information requirements.

The MWG appreciates the Agencies' focus on effective screening of transactions and agrees that effective merger review that minimizes errors in both under-enforcement and over-enforcement is in the public interest. Efficiency considerations are also important, because the cost burdens of merger review borne by the private parties and the resources used by the authorities involved in merger

¹ <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>

² Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42208 (June 29, 2023) (to be codified at 16 C.F.R. pt. 801 and 803).

reviews are substantial.

The MWG wishes to highlight for consideration, however, that the current filing thresholds in the US require notifications of thousands of transactions per year, a relatively limited percentage of which are subsequently subject to in-depth investigation and an even smaller percentage of which result in enforcement challenges by the FTC and DOJ. For example, in the Hart-Scott-Rodino Annual Report for Fiscal Year 2021, which was released by the FTC and DOJ in February 2023, the Agencies reported that a “record-breaking” 3,520 transactions were reported under the HSR Act (an increase from 1,637 transactions the prior fiscal year). Of those transactions, only 65 Second Requests were issued, representing 1.9% of the transactions reported under the HSR Act. In fiscal year 2021, the FTC ultimately brought 18 merger enforcement challenges and the DOJ brought 14 merger enforcement challenges. The percentage of notified transactions that received Second Requests in fiscal year 2021 was lower than previous years, but since fiscal year 2012, the percentage has never exceeded 3.7%.³

The FTC and DOJ are both founding and leading members of the International Competition Network, which seeks to promote effective enforcement of antitrust and competition laws in accordance with the rule of law. The International Competition Network’s Merger Working Group (“ICN Working Group”) has as its mission “to promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews.”⁴

The MWG agrees with the ICN Recommended Practices for Merger Notification and Review Procedures (“ICN Recommended Practices”), which state, “[i]nitial notification requirements should be limited to the information needed to verify that the transaction exceed 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.” The ICN Working Group’s comments note that “[b]ecause most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process.” The ICN Working Group cautions that “[j]urisdictions that review transactions of limited value, transactions with limited local nexus, or large numbers of transactions due to low jurisdictions thresholds should be particularly sensitive to any disproportionate burdens

³ Available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

⁴ [Merger - ICN \(internationalcompetitionnetwork.org\)](https://www.internationalcompetitionnetwork.org/).

arising from the breadth of their initial filing requirements.⁵

The MWG also agrees with the ICN Recommended Practices statement that “[i]nitial 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.” The ICN Working Group goes on to explain that “there are various ways to provide flexibility in the initial review” and that many jurisdictions use one or more of the following: (a) alternative notification formats, including short and long form notification options, (b) discretionary waivers, in which extensive initial notification requirements may be waived when the burden is not justified, and (c) discretionary supplementation, in which an abbreviated initial notification requirement may be coupled with procedures allowing agency staff to seek additional information during the initial review period. The ICN Working Group notes that “[w]hichever mechanisms are used to provide flexibility, competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns.”⁶

The MWG hopes that the following discussions of practices in the EU, China, Canada and Brazil will assist the FTC and DOJ in considering how proposed HSR changes may be refined in ways that allow for an efficient as well as effective first stage review process.

EU:

The EU merger control rules have recently been reformed to further increase the efficiency of the proceedings before the European Commission (the “EC”) effective September 2023.⁷ The main changes - which contrast starkly with the increased complexity of the proposed HSR form that makes no provisions for transactions that may warrant more simplified or expedited treatment - are as follows:

- introduced new “tick-the-box” filings in a further simplified procedure for the least problematic mergers;
- extended the scope of mergers that can benefit from the simplified procedure;
- introduced “flexibility clauses” that provide the EC with increased discretion to treat certain types of cases under the simplified procedure;
- introduced a “super-simplified” treatment for joint ventures without a local nexus or mergers

⁵ Section V.A.

⁶ Section V.B.

⁷ Please see the press release of the EC: https://competition-policy.ec.europa.eu/mergers/publications/simplification-merger-control-procedures_en

and acquisitions with no overlap between the parties;

- clarified the information requirements in filings; and
- introduced electronic filings as a default option (and established a secured file transfer system allowing the parties to send data up to 10 GBs).

