COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW IN RESPONSE TO THE COMESA COMPETITION COMMISSION’S REQUEST FOR COMMENTS ON THE PROPOSED DRAFT GUIDELINES TO THE COMESA COMPETITION REGULATIONS, 2004

June 2013

The American Bar Association Sections of Antitrust Law and of International Law (together the “Sections”) appreciate the opportunity to submit these comments on the draft Guidelines (the “Guidelines”) developed by the COMESA Competition Commission (the “Commission”) on the application and enforcement of the COMESA Competition Regulations of 2004 (the “Competition Regulations”). COMESA is to be commended for developing a comprehensive set of guidelines, addressing mergers and acquisitions, vertical and horizontal business practices, abuse of a domination position, market definition and the public interest test. With the permission of the Commission’s Director, the Sections will provide their comments on the Guidelines in two parts: (i) the merger-related guidelines, which are addressed herein; and (ii) the conduct-related guidelines, which will be addressed in a subsequent submission. These comments have been approved by the governing Councils of each Section. The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. SUMMARY OF COMMENTS

The Sections support the Commission’s decision to develop guidelines, which should promote efficiency, consistency, and transparency in the Commission’s enforcement of the Competition Regulations.1

The Sections collectively have substantial expertise in the antitrust and merger review laws in the United States and in the practical implications of those laws, and they also are familiar with competition law and enforcement in the European Union and other well established and newer competition law regimes. The Sections’ comments reflect their experience in these areas and their support of the Guiding Principles and Recommended Practices for Merger Notification and Review Procedures2 (“ICN Recommended Practices”) adopted by the International Competition Network3 (“ICN”), which have been implemented by many competition law jurisdictions around the world. We offer these comments in order to share our experience and support the Commission’s

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3 The International Competition Network seeks to provide competition authorities with a specialized yet informal venue for addressing practical competition concerns. The ICN is the only international body devoted exclusively to competition law enforcement. Where the ICN reaches consensus on recommendations, or “best practices,” arising from the projects, it is left to the individual competition authorities to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.
adoption of international best practices and refinements to the Guidelines that would further clarify and enhance the effectiveness of the Competition Regulations.

The Sections respectfully submit that the Guidelines in their present form, may be so burdensome as to discourage investment in the COMESA Member States. The potential breadth of the merger review rules (purporting to apply even to foreign to foreign transactions with no nexus to the Common Market) and the lack of any financial thresholds (since they are currently set at zero) could result in a huge number of notifications for transactions that have no competitive impact in the Common Market. Such an outcome would seriously undermine the credibility of the Commission and the merger review regime it oversees. No competition agency would have sufficient resources to handle such a large number of cases, nor would it be a productive use of its resources to be required to dedicate resources to reviewing transactions that have no impact in the Common Market.

The Sections respectfully submit that the Commission should focus its resources on transactions that could pose a material risk to competition in the Common Market and make clear that foreign to foreign transactions that have no appreciable impact in the Common Market are beyond the scope of the merger review regime and do not require notification.

The Sections understand that the Commission has intentionally erred on the side of being overinclusive (e.g., by setting the financial thresholds at zero). However, the Sections respectfully suggest that a new competition agency enforcing a new review system is better served by building experience over time based on a manageable number of relevant cases rather than generating an enormous number of largely irrelevant cases at the outset.

II. COMMENTS ON SPECIFIC ISSUES

A. Jurisdictional Issues

1. Territorial Scope

Article 23(3) of the Regulations addresses the scope of the merger review provisions and creates some ambiguity which allows for the interpretation that mergers would be notifiable to the Commission even if only one of the merging parties operates in two COMESA Member States and the other merging party does not operate in any COMESA Member State. In line with such an interpretation of Article 23(3), Section 1.4 and Section 3.6 of the Guidelines on Merger Assessment suggest that a merger is required to be notified to the Commission even if only one of the merging parties has activities in at least two COMESA Member States and the other party has none.

Furthermore, the language in the draft guidelines is vague with respect to what would be sufficient to trigger the notification thresholds. The draft mentions that both or  

4 Article 23(3) provides that “This Article shall apply where: (a) both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more Member States; and (b) the threshold of combined annual turnover or assets provided for in paragraph 3 is exceeded.”

5 In particular, Section 1.4 and Section 3.6 of the Merger Assessment Guidelines suggest that a merger in which a target firm has no operations in the Common Market is nevertheless notifiable to the Commission if the acquiring firm operates in two or more COMESA Member States.
either of target and acquirer “operate in two or more Member States”. It is not clear from the wording of the draft Guidelines what should be construed as local operations: would this require physical presence and local assets in the jurisdiction or would import sales be sufficient? It seems reasonable to interpret “operate” as requiring local physical presence, directly or indirectly, in a Member State. Export sales should not be considered as relevant for purposes of threshold verification. Based on the ICN Recommended Practices, export sales should only be used as a filing threshold if “significant”\(^6\). Given the zero threshold (discussed in further detail below), if the Commission were to consider export sales, the threshold would inevitably also cover companies with local sales that are not significant and that should ideally be disregarded for purposes of a merger control filing.

It is respectfully submitted that such an approach raises significant concerns because it purports to apply the COMESA merger review regime to transactions involving only foreign firms (“foreign to foreign transactions”) with no material nexus to the Common Market. This would be disproportionately costly and burdensome for parties to a potentially reportable transaction, especially considering that, absent the nexus to the Common Market, there is no substantive antitrust concern that would justify the requirement of a merger review filing. Consequently, such an interpretation would seriously undermine international acceptance of the COMESA merger review regime at a critical time when the Commission is seeking support for the regime among the international business and legal community. Notably, in circumstances in which a target (or purchaser) does not operate in COMESA, the “effect” of the merger (if any) is felt entirely outside the Common Market. Nevertheless, under this interpretation, merging parties still would be required to notify such transactions and pay a notification fee of up to $500,000. In such circumstances, merging parties might take the view that their transaction is not subject to merger review in COMESA based on the international law principle of extraterritorial exhaustion of domestic laws. Or they could decide to challenge the Commission’s extraterritorial exercise of jurisdiction in the courts. Neither of these outcomes would serve the interests of the Commission nor its goal of establishing a legitimate and credible merger review system in COMESA.

It is a well-established principle of statutory interpretation that there is a presumption against the extraterritorial application of legislation\(^7\). Nonetheless, competition authorities internationally assert jurisdiction over mergers that involve entities domiciled outside their jurisdiction. While this may appear to constitute the extraterritorial application of competition laws, it is well established that jurisdiction based on the “effects doctrine” can supersede the presumption against extraterritoriality when a merger is likely to have sufficient effects within the competition authority’s jurisdiction.

The ICN has considered the issue of sovereignty and extraterritoriality in its Recommended Practices for Merger Notification Procedures (the “ICN Recommended Practices,” item I.C, comment 1.

\(^6\) ICN Recommended Practices, item I.C, comment 1.

\(^7\) For example, in the United States the presumption against extraterritoriality applied for nearly as long as there have been federal statutes in place. Early in the 19th Century, the Supreme Court applied the presumption against extraterritoriality to limit the reach of federal customs and piracy laws, references to which can be found in The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (customs laws); United States v. Palmer, 16 U.S. (3 Wheat) 610, 630-32 (1818) (Marshall, C.J.) (piracy laws) and Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808) (Marshall, C.J.) (holding that foreign prize law was territorial). Perhaps the most famous modern statement of the presumption against extraterritoriality is Justice Holmes’ opinion in American Banana Co v. United Fruit Co, 213 U.S. 347 (1909), which applied the presumption to limit the Sherman Act to anticompetitive conduct within the United States.
While the first ICN guiding principle for merger notification and review provides that, “Jurisdictions are sovereign with respect to the application of their own laws to mergers,” the first recommended practice states that merger notification requirements should apply only to mergers that have a material nexus to the reviewing jurisdiction. The ICN’s Working Group Comments on the recommended practice note that: “[i]n establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned.”