China:

The State Administration for Market Regulation (“SAMR”) in China recently adopted the following measures to increase its efficiency:

- launched an online platform for online merger filing review;
- entrusted five provincial administrations for market regulation to review the simplified procedure filings; and
- implemented a targeted review strategy with specific focus on the realm of technology/digital platforms. Filers are required to check the box to indicate any involvement with a platform enterprise when submitting the filings through the online system. If a platform enterprise is involved, SAMR will pay special attention to examine the potential competitive impacts.

Canada:

In accordance with the ICN Recommended Practices, Canada uses a two-phase filing system in which the first phase is based on relatively focused filing requirements that enable the Canadian Competition Bureau (“CCB”) to identify the relatively small proportion of transactions that merit an in-depth second phase review (which is then commenced by an extensive Supplementary Information Request, similar to a U.S. Second Request). In addition, the CCB can review and challenge non-notifiable mergers (for up to one year after closing), which provides market participants with the opportunity to identify and bring to the attention of the CCB transactions that may be anti-competitive.

Brazil:

Brazil is a country with relatively low filing thresholds, which generates a high number of filings. On the other hand, Brazil has adopted two types of merger review proceedings: (1) the so-called “fast-track” proceeding; and (2) the regular procedure. The Administrative Council for Economic Defence (“CADE”) has managed to operate the review for fast-track cases in a timely manner, with clearance decisions being issued in up to 30 days from filing. Both the expected timeline and level of information required are different between these proceedings: fast-track cases use a short form which significantly limits the data and documents that CADE deems essential to identify the relatively small proportion of

transactions that would be subject to a regular review. More recently, CADE announced that it is considering further measures, including the adoption of a pure electronic filing form for fast-track cases in order to expedite this review even further.⁸

III. COMMENTS ON OPTIONS FOR MORE EFFICIENT TREATMENT OF STRAIGHT-FORWARD CASES

As the FTC and DOJ have acknowledged, the proposed HSR Form significantly increases the burden on parties to provide a wide range of information and imposes the same extensive questions on all transactions (with concomitant impact on Agency resources), but it does not increase the thresholds in order to capture fewer transactions. This combination will create significant unnecessary expense and delay for transactions that are clearly not anticompetitive, while concurrently increasing the burden on the Agencies' staff to wade through a substantially larger set of information on transactions that are highly unlikely to raise material competition issues.⁹

As noted above, the ICN Recommended Practices and the regimes in numerous other jurisdictions identify several options for reducing this tension and restoring greater efficiency and balance for the many deals that do not raise significant concerns including:

- use of a different form and/or simplified process for non-horizontal or other transactions that are unlikely to be problematic;
- additional categories of filing exemptions; and/or
- a waiver or irrelevancy carve-out mechanism to enable case-by-case reductions of burdensome elements.

If the Agencies were to implement a "short form" for transactions that are unlikely to raise competition issues, several elements of the proposed form could be eliminated to align it with the short form processes in other jurisdictions. For example, some of the new document production requirements could be eliminated for simple transactions (e.g., "all other agreements between any entity within the

⁸ See, e.g., "Brazil's CADE carrying out tests on digital system for merger reviews, de Andrade says", https://content.mlex.com/#/content/1426554/brazil-s-cade-carrying-out-tests-on-digital-system-for-merger-reviews-de-andrade-says?referrer=search_linkclick, and "Brazil's CADE aims to reduce average deal-review time to 25 days, Superintendent Barreto says", https://content.mlex.com/#/content/1420682/brazil-s-cade-aims-to-reduce-average-deal-review-time-to-25-days-superintendent-barreto-says?referrer=content_seehereview.

⁹ See, e.g., <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-fines-capital-one-ceo-richard-fairbank-repeatedly-violating-antitrust-laws>.

buyer and any entity within the target company that is in effect within one year of filing, including licensing agreements, supply agreements, non-competition or non-solicitation agreements, purchase agreements, distribution agreements and franchise agreements”). Or, as in the EU (see below), the Agencies could create a category of deals for which no documents would need to be attached.