(Emphasis added). This reflects public international law and principles of comity that limit the extraterritorial reach of a jurisdiction’s competition laws to those acts and transactions with effects in that jurisdiction. Making reference to the example mentioned in item 1.2 of the Merger Guidelines, if less than two companies involved in a transaction have sales, operations, or assets in the jurisdiction, the transaction should not affect competition in that jurisdiction. The Organization for Economic Co-operation and Development (OECD) also adopts the same approach as the ICN. The OECD Recommendation of the Council on Merger Review (“OECD RPs”), Section I.A.1.2.i, states that competition authorities should “Assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction.”

It is respectfully submitted that a merger in which only an acquirer operates in the Common Market does not have an appropriate nexus with the Common Market and the assertion of jurisdiction in these circumstances would be out of line with the recommended practices of both the ICN and the OECD.

Further, the Sections note that the Regulations themselves recognize the jurisdictional boundaries of the merger review regime. Article 26(3) of the Regulations provides that “[A] merger shall be contrary to the public interest if the Commission is satisfied that the merger: a) has lessened substantially or is likely to lessen substantially the degree of competition in the Common Market or any part thereof; or b) has resulted, or is likely to result in, or strengthen a position of dominance which is or will be contrary to the public interest.” Further, Article 2 of the Regulations addresses the purpose of the Regulations and specifically refers to enhancing the welfare of consumers in the Common Market, by providing that “The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of market markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors.” Because the Regulations contemplate that mergers investigated by the

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9 See ICN Recommended Practices, supra note 2.


11 The Commission’s draft Guideline on the Application of Public Interest Criteria addresses the public interest with which the Commission intends to be concerned and, in Section 1.3.c)(ii) indicates that “[P]ublic interest, in the context of COMESA, refers to the interest of the Common Market as a whole; thus, the interest of all the peoples of COMESA considered together.”
Commission must, at a minimum, have an effect on competition in the Common Market, it follows that mergers involving less than two parties with no sales, assets or operations in the Common Market should be outside the scope of the Regulations. Indeed, the Commission appears to recognize this when its states in Section 6(1) that “Once the Commission has decided to investigate a merger, the Director shall within 60 working days carry out [a] preliminary assessment of whether the merger is likely to generate anti-competitive effects in the Common Market.” It is respectfully submitted that in mergers in which less than two companies do not operate in the Common Market, no such assessment would reasonably be necessary, as the conclusion would inevitably be that there would not be anti-competitive effects within COMESA.

The burden and cost to business of being required to submit merger notifications in circumstances where a merger will have no effects in the Common Market also may deter multinational companies from investing in the Common Market as doing so may subject them to a merger notification requirement and associated filing fee any time they enter into a merger anywhere in the world.

The Sections therefore suggest that the Commission adopt the alternative, reasonable, and pragmatic approach to the Regulations, which is supported by a reading of the Regulations as a whole, that mergers involving less than two companies with no appreciable operations in the Common Market are outside the scope of the merger regulation and do not need to be notified to the Commission. The basis of this approach is found in the jurisdictional scope of the Regulations, as set out in Article 3 of the Regulations. This Article clearly intends to limit the application of the Regulations to mergers that “have an appreciable effect on trade between Member States” and “which restrict competition in the Common Market.”

It is respectfully submitted that in order for the Commission, as a new regulator, to gain credibility and the support of the international community, it is important that the Commission acts in accordance with international norms and best practices, drawing on the experiences of established regulators who are part of the ICN and does not seek to enforce its laws extraterritorially, which also could have a chilling effect on investment in the Common Market.

2. Types of transactions caught by the Guidelines

Article 23 of the Regulations defines a “merger” as “the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person….” Paragraphs 2.1 through 2.8 of the Guidelines discuss the various factors the Commission will take into account in assessing whether a party will acquire control of another undertaking. These paragraphs conclude that “control” shall be defined as rights, contracts, or any other means that “confer the possibility of exercising decisive influence on an undertaking.”

The Commission is to be commended for using objective standards to assess the issue of control, including the acquisition of majority voting rights and the right to appoint,

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12 Article 3(1) provides that the Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market (subject to limited exceptions). Article 3(1) provides further that the Regulations apply to conduct covered by Parts 3, 4 and 5 of the Regulations which “have an appreciable effect on trade between Member States and which restrict competition in the Common Market.”
or to veto the appointment, of a majority of directors. However, the Guidelines also refer
to subjective considerations that the Commission may take into account by way of
“material influence” such as the corporate/industry expertise of the acquirer (Sections 2.7
and 2.8). The ICN’s Recommended Practices for Merger Notification Procedures state
that merging parties (and the competition agency) should be able to readily determine
whether a transaction is notified based on objective criteria.\textsuperscript{13} To that end, the Sections
respectfully submit that the subjective considerations mentioned above should be removed
and that the Guidelines make clear that there is a single test for determining control,
namely “decisive influence.”

Relatedly, the Sections invite the Commission to consider establishing a minimum
shareholding threshold below which a party will be deemed not to exert decisive influence
over another. We note that a number of countries have adopted such thresholds, consistent
with the ICN’s recommendation that objective tests in this area are preferable to subjective
ones. For example, the U.S. exempts acquisitions of voting securities of a foreign issuer
by a foreign person unless that acquisition confers control of the target issuer (i.e., the
acquisition is one that gives the acquiring person 50 percent or more of the target’s voting
stock). The adoption of similar exemptions or safe harbors by the Commission would help
achieve greater transparency and provide greater certainty to parties that seek to make a
non-controlling minority investment in another undertaking.

Lastly, the Sections respectfully suggest that the Commission take this opportunity
to make clear that certain classes of transactions are not reportable mergers at all. These
include:

\begin{itemize}
\item Intra-group restructurings.
\item Acquisitions of non-voting securities.
\item Minority investments that do not confer some measure of influence or control
over the target entity. As discussed above, the Sections believe that this is best
instituted through a minimum shareholding threshold, under which a party
may be deemed to hold interests incapable of conferring decisive influence.
\end{itemize}

3. Thresholds

Section 1 of the Guidelines requires notification of a qualifying transaction if the
following two financial thresholds are met: (a) the combined worldwide aggregate
turnover or the combined worldwide aggregate value of assets, whichever is higher, of all
firms to the merger in the Common Market equals or exceeds COM$ Zero; and (b) the
aggregate annual turnover value of assets, whichever is higher, of each or [sic] at least two
firms to the merger in the Common Market equals or exceeds COMS Zero. The
Guidelines explain that the reason the thresholds have been set at zero is because
“different Member States are at different levels of economic development and hence a
realistic threshold can only be determined after the Regulation has been tested on the
market.” The Sections suggest, in accordance with those comments and suggestions put
forth in Section II.A.1 above regarding extraterritoriality and local nexus considerations,

\textsuperscript{13} See ICN Recommended Practices, supra note 2, [WHAT SECTION] (stating that [n]otification
thresholds should be based on objectively quantifiable criteria,” and “[n]otification thresholds should be
based on information that is readily accessible to the merging parties”).
that the “zero” thresholds should be modified to include reasonable monetary thresholds, and that the Commission clarify the wording within the threshold test itself.

First, although Article 23 of the Regulations requires the Board to establish “a threshold of combined annual turnover or assets in the region . . . at or above which this Article will apply with regard to mergers with a regional dimension,” the Guidelines propose to require notification in “all mergers where both the acquiring and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States” with a “COM $Zero” threshold. This is, in effect, no threshold, which seems contrary to the requirement for a threshold in the underlying Regulation and would contravene the Recommended Practices of both the OECD and the ICN. The Requirement for an objective threshold in the underlying regulation seems to be in line with international best practices, according to which jurisdictions should establish a level of either turnover affected or transaction size below which material competitive concerns can be presumed not to arise. While it is understandable that the economic reality in COMESA Member States might be in different stages of development and that this is a challenging estimate to make, starting without a threshold might not be the best alternative. This might result in an overwhelming amount of simple filings with no substantive concerns which will not be at all helpful in subsequently adjusting these thresholds to more adequate levels.

As discussed in item II.A.1 above, the recommended practices of both the ICN and the OECD recommend that competition authorities assert jurisdiction only over mergers that have an appropriate nexus with their jurisdiction. By definition, “zero” nexus cannot be deemed to be an appropriate nexus. Moreover, the ICN Recommended Practices further require that “[m]erger notification thresholds should incorporate appropriate standards of materiality as to the level of ‘local nexus’ required for merger notification.”14 As noted above, the ICN Recommended Practices explain that thresholds should capture transactions with a sufficient local nexus such as “material sales or assets levels within the territory of the jurisdiction concerned.”15 The Sections are concerned that a COM $Zero threshold is not consistent with this materiality standard, and will not “screen out transactions that are unlikely to result in appreciable competitive effects.”16

Again, the Sections understand the Commission’s concern regarding the differing levels of economic development among Member States, but note that many other jurisdictions have successfully established minimum, jurisdictional-specific revenue, asset and transaction size thresholds at levels they have found sufficient to safeguard competition. In fact, several regimes have adopted revenue-based minimum jurisdictional thresholds while preserving the flexibility to modify those initial thresholds based on actual enforcement experience. Also, should there be a concern about possibly anticompetitive deals that do not fall within the objective thresholds, the Commission could simply create a clawback provision that, for a period of time after closing, would allow the Commission to challenge non-reportable transactions. In the U.S., for example, the authorities are allowed to challenge transactions that have an appreciable effect on competition even if the relevant thresholds are not met and an HSR notification is thus not

14 ICN RPs, § I.B (emphasis added).
15 Id., Comment 1.
16 Id.
required. Another example would be the clawback provision adopted by the recent reform in the Brazilian Competition Law, which allows the local authority to challenge non-reportable and supposedly anticompetitive deals for up to one year post consummation.

The adoption of the “zero” thresholds will impose unnecessary burdens on both the Commission and merging parties. The competition authority will deploy resources for no expected benefit, because transactions in which the acquirer and the target do not both have significant presence in the jurisdiction are highly unlikely to raise competition concerns. Parties to such transactions will have to expend time and incur costs needlessly in meeting filing requirements. The Sections submit that the Commission should aim to identify, with a minimum of resources, those relatively few transactions that are likely to merit further review and let the rest pass through the system quickly with minimal cost and delay. As a result, the Sections strongly suggest that the Commission, prior to the final adoption of the Guidelines, put forth real and material monetary thresholds, in line with those initially contemplated in the Regulations.

The Sections commend the Commission for including on the seller’s side only the revenues of the target entity or assets being sold. As noted in the ICN Recommended Practices, “[t]he ‘local nexus’ thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired.” Thus, with respect to the selling entity, only the sales or assets of the target are relevant. The non-target sales or assets of the selling entity or its group should not be included, since those are not being transferred.

Finally, the Sections respectfully suggest recommend that the Commission clarify Section I.3(b) of the Guidelines, which states, with regard to the Common Market-based asset and turnover thresholds: “the aggregate annual turnover or the aggregate value of assets, whichever is higher, of each or at least two firms to the merger in the Common Market equals or exceeds COM$ Zero” (emphasis added). The word “aggregate,” could be misinterpreted to mean that the turnover or assets figures of all parties to a transaction should be summed, and that the resulting figure should then be compared to threshold number (once adopted). However, the logical reading of this provision (and one that is consistent with turnover thresholds in most other jurisdictions) is to impose a requirement that both parties to a transaction meet a minimum asset or turnover level (as is suggested by inclusion of the word “each”). To avoid any confusion, the Sections respectfully suggest that the word “aggregate” should be clarified or replaced with “total” so the phrases “total annual turnover or the total value of assets within the Common Market” should replace “the aggregate annual turnover of the aggregate value of assets.” For reasons already discussed extensively herein, the Sections strongly urge that the latter interpretation be adopted (i.e., that multiple parties to a transaction be required to have

17 By way of example, it is possible to mention the U.S. vs. BazaarVoice complaint, in which the DOJ recently challenged a transaction not covered by the HSR due to the alleged effects on competition (http://www.justice.gov/atr/cases/T291100/291187.pdf)

18 In the US, for example, only 3.5% of reported transactions are subject to a Second Request (2012 data, http://www.ftc.gov/os/2013/04/130430hsrreport.pdf).

19 ICN RPs, § I.B., Comment 3.
common market assets or revenues), and that the word “aggregate” be deleted or otherwise clarified in the final Guidelines.

4. Joint ventures

Section 8 of the Guidelines addresses the extent to which the Commission will view joint ventures as “mergers,” within the meaning of Article 23 of the Regulation. Section 8 states that the creation of a “full-function” joint venture constitutes a merger within the meaning of Article 23, and goes on to discuss the factors on which the Commission will rely in determining the extent to which a joint venture is indeed full-function. As currently drafted, however, the Guidelines fail to expressly exclude non-full-function (or partial) joint ventures from notification.

B. Procedural Issues

1. Notifications

The Sections note that according to Section 10 of the Guidelines, a concentration with a regional dimension shall not be implemented before its notification to the Commission, but may be implemented before the decision is reached. The Sections commend the Commission for confirming in the Guidelines that the COMESA merger review regime is not suspensory. However, the Sections note that the Guidelines also state that both failure to notify the merger or notifying the merger more than 30 days after the decision to merge will be subject to the same penalty of up to 10% of the merging parties’ turnover in the Common Market, as well as being legally void and unenforceable.20 The Sections submit that it is disproportionate to impose the same penalty for late notification as for failure to notify a reportable merger at all, especially in a non-suspensory jurisdiction. Furthermore, it is not clear what the trigger for notification is. Article 24(1) requires notification within 30 days of a “decision to merge.” The Guidelines indicate that a decision to merge is “construed when there is established a concurrence of wills between the merging parties in the pursuit of a merger objective.” The Sections suggest that the Guidelines make clear that the notification time period is triggered by execution of a binding agreement. This is consistent with the ICN Recommended Practices, which state that “the jurisdictions that do not prohibit closing pending review by the competition agency should nevertheless allow parties a reasonable time in which to file notification following a clearly defined triggering of event.” They go on to explain that

the triggering event for purposes of calculating the filing deadline should be clearly defined so as to permit the parties to determine the timing of their notification obligation in a definitive manner. The triggering event should also be defined so as to avoid imposing mandatory notification requirements with respect to proposed transactions that have not yet reached an appropriate level of development in the negotiation process. This will avoid premature filing requirements and thereby promote the efficient allocation of enforcement resources and avoid imposing unnecessary

20 According to Article 24(1) “any notifiable merger carried out in contravention of this part shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the common market.”
costs and burdens on parties contemplating (but not yet fully committed to) a possible transaction.21

2. Filing fee

Section 4.3 of the Guidelines addresses the calculation and level of the filing fees. At the outset, the Sections respectfully submit that the potential filing fee is excessive in comparison to other jurisdictions where fees are payable. The fee will be 0.5% of the combined assets or turnover of the parties (whichever is higher) or COM$500,000,22 whichever is lower. Accordingly, for any transaction where the combined asset value or the combined annual turnover of the parties in COMESA member states exceeds COMESA $100 million, the filing fee will be COM $500,000 (0.5 x 10 million = $500,000).

We attach a schedule of sample filing fees for your information (III.Exhibit A, from which you will note that the COMESA filing fee is far in excess of the maximum filing fee applicable to any other merger review regime. Indeed, the European Commission, which appears to be a model for the COMESA regime, does not charge any filing fee at all, and neither do the competition authorities of Italy, France, China or Japan. The highest filing fee elsewhere in the world is in the United States, where the maximum fee is $280,000. However, that fee is imposed only for transactions valued at $709.1 million or greater. Thus this fee represents less than 0.04% of the transaction value, which is far lower than COMESA in absolute and proportionate terms.