Other elements of the proposed Form that could be pared back or eliminated entirely for simplified filings include:

- Identifying all minority shareholders (including limited partners) holding more than 5% of the acquiring entity, any entity that controls or is controlled by the acquiring entity, or any entity that has been or will be created for completing the transaction;
- For the acquiring entity and any entity it controls or is controlled by, identifying individuals or entities that (i) provide credit exceeding 10% of the entity’s value, (ii) hold options, warrants or nonvoting securities exceeding 10% of the entity’s value, (iii) are board members/observers or have nomination rights for those positions and (iv) have agreements to manage entities related to the transaction;
- Identifying all officers, directors and board observers of all entities within the organizational structures of the filer (i.e., any controlled subsidiary entities) for the past two years, and for each such individual, identifying any other entities for which the individual has served in such roles within the last two years;
- Narratives describing the business of the acquiring person, strategic rationales for the transaction, a diagram of the deal structure and a timeline of key dates and conditions to closing;
- Information about employees including: (i) the five largest categories of workers based on their occupational categories as defined by the Bureau of Labor Statistics; (ii) the five largest Standard Occupational Classification codes in which both parties employ workers; (iii) overlapping geographical commuting zones; and (iv) any penalties incurred by, or findings by U.S. labor agencies against, the acquiring or acquired entities in the five years prior to filing.

The MWG also notes that the proposed amendments include requirements to address markets affected by a transaction. This is a concept that is heavily used in the EU and various other regimes. However, in order for this approach to operate effectively, there would be a need for more written decisions about market definition in cases dealt with by the Agencies that do not proceed to litigation. For example, the EC’s decisional practice is to provide reasons that identify markets even for phase one decisions (that are subject to its normal review).

EU:

In the EU, the authority has a simplified procedure for certain filings to better balance the efficiency of the review with the likelihood and significance of potential competition concerns. Until September 2023, a concentration has been subject to simplified treatment if one of the following conditions is met:

- the concentration amounts to the establishment of a joint venture with no activities in the European Economic Area;
- no horizontal overlap or vertical links between the parties;
- the concentration amounts to the establishment of a joint venture with expected turnover generated in the European Economic Area lower than EUR 100 million and resulting in the transfer of European assets worth less than EU 100 million;
- horizontal overlap between the parties resulting in a combined market share lower than 20% (regardless of the increase in the HHI), or the horizontal overlap between the parties resulting in a combined market share lower than 50% (if the increment of HHI is lower than 150);
- vertical links resulting from the concentration between the parties where the parties have less than a 30% market share in both upstream and downstream markets; or
- acquisition of sole control over an undertaking in which the acquirer already has joint control.

In the recently adopted changes, the EC extended the scope of mergers that can benefit from the simplified treatment by adding additional conditions that allow the case to qualify for the simplified procedure where there is a vertical link between the parties:

- the parties' market share in the upstream market is lower than 30% and the parties' market share in the downstream market is lower than 30%; or
- the parties' market share in both the upstream and downstream markets is lower than 50% but the increment of HHI in both of those markets is lower than 150 and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

In the new regulations, the EC also introduced four so-called "flexibility clauses" that provide it with the discretion to use the simplified procedure for certain types of cases that do not fall within the default categories. They are:

- for horizontal overlaps where the combined market share of the parties to the concentration is 20-25%;

- for vertical relationships where the individual or combined upstream and downstream market shares of the parties are 30-35%;
- for vertical relationships where the individual or combined market shares of the parties to the concentration do not exceed 50% in one market and 10% in another vertically related market; and
- for joint ventures with turnover and assets between EUR 100 and 150 million in the EEA.

Under the new regulations, the merger filing in the simplified proceedings is organized as a “tick-the-box” document – i.e. the parties reply yes or no to several questions, or provide simple numerical information such as market shares. The EC also introduced categories of cases that can benefit from “super-simplified” treatment – i.e. for which the parties are invited to notify directly without requiring pre-notification exchanges with the EC. There is no need to provide underlying evidence except for the turnover split between different EU countries and the description of methodology used for establishing market definitions.

China:

SAMR makes a distinction between the information required for the simplified and normal filing procedures, in order to strike an appropriate balance between the efficiency of the review and the effectiveness of identifying potential competition concerns. Filings may be submitted and reviewed under the simplified procedure if one of the following criteria is satisfied:

- the market share held by the undertakings are less than 15% in each horizontal overlap market or less than 25% in each vertically related market;
- the transaction will not concern any relevant markets in China; or
- a joint venture held by two or more undertakings will be held by one of them after the transaction.