The Sections are concerned that the filing fee is disproportionate to the administrative and investigative resources required to review an individual transaction, and is therefore not related to the costs of the merger review process. This is out of line with the ICN Recommended Practices.23 The fees appear to be more akin to a tax on transactions, and the Sections are concerned that they might deter parties from entering into mergers that would be beneficial for the COMESA Member States, or alternatively may encourage non-compliance with the COMESA merger notification procedure.

The Sections suggest that the filing fee should be substantially reduced to a reasonable level, taking into account the benchmarks in other jurisdictions. Furthermore, consideration should be given to introducing a tiered filing fee beginning at significantly lower levels, and based on transaction value rather than the combined asset or turnover values of the merging parties.

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21 See ICN Recommended Practices, supra note 2.
22 1 COM$ = 1 USS.
23 See ICN Recommended Practices, supra note 2 at VI.E (“competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations”).
3. Presumption of anticompetitive effects

The Sections note that Section 4.4 of the Guidelines provides for a rebuttable presumption that a merger would lead to a substantial lessening of competition, which can be rebutted only after an assessment of the merger subsequent to notification has been made. This presumption is absent from and does not appear to be supported by the Regulations or the Rules.

The Sections respectfully submit that, based on the experience of authorities around the globe, the number of anticompetitive deals is very small if compared to the total universe of reportable deals\(^\text{24}\), much more so if compared to the total number of deals in the marketplace (which would be the standard in the presence of a zero threshold). In that context, a presumption of anticompetitive effects applicable for all deals will necessarily result in a plethora of unnecessary notifications, overburdening the Commission with transactions that are not appropriate to notify and raise no concerns in the Common Market\(^\text{25}\). The Sections are unaware of any precedent anywhere in the world for such a presumption and it does not appear to be supported by the Regulations. The Sections therefore respectfully suggest that it be removed.

4. Notification Process

The Sections note that the proposed notification process appears to be cumbersome, with parties required to submit an original and three certified copies of all documents. This is time-consuming and costly for the parties, and the necessity for this is questioned. Parties must arrange for voluminous documents to be obtained in their original form and certified copies prepared and delivered to the Commission in Lilongwe, which will add to the administrative burden on parties.

Furthermore, the need to submit originals and certified copies in this manner precludes parties from filing electronically. Although experience suggests that there may be flexibility regarding initial submission of documents electronically, the fact that originals and certified copies must be submitted potentially leads to confusion regarding the date of acceptance of a filing. This lack of certainty is unhelpful to the Commission and notifying parties. The Sections recommend that originals should not be required, and that it should be sufficient to submit one copy thereof. In addition, the parties should be able to submit documents electronically, with a hard copy submitted on request to the extent necessary.

It is also submitted that the COMESA Commission should consider developing a simplified filing procedure for straightforward transactions that raise no issues whatsoever, so as to reduce the amount of work required from filing parties and to make the review process easier for the authority. While it is legitimate for an authority to require that all notifications contain sufficient information to exclude the possibility of anticompetitive effects, it is undeniable that this goal can be met with different levels of detail for

\(^{24}\) In the U.S., for example, the proportion of transactions resulting in a Second Request (i.e., subject to an in-depth review) has ranged from 2%-4% in the past 10 years (with the exception of a record high 4.5% in 2009). It should be stressed that, even within that reduced universe, only a portion of the transactions resulting a Second Request resulted in any type of enforcement action by the competition authorities.

\(^{25}\) See footnote 18, above.
transactions varying in complexity. Therefore, a simplified procedure for deals that do not present any material competitive concerns is a welcome alternative to make compliance with requirements easier and to streamline the authority’s review efforts.\footnote{ICN Recommended Practices, page 12.}

Also, it seems reasonable to assume that, following the example of the European Commission, if a filing is made before the COMESA Competition Commission, this would render unnecessary any national individual filings before the Member States’ national agencies. It would be advisable to acknowledge that expressly in the draft Guidelines.

5. **Review Period**

The Sections commend the Commission for recognizing in Section 5.12 of the Guidelines that a merger that has not been decided within the required time frame shall be deemed to have been approved.

However, the Sections note with concern that the review periods within which the Commission may reach its decision are lengthy. Notwithstanding that the regime is non-suspensory, the Commission may find that the merger is incompatible with the Common Market under Article 26(7) of the Regulations and require the parties to dissolve the merger or to comply with conditions. It is therefore still important that a decision is reached as soon as practicable.\footnote{Section 10.7 of the Guidelines.} Section 5 of the Guidelines provides that the Commission may take up to 30 calendar days (presumably from receipt of the merger filing, which would be useful to clarify) to decide whether the transaction does fall within the scope of the Regulations. Section 6 of the Guidelines indicates that only thereafter, “Once the Commission has decided to investigate a merger” will the preliminary assessment be carried out within 60 working days. The initial review period is therefore effectively three months. The Sections submit that is too lengthy for transactions that do not raise material competitive concerns.

If the merger is considered likely to harm competition then the investigation will continue for the remainder of the total review period, which is a further 60 days, allowing for a lengthy total review period of 120 days.

Furthermore there is a lack of clarity as to whether the time periods envisage calendar or working days. In terms of Section 5 of the Guidelines, it is stated that the 120 days within which the decision must be made are working days as opposed to calendar days. However this seems inconsistent with the Rule 3 regarding computation of time, which provides:

(2) *Where the time prescribed by or allowed under these rules for doing an act or taking a proceeding expires on a Saturday or Sunday or on a day on which the office of the Registrar is closed, the act may be done or the proceeding may be taken on the first day following that is not a Saturday, Sunday or day on which that office is closed.*
Thus, Rule 3 makes clear that the computation of time is in calendar days, and it is only when a deadline would occur on a Saturday, Sunday or public holiday, that it is carried over to the following working day. If the Rules were based on working days, rather than calendar days, there would have been no need for Rule 3.

The Sections accordingly recommend that the Guidelines should be consistent with the Rules and state that all time periods are calculated using calendar rather than working days. This will also obviate the need for specifically referring to calendar days and working days in computations of times as occurs throughout the Guidelines.

6. Coop eration with authorities in Member States

An area of uncertainty is the extent to which the Regulations remove the jurisdiction of the individual member states to review mergers. The Sections are aware that there has been some debate between the Member States and the Commission in this regard. It is noted in sections 12 and 14 that Rule 43 and Articles 24.7 and 26.6 of the Regulations will apply. Rule 43 envisages the Commission requesting the Member State to carry out an investigation whereas Article 24 envisages a Member State requesting the Commission to refer a merger to it for consideration if it is satisfied that the merger would “disproportionately reduce competition to a material extent in the member state or any part of the member state.” Even in that event, the Commission may choose to “deal with the case itself” or refer “the whole or part of the case” to the member state.

This creates uncertainty as to whether the Commission, in choosing to deal with the case itself, removes the jurisdiction of the Member State. It also creates uncertainty as to determination of the case where it refers “the whole or part of the case” back to the Member State. Even though it is acknowledged that this will most likely vary on a case-by-case basis, the Guidelines should be clearer as to objective criteria that will be used to determine which part will be decided by the Member State and which by the Commission.

The Sections submit that the Guidelines should provide greater clarity as to the division of roles between the Commission and the Member States on this point. The intention is no doubt that notification to the Commission obviates the necessity to notify Member State/s, but this should be clearly articulated.

C. Substantive analysis

1. Presumptions

1.a) Legal framework

The COMESA Competition Regulations state that:

“When measuring market concentration, the Commission may consider the following factors:

(a) Market shares of firms in the market;
(b) Number of firms in the market;
(c) Concentration ratios; and
(d) The Herfindahl-Hirschman Index ("HHI").
When assessing markets shares the Commission will be less likely to identify:

(a) Horizontal competition concerns where the merger results in combined market shares of less than 40%; and

(b) Non-horizontal competition concerns where the merger results in combined market shares of less than 30%.

When assessing the HHI the Commission will be less likely to identify:

(a) Horizontal competition concerns where the post-merger HHI is between 1000 and 2000 and a delta below 250, or above 2000 and a delta below 150, except where special circumstances are present; and

(b) Non-horizontal competition concerns where the post-merger HHI is below 2000.

Market shares and the overall level of concentration in a market normally give a useful initial screen to identify transactions where the agency is not likely to have competitive concerns and transactions in which it may have such concerns, which to some extent can improve the predictability of an enforcement system for prospective users.

1.b) General principles and comment on use of market concentration indices

The Guidelines appear to take a broad approach to assessing market structure and measuring market concentration, in that the initial analysis includes the use of market shares, a firm concentration ratio (CRx), and the Herfindahl-Hirschman Index (HHI). It is submitted that all three metrics are potentially useful in assessing the competitive effects of a merger. A number of jurisdictions rely on the use of two metrics as an initial screening mechanism.

The Guidelines use HHI benchmarks for determining when a merger may be investigated. The HHI is now commonly used, inter alia by the U.S. antitrust enforcement agencies, and is accepted as a useful tool to measure relative concentration in a market, particularly when the change in concentration is calculated. As the Guidelines note, the Commission may use various thresholds described in paragraphs 7.3 and 7.4 as an initial indicator of the absence of competition concerns. However, while it appears that the Guidelines offer some form of safe harbor thresholds, they then point out that the thresholds “shall not give rise to a presumption of either the existence or the absence of such concerns.”

The U.S. Horizontal Merger Guidelines (2010) are clear that market shares are considered merely “in conjunction with” other evidence to predict the likely effect of a merger, and are not used as an actual “screen” to separate competitively benign mergers from those that may be or are likely to be anticompetitive.

One important question will always be where to put the indicative levels and whether these indicative levels are appropriate for the competition regime. As the ICN
notes “[t]here is no simple answer as to how high (or low) concentration measures need to be to prompt (or dismiss) concerns about the impact of a merger on competition.”

Ideally, thresholds should provide the business community with clear guidance as to which type of transactions would be most likely to raise concerns and which would not.

Also, with respect to Section 7.9 (b) of the Guidelines, there is a reference to “Non-horizontal competition concerns where the merger results in combined market shares of less than 30%”. It is not clear where this provision would apply. In vertical or non-horizontal mergers, it is presumed that merging parties are active in different markets and, therefore, it would not be precise to make reference to “combined market shares”. This should be therefore adjusted to make clear whether the authority will be concerned about pre-existing market shares in either upstream or downstream markets or whether only overlapping markets will be the focus of analysis.

2. Defenses

The COMESA Competition Regulations state that:

When assessing a proposed horizontal merger, the Commission shall assess both its unilateral effects and coordinated effects.

In regard to non-horizontal mergers the Guidelines provide for an assessment of input foreclosure and customer foreclosure as well as coordinated effects.

As noted, the core concern of the merger assessment is the creation or enhancement of market power. In the context of sellers of goods or services, “market power” may be defined as the ability profitably to maintain prices above competitive levels for a significant period of time. Market power may be exercised, however, not only by raising price, but also, for example, by reducing quality or slowing innovation. Furthermore mergers may create market power on the buyer side of a market and cause monopsony concerns. Most mergers between rivals do not create or enhance market power. Many mergers, moreover, enable the merged firm to reduce its costs and become more efficient, which, in turn, may lead to lower prices, higher quality products, or investments in innovation. It is recognized that horizontal mergers could create or enhance the merged firm's ability -- either unilaterally or through coordination with rivals -- to exercise market power.

There has been a global trend towards a more effects-based approach to competition policy. This evolution has been motivated by a desire better to reflect the objectives underlying competition law in decision-making practice.

The Guidelines appear to provide an extensive list of factors that are taken into account when assessing the likelihood that competitive harm may arise. It bears emphasis that the ultimate goal of merger analysis is to evaluate the likely potential to harm competition, using all the available evidence.

29 It is noted that the Guidelines do not provide guidance as to what CRx ratio threshold will be considered problematic when assessing a merger.
The Guidelines appear to place equal emphasis on an assessment of unilateral effects and coordinated effects.\(^{30}\)

In terms of issues highlighted in an analysis of unilateral effects, market shares and market concentration are often less relevant for unilateral effects analysis than for coordinated effects analysis. While the unilateral effects section highlights that “The larger the market share, the more likely a firm is to possess market power,” structural presumptions arising from market concentration may have limited probative value for unilateral effects cases.

There is also a tendency in the Guidelines to restrict the focus to a single outcome variable, such as price. However, the analysis of the unilateral effects arising from a merger can involve a number of complex considerations. Other factors such as quality, range, service, investment, innovation and R&D can have an important role in shaping the competitive landscape of particular markets.

While recognising that coordinated-effects analysis can be complex, further guidance on the following points would be helpful: (i) the nature of pricing evidence required to distinguish between coordination and competition (e.g. relevance of parallel discounting); (ii) the types of evidence that the Commission gives most weight to when establishing pre-existing coordination; and (iii) the nature and value of evidence of past coordination. While the Guidelines contain some useful commentary regarding factors that may make a market more conducive to coordinated effects, it may also be useful to highlight the difficulties in identifying coordinated conduct. For instance, price parallelism is not necessarily indicative of coordinated conduct but merely evidence that the market is working efficiently.\(^{16}\)

The Guidelines’ approach to non-horizontal mergers contrasts with international standards, as well as with the approach adopted by the U.S. and EU. In the U.S., the Non-Horizontal Merger Guidelines clearly state that “non-horizontal mergers are less likely than horizontal mergers to create competitive problems.”\(^{31}\) In a similar fashion, the 2008 EU Non-Horizontal Merger Guidelines state that non-horizontal mergers generally are less likely to significantly impede competition than horizontal mergers (at para, 11). The Guidelines state as background to analyzing the competitive effects of non-horizontal mergers that: “First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market […]. Second, vertical and conglomerate mergers provide substantial scope for efficiencies.”\(^{32}\) From an economic perspective vertical mergers (as the primary form of non-horizontal mergers) may be good for consumers, as they may eliminate double mark-ups and better align incentives. The Guidelines consider only the possibility that non-

\(^{30}\) It is interesting to note that the 1982 and the 1984 U.S. Merger Guidelines focused exclusively on the increased likelihood for either explicit or implicit cooperation among competitors post merger. Concern about adverse “unilateral effects” resulting from the post-merger conduct of a single firm was first introduced in the 1992 version. The 2010 Merger Guidelines place greater emphasis on unilateral effects, by highlighting it first and discussing it in greater length. This may be partly due to the fact that it is more often applied by agencies today.


horizontal mergers may give rise to unilateral effects (input and customer foreclosure) and coordinated effects. The Sections therefore suggest that the Guidelines include a section highlighting the competitive benefits that may result from non-horizontal mergers.

3. Remedies

3.a) Legal framework

The Regulations grant the Commission the power to devise remedies in respect of a merger “if the Commission is satisfied…that an actual or proposed merger will be contrary to the public interest.” The Commission may impose behavioral as well as structural remedies.

The notion of “public interest” in the COMESA Competition Regulations is rooted, in the main, in an economic analysis as regards the effect of the merger on competition within the relevant market(s).

Although the Regulations provide for the power to confirm remedies agreed between the Commission and the merging parties, the Guidelines are silent in addressing the Commission’s approach to remedies in merger review.