Different filing forms are applied for transactions under the simplified and normal procedures. Filing forms for the simplified procedure typically request basic information regarding the company concerned, the transaction, and market competition. For reference, SAMR requests the following information:

- basic information (company name, incorporation place, basic business description) of affiliates that are engaged in the businesses related to the concentration;
- past concentrations in the relevant market concerned in the past three years;

- competitive analysis (although for purely foreign-to-foreign filings, market data and substantial competitive analysis are not required);
- if transaction documents/financial statements are in a foreign language, typically a Chinese summary (instead of full translation) is requested in practice; and
- executed agreements related to the concentration are required to be submitted (in practice, filers can submit the final executed version of transaction documents which are directly related to the filed concentration).

By contrast, the following information is not required:

- director and officer information;
- transaction-related documents (e.g., internal documents prepared by or for officers or directors, confidential information memoranda, studies, surveys, reports, etc.), periodic plans and reports;
- foreign subsidy information;
- the effects on labor market (workers/employees);
- defense or intelligence contracts; and
- identification of communications and messaging systems.

Canada:

While Canada does not have a formal simplified filing form, it has two mechanisms that in practice provide opportunities for merging parties to provide focused information at a sufficient level of detail to allow the CCB to assess straight-forward cases, while reducing the burdens on filing parties and saving scarce agency resources:

- Parties to a merger (regardless of whether it is subject to pre-notification or not) may submit an application for an advance ruling certificate, which takes the form of a letter with relevant supporting information. The CCB may request additional information, including any or all of the information that would be contained in a formal pre-notification filing. In practice, however, the CCB uses focused information requests to obtain the limited additional information needed to confirm that a transaction is not likely to have anti-competitive effects. As a result, this is an expeditious and cost-effective way for merging parties and the CCB to complete the assessments of straight-forward cases.
- Alternatively, a party submitting a pre-notification filing may omit any required component of the filing if it is able to explain and certify under oath why such information “could not, on any reasonable basis, be relevant to the assessment [by the CCB] of whether the proposed transaction is likely to prevent or lessen competition substantially”. These types of carve-outs are frequently

used to omit information, data and documents that relate to products, businesses or affiliates that do not involve horizontal overlaps or vertical relationships between the parties. The CCB retains the ability to require the carved-out information to be provided, but in practice almost all carve-outs are accepted if they are appropriately supported.

Brazil:

In Brazil, the fast-track proceeding applies to non-complex cases that are less capable to harm competition, such as:

- those that do not result in any actual or potential horizontal overlap or vertical links;
- transactions resulting in only minor horizontal overlaps where the parties have a combined market share below 20% in any and all relevant markets that cover the Brazilian territory;
- transactions resulting in horizontal overlaps where the parties have a combined market share above 20% and below 50% in any and all relevant markets that cover the Brazilian territory, but in which the HHI increase remains below 200 points; and
- transactions resulting in vertical integration where the parties hold less than 30% market share in any and all vertically related markets.

A short filing form is applied for transactions under the fast-track proceeding, which requests limited information regarding the company concerned, transaction, and market competition, for instance:

- company name and basic financial information and business description of the parties and their respective economic groups;
- transactions carried out in the past five years, but limited to transactions related to or with effects in Brazil;
- limited information on interlocking directorates and minority stakes in other companies (but only above 10% and related to the affected market(s));
- executed agreements related to the transaction and relevant exhibits/annexes, but no requirement for internal documents; and
- only in case of overlaps, limited information on market shares (for the past year) and competitors, with no details being required in relation to customers and suppliers.

IV. COMMENTS ON THE REQUIREMENTS FOR SPECIFIC TYPES OF INFORMATION THAT ARE OF LIMITED RELEVANCE OR OVERLY BURDENSOME

(A) Labor Market Information

While the Notice of Proposed Rulemaking (“NPRM”) notes “the importance of evaluating the effect of mergers and acquisitions on labor markets”, the draft form requires information that goes beyond that which is related to the specific deal under scrutiny, and thus would not be expected to have any reasonable link with antitrust analysis of that particular deal. For example, in addition to employee classification information and geographic market information for each overlapping employee classification, the draft form also would require the identification of any penalties or findings issued against the notifying entity by the U.S. Department of Labor’s Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the previous five years. This information, which may be burdensome to collect, is likely to have minimal value to assessing any substantive antitrust issues raised by the particular transaction being notified, as indicated by the fact that there is no comparable requirement for labor information in other major merger control regimes.