We set out below the general principles that we recommend the Commission incorporated into the Guidelines, either directly or by reference, or by issuing non-binding practice notes, relating to the Commission’s approach to selection, implementation and monitoring of effective remedies. The suggested principles are gleaned from international competition law jurisprudence and are intended to assist the Commission in supplementing the Guidelines to provide greater certainty, clarity, and transparency to parties that are required to notify mergers to the Commission.

33 Article 26(7) of the COMESA Competition Regulations.

34 Article 26(7)(d) provides that the Commission may make the following order: “Requiring that if any merger takes place, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order.”

35 Article 26(7)(e) provide that the Commission may make the following order: “Generally making such provisions as, in the opinion of the Commission, are reasonably necessary to terminate or prevent the merger or alleviate its effects.” Furthermore, Article 26(8) the COMESA Competition Regulations provides that “An order made in respect of a merger may provide for any of the following matters: a) the transfer or vesting of property, rights, liabilities or obligations; b) the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise; c) the creation, allotment, surrender or cancellation of any shares, stocks or securities; d) the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.”

36 See section 3(a) and (b) of Article 26.

37 For example, referring to principles contained in the guidelines of other jurisdictions or institutions such as the ICN.
3.b) General principles to govern the determination of appropriate remedies

When crafting remedies in merger cases, we suggest that the Commission should be guided by the following principles which, in turn, should be articulated in the Guidelines:38

i. The Commission should consider remedies only if a threat to competition has been identified, and should not be used for industrial planning or other non-competition purposes.39 In other words, remedies should not be used to make the competitive landscape better than it was before the transaction. The Sections believe the Commission should not use merger review to engage in industrial policy or to become a market regulator, even if the outcome of such an intervention could be more desirable from a competition point of view. To do so would be to compromise the legitimacy of the Commission.

ii. Proportionality.40 Competition authorities normally seek to implement the least burdensome remedy, or package of remedies, that will be fully effective in eliminating the specific competitive detriments expected from a merger. Some competition authorities, however, apply a principle of proportionality, whereby they might decide to permit the merger with no remedies if even the least burdensome effective remedy will be disproportionate to the competitive detriment.

iii. Comprehensive Impact.41 The remedy should seek to deal with all the competitive detriments expected from the merger.

iv. Acceptable Risk.42 The eventual impact of any remedy is, to some extent, uncertain. The Commission should seek remedies that are the least restrictive means to eliminate competition concerns effectively.

v. Practicality.43 An effective remedy should be capable of practical implementation, monitoring, and enforcement within the jurisdiction of the Commission. This implies that the implementation and operation of the remedy should be clearly expressed. Furthermore, the Commission should be flexible and creative in devising remedies. Devising remedies entails a fact-based analysis to ensure that remedies will be appropriate and effective.

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38 See for example, the UK Competition Commission’s guidelines: Merger Remedies: Competition Commission Guidelines, November 2008.
41 Par 2.5 ICN Remedies Project. See also the UK Competition Commission’s guidelines: Merger Remedies: Competition Commission Guidelines, November 2008.
42 Ibid.
43 Ibid.
vi. **Appropriate Duration and Timing.**

It is desirable for remedies to address the competitive detriments effectively over their expected duration. Remedies that act quickly to address competitive concerns are preferable to those that are expected to have an effect only in the longer term or where the timing of the effect is uncertain.

vii. **Transparency.**

The Guidelines should provide a transparent framework for the proposal, discussion, and adoption of remedies. Transparency implies that the principles and major issues in determining remedies in individual cases are visible and intelligible to the merging firms, and, where appropriate, their competitors and customers. The application of these principles to an individual case should be clearly explained during the merger review process. Where necessary, the Commission should consult third parties and customers on the effectiveness of the remedy. The Guidelines should make clear, however, that confidentiality is respected during this consultation.

viii. **Consistency.**

Consistency of remedy practice is desirable to provide a predictable basis for corporate decisions and expectations. However, consistency must be balanced by the need to deal with each case on its merits. Consistency of remedy practice between national agencies is especially desirable in the case of mergers that are reviewed by many jurisdictions. In these cases, it is desirable for the Commission to coordinate its approach with that of the competition authorities in other relevant jurisdictions to avoid inconsistent or divergent remedies being imposed on a merging entity by a number of jurisdictions.

3.c) **Types of remedies**

The Sections propose that the Guidelines include discrete sections dealing with horizontal and vertical mergers given that they generally involve different competitive concerns.

These differences should be taken into account when crafting an appropriate remedy. Frequently, for example, competitive concerns in horizontal mergers can be best resolved by a structural remedy, while vertical mergers lend themselves to behavioral remedies or a combination of both.

i. **Structural remedies**

While the majority of competition authorities, such as in the European Union (the European Commission), Germany, United Kingdom, Netherlands, and Italy, prefer

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44 Ibid. See also the UK Competition Commission’s guidelines: Merger Remedies: Competition Commission Guidelines, November 2008.

45 Par 2.7 ICN Remedies Project.

46 Par 2.9 ICN Remedies Project.

structural remedies, many national competition authorities are receptive to the use of behavioral remedies in appropriate cases.48

The Sections propose that the Guidelines address, in some detail, the specific remedy of divestitures. Divestitures are the most common form of structural remedy in the context of mergers. The aim of divestiture is to address the competition law concerns of the merger either by creating a new source of competition through disposal of a business or assets from the merger parties to a new market participant, or strengthening an existing source of competition through disposal of a business or assets to an existing participant independent of the merger parties.49

ii. Behavioral remedies

Behavioral remedies operate principally to enable competition by removing obstacles to competition or stimulating potential competition through incentives or sanctions to change a firm's behavior in the market. These include measures that seek to prevent merging parties from restricting access to their customers. Such measures may, for instance, limit the parties' ability to:

- Require their customers to enter into long term or exclusive contracts;

48 In 2011, the U.S. Department of Justice published an updated Policy Guide to Merger Remedies. The Department of Justice continues to prefer divestitures of an existing business, although the guidelines show that it will be receptive to conduct or behavioral remedies (such as firewalls, non-discrimination, mandatory licensing, transparency and anti-retaliation provisions) if divestiture risks eliminating efficiency gains to be attained from the transaction.

The European Commission updated its guidelines on merger remedies in 2008 (“EU notice on merger remedies”). The Commission clearly favors structural remedies: “Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns. Other structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects [...]. Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring [...], and if they do not risk leading to distorting effects on competition.” In cases of horizontal overlap, the Commission is unlikely to accept behavioral commitments, in particular remedies related to price and quantity. The European Commission is prepared, however, to consider behavioral remedies in (purely) conglomerate mergers, subject to an effective monitoring system put in place by the parties.

The United Kingdom Competition Commission (“CC”) shows a clear preference for divestiture remedies. This preference is justified by the fact that structural remedies are more likely to restore rivalry, whereas behavioral remedies may not be effective in eliminating adverse effects, and may create distortions in market outcomes. The CC may choose behavioral remedies if: i) divestiture and/or prohibition is not feasible or proportionate, ii) the adverse effects on competition are expected to have a relatively short duration (e.g. two to three years), and iii) the customer benefits are likely to be substantial compared with the adverse effects of the merger. Contrary to EU notice on merger remedies, the CC’s guidelines highlight the role of behavioral remedies in safeguarding efficiency gains that may be achieved by the contemplated merger, which is also an objective of the U.S. Department of Justice’s Policy Guide to Merger Remedies. CITE

In France, the Autorité de la concurrence gives priority to structural remedies; behavioral measures may be adopted on a stand-alone basis, for example when no adequate buyer can be found, or in case of conglomerate mergers.

49 See in this regard the UK Competition Commission’s guidelines: Merger Remedies: Competition Commission Guidelines, November 2008.
• Create switching costs for customers;
• Bundle or tie the sale of particular products.  

In the context of vertical mergers, if the merged entity controls key facilities or inputs required by other firms to compete effectively, enabling measures may include provisions governing access to and pricing of facilities and products. These may include conditions that the merged entity will not discriminate in providing access to the facility or input as between itself and its competitors. We suggest that the Commission incorporate these circumstances as examples in the Guidelines of when it may consider imposing a behavioral remedy.

The Commission should avoid the trap of becoming a market regulator. For example, the Commission’s function is not to determine prices in a market(s) or levels of supply. Accordingly, any behavioral conditions that the Commission may consider imposing should be specific to the competition issue arising from the merger and should not unduly constrain the merged firm’s activities in the relevant market. We also suggest that the Commission make this position clear in the Guidelines.

3.d) Considerations in selecting a remedy

As noted above, in many jurisdictions, there is a strong preference, at least for horizontal mergers, for structural over behavioral remedies. A structural remedy, such as divestiture, is likely to be more effective, as it directly addresses the cause of the competitive detriment. Structural remedies also typically are easier to administer because they do not require ongoing monitoring by authorities once they have been implemented. Accordingly, the Sections submit that, to the extent possible, the Commission use structural remedies and that the Guidelines reflect this policy.

We address, in greater detail below, the specifics of what we believe the Commission should include in the Guidelines.

Generally, to be effective, a divestiture will require (1) the sale of an appropriate divestiture package (2) to a suitable purchaser (3) through an effective divestiture process. The main principles that we suggest the Guidelines include are described below.

We recommend that the Guidelines provide that the divested business should be viable, preferably a stand-alone business. The scope of the business should be carefully and exhaustively defined in commitments submitted to the Commission. The divestiture of an entire ongoing business will increase the likelihood that a remedy will be effective. An ongoing business has already proven to the market that it is a viable, competitive force and its divestiture closely reflects how the firms actually compete in the market. Thus, by

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50 Ibid.
51 Ibid.
53 See in this regard the UK Competition Commission’s guidelines: Merger Remedies: Competition Commission Guidelines, November 2008.
insisting on the divestiture of an ongoing business, the Commission does not have to make assumptions about the competitiveness and viability of a collection of assets. This substantially reduces the risk of making wrong assumptions about future competition. These principles ought to be incorporated into the Guidelines.

We recommend that the Guidelines also provide that the divested business be transferred to a suitable purchaser, independent from the merging parties, which will be able to make the divested business a competitive force in the market.

We also suggest that the Guidelines provide for the possibility of behavioral remedies in limited cases in which effective structural remedies are difficult to craft.

In this regard, we suggest that the Guidelines note that this will apply especially in the case of mergers with vertical elements, and where markets are quickly developing and future developments are difficult to anticipate. Behavioral remedies are typically considered particularly appropriate in mergers with vertical elements as they may be better suited to preserve potential efficiencies of a merger while preventing foreclosure risks, which we suggest the Guidelines also reflect.

In this regard, the 2005 ICN report on Merger Remedies Review Project identified three instances where, despite the presumption in many jurisdictions in favor of structural relief, behavioral remedies may be appropriate:

- when a divestiture is not feasible or subject to unacceptable risks (e.g., absence of suitable buyers) and prohibition is also not feasible (e.g., due to multi-jurisdictional constraints);
- when the competitive detriments are expected to be limited in duration owing to fast changing technology or other factors;
- when the benefits of the merger are significant (e.g., in some vertical mergers behavioral remedies are substantially more effective than divestitures in preserving these benefits in the relevant case).

We suggest that the Guidelines note three instances as examples of when the Commission would consider choosing behavioral remedies in favor of structural remedies.

We also advise that the Guidelines note that it may employ behavioral remedies to provide interim protection until structural measures are fully operative. Such behavioral remedies can include supply obligations, measures such as waivers of long-term contracts and pro rata refunds to facilitate switching of customers, and the obligation to provide the buyer of divested assets technical assistance and training. The Commission could usefully provide these as examples of its approach to behavioral remedies.

As behavioral remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration. In this regard, behavioral remedies should not be imposed for an indefinite

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56 Ibid.
time, or should be reviewed after a certain period to ensure that remedies remain relevant and do not become an undue restriction on competition. The Commission should record in the Guidelines that it reserves the right to review behavioral remedies periodically.

For behavioral remedies to have the desired impact, it is essential that there be effective and adequately resourced arrangements in place for monitoring and enforcement so that there is a powerful threat that non-compliance will be detected and that action will be taken to enforce compliance where this is necessary.\textsuperscript{58} Accordingly, in each of these cases it will be necessary to ensure that monitoring is feasible and enforcement is a practical proposition. The Commission should stress in the Guidelines that it will police adherence to remedies with the threat of sanctions for non-compliance.

3.e) Implementation of remedies

As mentioned above, whether the remedies chosen are structural, behavioral or a combination of the two, the Commission should provide a certain level of oversight to ensure that the remedies are implemented effectively.

Several factors, which we suggest should be considered in supplementing the Guidelines, may assist in facilitating effective implementation and ongoing administration of remedies.\textsuperscript{59}

i. \textit{Clarity}. It must be clear what the remedy is, how it will operate and what constitutes compliance. It must also be clear how the remedy binds the parties and what steps are available to the Commission to enforce compliance.

ii. \textit{Consultation and Reporting}. Active consultation with the merging firms and other appropriate parties during the implementation process helps to identify unforeseen consequences and improves the achievement of the desired outcome. Periodic reporting is also a useful mechanism for effective implementation. We recommend that the Guidelines state that active consultation and reporting is an essential feature of the merger system.

As discussed above, when remedies are structural and a divestiture of assets is required, the Commission may appoint an experienced, knowledgeable, and impartial trustee, such as an investment bank or consulting firm. The trustee can help the merging parties locate interested buyers and arrange for a sale that will maintain the value of the assets. Sometimes the appointment of a trustee comes only at a later stage if merging parties do not complete the divestiture in time themselves.\textsuperscript{60} When remedies are behavioral or conduct-based, a monitoring trustee may be used to carry out the oversight role. We suggest that the Guidelines provide for this function.

\textsuperscript{58} See in this regard the UK Competition Commission’s guidelines: \textit{Merger Remedies: Competition Commission Guidelines, November 2008}.

\textsuperscript{59} 2005 ICN Report on Merger Remedies Review Project.

\textsuperscript{60} See in this regard the UK Competition Commission’s guidelines: \textit{Merger Remedies: Competition Commission Guidelines, November 2008}.
3.f) Monitoring of compliance with remedies

Effective monitoring is critical to the effectiveness of a remedy, as a firm’s incentive to comply with a remedy decreases to the extent it perceives that its compliance is not being monitored effectively. It is necessary to ensure effective monitoring throughout the life of the remedy. In certain cases, market participants may have an interest in ensuring compliance with a remedy, and where appropriate should be involved.

It is easier to involve market participants, such as customers and competitors, in monitoring where they are relatively well-informed and well-resourced, or are intended beneficiaries of a remedy. Reliance on market participants, however, may complicate the process, and cause other problems, because they make be seeking to advance their individual interests. Nonetheless, if their assistance is to be encouraged, these third parties must be given clear information as to the nature of the remedy and what the firm must do to comply. They must also know how and to whom they should complain. The Commission should accordingly note in the Guidelines that it encourages market participants to assist in the oversight of remedies.

In general, it is preferable to set up monitoring points throughout the lifetime of a remedy at which the Commission will assess the firm’s compliance. Reporting periods typically can range from monthly, to once per year, depending on the nature of the remedy, and the intensity or frequency of the commitments undertaken. The Commission could consider noting certain time periods in the Guidelines without binding itself to any of them.

4. Co-operation and co-ordination among competition authorities

Where several competition authorities consider remedies in the same transaction, the Commission should consult the other relevant competition authorities to ensure consistency and effectiveness between remedial solutions. It will normally be in the interests of the competition authorities and the merger parties for such consultation to take place at an early stage to prevent inconsistent approaches. These efforts are essential to ensure that a remedies package meets the competition concerns of all authorities involved, and leaves the parties with a set of non-conflicting obligations. To be fully effective, cooperation and coordination should cover both the design stage and the implementation stage of remedies. The Commission should be frank about this in the Guidelines and note that it may, if appropriate, actively seek to cooperate with competition authorities in other jurisdictions when assessing the appropriate remedy for a merger.