EU:

There is no requirement to include labor market information in merger filings submitted to the EC.

China:

There is no requirement for labor market information to be provided in merger filings in China.

Canada:

There is no requirement for labor market information in Canadian pre-notification filings.

Brazil:

The filing form (for fast-tracks and regular cases) requires that parties submit non-solicitation agreements, but these are limited to agreements resulting from that specific transaction. There is no other requirement for labor market information to be provided in merger filings in Brazil.

(B) Foreign Subsidies Information

Foreign subsidies raise a different policy concern and not one directly relevant to antitrust considerations. The EU has recognized this by developing a separate foreign subsidies regime (see further below). The HSR form should therefore focus on information that is relevant for the assessment of antitrust issues and that have a link with the proposed transaction under review. Moreover, the Committee on Foreign Investment in the US (“CFIUS”) already is tasked with the review of certain transactions involving foreign investment in the United States, in order to determine the effect of such transactions on the national security of the United States, and thus could more naturally be used for the purpose of pursuing foreign subsidiaries. Requiring information about foreign subsidies in the HSR form would add to the burden of notifying parties (and the Agencies) without providing concurrent value for the substantive antitrust analysis.

EU:

There is an obligation to disclose financial support received from public bodies (both from EU member states and foreign countries). However, this requirement is linked with the EC’s state aid monitoring powers. In addition, more recently, the EU adopted the Foreign Subsidies Regulation (the “FSR”) that established a pre-closing suspensory filing regime for acquisitions of “control” of targets that meet the following criteria:

- the combined turnover generated by the parties to the concentration in the EU exceeds EUR 500 million;
- the financial contribution received by the parties from third countries in the preceding three years exceeds EUR 50 million; and
- at least one of the entities (or the joint venture that will be established) is established in the EU.

Parties that have to comply with this filing obligation must disclose information to the EC regarding the financial contributions they have received. The EC will then assess whether such financial contributions are distortive subsidies.¹⁰

China:

There is no requirement for information about foreign subsidies received by merging parties to be

¹⁰ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market and the Implementing Regulation (EU) 2023/1441.

provided in merger filings in China.

Canada:

There is no requirement for information about foreign subsidies received by merging parties to be provided in pre-notification filings in Canada.

Brazil:

There is no requirement for information about foreign subsidies to be provided in merger filings in Brazil. The parties involved in the transaction only need to indicate whether the transaction is subject to approval by any other regulatory agencies in Brazil or abroad and the request is the same for fast-tracks and regular cases.

(C) Information About Prior Acquisitions

The draft form requires more expansive information about prior acquisitions, doubles the time period applicable for such information (i.e., 10 years) from the five-year window that currently required for prior acquisition information, and extends this requirement to both the acquiring and acquired entities. This proposed requirement is notably broader than in other jurisdictions, which have more tailored requests both in scope and duration, as detailed below. Particularly given the comparable time frames used by other major regulators, doubling the time frame from five to ten years will significantly increase the burden on the notifying parties without providing comparable value to the Agencies, given a period of five years in practice should be sufficient to identify situations that would be of concern.

EU:

There is no obligation to provide information on past merger and acquisition transactions in filings submitted to the EC.

China:

China's filing form only requires the past concentrations in the relevant market concerned in the past three years.

Canada:

Canada's filing form does not require information on businesses acquired previously by the merging

parties.

Brazil:

The parties involved in the transaction are required to provide a list of transactions carried out by any entity of the economic groups in the past five years, along with the relevant decision issued by CADE (if applicable). This list is limited to transactions carried out or with effects in Brazil and the request is the same for fast-tracks and regular cases.

(D) Director and Officer Information

Particularly in comparison with other major merger control regimes, the draft form significantly increases the amount of information required to be provided about individual directors and officers. Specifically, the draft form requires the identification of the officers, directors, or board observers of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer. While information about current and expected future overlaps is relevant for assessing interlocking directorships and coordinated effects issues, such detailed and historic information across all entities of the company has minimal if any relevance to the antitrust assessment of a specific transaction. There is no comparable requirement in scope or time period across other major jurisdictions, and the draft form should at least be limited to current and potential future overlaps.