5. General Comments

As we have noted, the Competition Regulations provide that the Commission has the authority to authorize a merger subject to certain conditions. However, the Guidelines fall short of providing guidance to prospective merger parties as to how the Commission will utilise this power.

Transparency in merger review (and in particular the issue of remedies) is important for the promotion of merger activity within the Common Market. We suggest,

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61 Ibid.

therefore, that the Commission prepare and adopt detailed guidelines as to its approach to remedies (to be incorporated into the Guidelines or referred to by reference in associated non-binding practice notes63) based on the principles set out above.

D. Relevant Market Definition

1. Introduction

The Sections congratulate the Commission for facilitating a discussion on the topic of Market Definition by publishing the Draft Market Definition Guideline under the Regulations (“Market Definition Guidelines”). Greater transparency into the practices of the Commission is important to companies for assessment of costs and risks of pursuing a particular course of conduct.

The Sections recognize that the Commission has consulted existing literature including the Guidance published in this regard by the European Commission. The Sections would also welcome the adoption of international best practices64 by the Commission at the time of assessment of competition cases. Adoption of the principles outlined by the ICN would facilitate cross-border cooperation and convergence of review policies of the plethora of competition agencies. In this era of globalization it is critical that the review policies of the Commission do not impose inconsistent standards for parties engaged in a transaction with cross-border implications.

The Sections’ comments on the Guidelines relate to three key issues: (i) complications when defining the market in some special cases; (ii) value of the Small but Significant Non-transitory Increase in Price (“SSNIP”); and (iii) consideration of alternative tools in special cases. The Sections elaborate on these issues below and provide recommendations in relation to them.

2. Recommendations

2.a) Section 2 - Introduction

The Sections agree with the Commission that the definition of the market in both its product and geographic dimension often has a decisive influence on the assessment of a competition case.65 The definition of the market is one of the most important analytical tools to examine and evaluate the competitive constraints that a firm faces and the impact of its behavior on the competition.

However, in some special conditions defining the market may be a complex task and it may be of limited value considering that accurate calculation of market shares may not be possible. This may be the case in relation to markets with network effects, dynamic markets, auction and bidding markets, two-sided markets and vertical settings. For

63 Jurisdictions such as South Africa, the United Kingdom, and the United States have published such guidance in the form of practice notes or general guidelines.
64 See ICN Recommended Practices, supra note 2.
65 Guidelines, paragraph 2.4.
example, in bidding or auction markets, the closeness of competition between bidders provides better information about the conditions relating to a particular transaction. Similarly, in some industries such as e-commerce, computer software, internet etc., several characteristics exist such as high sunk costs, low marginal costs, network effects, rapid market entry and exit, fast market structure changes and low transportation costs which is unlike the case in other markets such as steel or automobile.

The U.S. Horizontal Merger Guidelines (2010) acknowledge the importance of market definition, stating that the agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. The Sections therefore recommend that the Commission recognize in the Guidelines at Section 2 that: “Although market definition should in most cases be a first step in competition analysis it is important to recognize that a market cannot always be defined with complete precision.”

2.b) Section 4: Basic principles for market definition

(1) Potential competition

The Guidelines discuss the inclusion of potential competitors when defining markets. The Sections are of the view that the Guidelines would benefit from an explanation including additional details regarding the particular circumstance in which the Commission may seek to challenge a merger involving a potential competitor. The Sections recommend that paragraph 4.11 of the Guidelines be revised to note that a merger involving a potential entrant is unlikely to harm competition unless the relevant market is highly concentrated (i.e., already characterized by single firm or collective dominance), the potential competitor was likely to enter in the near term, entry by the firm would significantly increase competition, and there are no or few other potential entrants also likely to enter in the near term that would have a similar impact on competition. The Guidelines should also clarify the standard of proof to show that the potential competition would have entered the market but for the merger.

(2) Miscellaneous

The Sections note that paragraph 4.2 of the Guidelines refer to paragraphs 18 to 21. The paragraph references are incorrect and the Sections consider that the correct reference would be paragraphs 4.6 to 4.9.

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68 Guidelines, paragraph 4.1, 4.2 and 4.11.
2.c) Section 5

(1) Evidence of substitution

The Sections applaud the statement of the Commission that it would be willing to consider quantitative tests for the purpose of delineating markets. Over the years there have been significant advances in economic learning that is being used in the assessment of transactions to supplement the market definition analysis. The alternative tools that have been developed to assess market definitions include concepts such as pricing pressure indices (PPI’s), compensating marginal cost reductions, merger simulations, and a direct effects approach. The quantitative economic tools used by the European Commission include price correlation analysis,69 critical loss analysis,70 past shocks analysis, natural experiments,71 and demand estimation.72

While the Sections recognize that newer agencies such as the Commission would find it both difficult and costly to apply alternative methods to evaluate competitive effects, these new and evolving tests may in time be useful to apply in appropriate cases to evaluate the potential competitive impact of the merger. The Sections therefore recommend that the Commission revise paragraph 5.15 of the Guidelines to add: “When market definition may be problematic, such as in cases involving differentiated product markets, the Commission will consider the application of other analytical tools such as pricing pressure indices.”

III. CONCLUSION

The Sections offer the foregoing recommendations based upon our experience. We hope these comments are helpful and we would consider it a privilege to be able to offer any further assistance that may be helpful as the Commission drafts implementing regulations and considers any further amendments thereto.

69 E.g. Case COMP/M.5153 Arsenal/DSP, Case COMP/M.4799 OMV/MOL.
70 Case COMP/M.4734 INEOS/Kerling.
71 Case COMP/M.5335 Lufthansa/SN Airholding.
72 Case COMP/M.5658 Unilever/Sara Lee, Case COMP/M.5644 Kraft/Cadbury.
<table>
<thead>
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<th>Jurisdiction</th>
<th>Filing fee</th>
<th>Original currency</th>
<th>US Dollars(^{73})</th>
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<tr>
<td>Brazil</td>
<td>BRL 45,000</td>
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<tr>
<td>Canada</td>
<td>C$ 50,000</td>
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<td>France</td>
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<tr>
<td>Germany</td>
<td>Varying amount depending on complexity of case, up to Euro 100,000</td>
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<td></td>
<td>in exceptional cases</td>
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<tr>
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<td>$900 to $18.2 thousand</td>
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<td>Complex matters - INR 1,000,000</td>
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<tr>
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<td>No filing fee (repealed)</td>
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<td>No filing fee</td>
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<tr>
<td>Russia</td>
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<td>$320</td>
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<td>From U.S. $45,000 – U.S. $280,000, depending on the transaction size</td>
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</table>

\(^{73}\) As of May 10, 2013; approximate figures.
Appendix

Links to Comments on Relevant Draft Laws and Regulations prepared by the Sections

- Comments on Draft FTC/DOJ Horizontal Merger Guidelines: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_hmg.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_hmg.authcheckdam.pdf)

- Comments on Brazilian Merger Regulations: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_brazilian_201204.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_brazilian_201204.authcheckdam.pdf)

- Comments to German Guidance on Substantive Merger Review: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20110921.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20110921.authcheckdam.pdf)


- Comments on MOFCOM’s Market Definition Guidelines: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_china-mofcom.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_china-mofcom.authcheckdam.pdf)

- Comments on UK Competition Commission’s Guidelines on Remedies: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_divestiture.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_divestiture.authcheckdam.pdf)

- Comments on China’s proposed regulation on notification of concentrations: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_undertakingdraft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_undertakingdraft.authcheckdam.pdf)

- Comments on India’s proposed Merger Review regulations: [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_indian_competition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_indian_competition.authcheckdam.pdf)