EU:

As a result of the recently adopted changes, merging parties will be obliged to provide information on any current interlocking directorships (effective 1 September 2023). However, there is no obligation to provide historical information.

China:

There is no requirement for director and officer information for merger filings in China.

Canada:

There is no requirement for director and officer information to be provided in merger filings in Canada.

Brazil:

In Brazil, the requirement (for both fast-track and regular cases) is limited to members of the board of directors of the parties who are also members of the board of directors or of the supervisory boards of any other company active in the same economic activities related to the transaction. Usually, CADE accepts to limit this information for entities with activities in Brazil.

(E) Broadening of Transaction-Related Documents

The proposed form requires a substantial expansion of the documents that must be produced with the initial filing, including drafts as well as certain documents that were not prepared for or received by directors or officers. This will significantly increase the amount of work for merging parties to compile and for the Agencies' staff to review, but will likely be highly repetitive and of debatable value. To the extent the reviewing agency issues a Second Request to more closely review the transaction, such documents would be provided as part of that detailed review. In addition, such a requirement would be inconsistent with and significantly more onerous than comparable document requests in other jurisdictions.

EU:

In the case of the simplified procedure, the parties need to submit only the final version of the agreement and data on turnover generated in the European Economic Area. In addition, parties are only required to submit copies of documents and presentations prepared by, for or received by members of the entity's board of directors where the merger gives rise to a horizontal overlap or a vertical link. Otherwise, no such documents or presentations are required in simplified procedure cases.

For the normal procedure, under section 5 of the EC merger filing ("Form CO") the parties must provide the following transaction documents:

- the final (or if the notification is made before signing, the most recent) version of the agreement or the offer made in the public bid;
- annual reports of the parties (link to the website is sufficient);
- copies of documents (such as analyses, reports, studies, presentation etc.) prepared by or for or received by members of the board in the context of the transaction, or any other strategy-related documents describing market dynamics (market shares, competitive conditions, potential growth, etc.) prepared by or for or received by members of the board in the last two years; and

- minutes of the board(s) and shareholder meetings.

While the requirements are more significant for normal procedure cases, notifying parties are nonetheless not required to provide drafts or documents related to the transaction that were not prepared by or for members of the entity's board of directors.

In addition, the EC has been willing in the past to grant the parties waivers for providing the documents described above, especially in the context of less problematic transactions.

China:

Transaction agreements related to the concentration are required to be submitted. In practice, notifying parties can submit the final executed version of transaction documents (agreements) which are directly related to the filed concentration.

There is no mandatory requirement for submitting transaction-related business documents (e.g., documents prepared by or for officers or directors, confidential information memoranda, studies, surveys, reports, etc.), or other business plans and reports. These documents may be required by SAMR later in the review process, if it considers there are any competition concerns.

Canada:

The Canadian filing form requires that copies of all legal agreements be provided. However, unexecuted drafts are not required to be produced.

Brazil:

The Brazilian short filing form requests the parties to provide the following documents:

- copies of the final or most recent version of all transaction documents and the exhibits/annexes that are relevant for the antitrust analysis;
- copies of non-competition agreements and shareholders' agreements, if applicable;
- list of all other agreements that have been created/executed due to the transaction; and
- copies of the most recent annual reports and/or audited financial statements of the parties directly involved in the transaction and their respective corporate groups (only if available, and a link to the website is sufficient).

Only for regular proceedings, in which the longer form is used, are the parties also required to provide copies of minutes of board and shareholder meetings, internal documents (such as analyses, reports, studies, presentation etc.) prepared by or for or received by members of the board in the context of the transaction, or any other strategy-related documents describing market dynamics (market shares, competitive conditions, potential growth, etc.).

V. CONCLUSION

The Section considers that the Agencies can accomplish their goal of effective first phase screening of transactions that warrant detailed review using filing requirements and processes that are significantly less burdensome for responding parties and would consume significantly less of the Agencies' scarce enforcement resources, and have identified various areas where such refinements could be made.

The Section appreciates the opportunity provided by the FTC and DOJ to participate in the Public Consultation. The Section would be pleased to respond to any questions that the FTC and DOJ may have regarding these comments, or provide additional comments or information that may assist the Agencies.