COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW TO THE IRISH COMPETITION AUTHORITY'S PUBLIC CONSULTATION ON MERGER GUIDELINES

October 30, 2013

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law ("Sections") of the American Bar Association (the "ABA") are pleased to submit these comments on the Irish Competition Authority's ("Authority") Draft Merger Guidelines for Consultation ("DMG").[1] The Sections applaud the Authority's invitation for public comments in light of developments since existing merger guidelines were published in 2002. As the Authority notes, those developments include new insights from economic analysis; the Authority's experience in reviewing nearly 600 mergers and acquisitions; and the merger review experiences and guideline revisions carried out in other countries. The DMG represent a very thoughtful updating of Irish merger analysis in light of the latest and best international thinking on the topic. We hope that our comments may prove beneficial and help further the Authority's goals of delivering guidance that best deters potential anticompetitive mergers while enabling transactions that benefit consumers to go forward. As requested, we identify our comments by DMG section and paragraph number.

Section 1. Elements of Merger Review

a. Paragraph 1.11

Paragraph 1.11 states that the Authority will consider effects "that may arise where any one or more of the merging parties have non-controlling minority shareholdings in relevant third

---

[1] The Sections submit these comments based on learning and experience developed in numerous prior opportunities to address merger policy initiatives by many international antitrust/competition authorities. For example, the Section of Antitrust Law submitted two rounds of comments to the U.S. Department of Justice and Federal Trade Commission, as part of the process leading up to their joint issuance of the 2010 Horizontal Merger Guidelines. http://www.abanet.org/antitrust/at-comments/2009/11-09/P092900.shtml; http://www.abanet.org/antitrust/at-comments/2010/06-10/2010_hmg.shtml. Similarly, in August 2009 and May 2010, the Sections jointly submitted rounds of comments to the U.K. Competition Commission and Office of Fair Trade, in connection with the development of their 2010 Mergers Assessment Guidelines. http://www.abanet.org/antitrust/at-comments/2009/08-09/intl_law-fair_trading.shtml; http://www.abanet.org/antitrust/at-comments/2010/05-10/2010_draft_merger.shtml. In December 2010, the Sections jointly commented on the Canadian Competition Bureau's Discussion Paper for Merger Enforcement Guidelines Consultation. http://apps.americanbar.org/intlaw/committees/Antitrust/Comments%20-%20ABA%20CBC%20Comments%20SAL%20SIL%20Dec%2022%20FINAL.pdf. Also, in September 2011, the Sections jointly commented on the Bundeskartellamt's Draft Guidance on Substantive Merger Control. http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20110921.authcheckdam.pdf. The U.S., U.K., Canadian, and German merger policy projects raised many of the same issues of merger analysis also found in the Discussion Paper. As a consequence, the Sections' comments substantially reflect comments previously provided in the submissions to the U.S., U.K., Canadian, and German authorities.

parties prior to the merger", but gives no guidance as to how such evaluations will be conducted. We believe that this lack of guidance will increase uncertainty for many potential merging parties and may potentially deter transactions that would benefit consumers. Accordingly, the Sections respectfully suggest that this paragraph would benefit from clarification or the addition of representative examples.

b. Paragraph 1.17

This paragraph notes that a merger that removes an important potential competitor could adversely affect competition by eliminating the competitive threat posed by that potential competitor *or* "by discouraging entry that might otherwise have occurred." With respect to the latter, ¶1.17 states that a proposed merger that eliminates an important potential competitor might adversely affect competition if the result of the merger was to "discourage effective entry *by increasing the minimum size needed to enter* or by increasing the preparation time necessary for entry, thereby delaying entry" (emphasis added). A merger that increases the minimum size needed to enter may merely reflect the superior efficiency of the merged entities. This provision of the DMG can be read to suggest that a merger that engenders substantial efficiency benefits, allowing the merged company to offer a product at reduced cost, is problematic *because* of such efficiencies – that is, because the merger might discourage entry by less efficient potential competitors. Because such a result might be seen as penalizing the realization of productive efficiencies that benefit consumers, we respectfully suggest that the Authority clarify that such is not the intent of this paragraph, and that increasing the scale required for entry is problematic only in the relatively unusual case where it will shield the merging firms from efficient and effective new entry.

c. Paragraph 1.19

According to paragraph ¶1.19 of the DMG, "market definition [need not] precede and set the boundaries for identifying and analyzing competitive effects." This appears to suggest that the Authority may, in certain matters, elect not to define a relevant product and geographic market. The Sections believe that, if this was the Authority's intention, it would be useful to detail more specifically when the Authority believes that market definition is not necessary, particularly when the Authority concludes that a transaction would result in an SLC. (We note that, as stated in ¶1.18 of the DMG, section 22(3) of the Competition Act 2002 directs the Authority to determine whether a merger may "substantially lessen competition *in markets* for goods or services" (emphasis added).)

Section 2. Market Definition

The market definition provisions of the DMG well reflect current thinking about defining markets. The Sections believe that they could be further honed through a few targeted clarifications.

In general, and consistent with the views expressed by the Sections regarding draft guidelines prepared by other jurisdictions,[2] we recommend that the DMG should continue to acknowledge the importance of market definition, which may be required as a matter of law in many circumstances. Rigorous application of the market definition exercise helps to ensure that the Authority will identify the competitive alternatives available to consumers, determine the individual and collective importance of those alternatives, and ultimately strengthen the Authority's ability to make the right decisions in merger cases. An analysis of competitive effects as such is not particularly informative – certainly as to magnitude – absent an indication of the market or markets in which those effects may occur.

The Sections recognize that the Authority's approach to market definition parallels principles stated in the 2010 Horizontal Merger Guidelines of the U.S. Department of Justice and Federal Trade Commission (hereinafter "US HMG"), but the U.S. antitrust agencies affirm the relevance of market definition to an extent not found in the revisions to the DMGs. Section 4 of the US HMG states: "In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition."[3] The Sections respectfully recommend that the DMG articulate a similar re-confirming principle regarding the importance of market definition.

a. Paragraph 2.1

The last sentence of ¶2.1 states that "there may be local areas within the relevant geographic market that raise particular issues that would need to be examined when assessing the competitive impact of a merger." The Sections respectfully suggest that the Authority explain what those issues are and how they would be assessed.

b. Paragraph 2.4

Paragraph 2.4 of the DMG makes the incontrovertible point that where a merger would have an SLC in both a narrow and a broader market, "it is sufficient to show that the merger will result in an SLC regardless of the choice of market definition" – that is, in both markets. But ¶2.4 states that in some "circumstances, expanding the market may lead to a finding of competitive harm in the wider market (such as, for example, in a conglomerate merger with portfolio effects)." Conglomerate mergers involve multiple product markets and we believe that the introduction of this topic in the discussion of market definition (as opposed to competitive effects) risks substantially confusing the discussion of market definition for horizontal mergers.

---

[2] See note 1, *supra.*

[3] US HMG § 4, http://www.justice.gov/atr/public/guidelines/hmg-2010.html. *See also* Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, "Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission," presented at the George Mason Law Review's 14th Annual Symposium on Antitrust Law (Feb. 9, 2011) at 20 (noting "the importance of market definition in Section 7 [of the Clayton Act] cases" and that "the antitrust agencies must … carefully consider what the relevant market is before going into court").

Indeed, it is not an expansion of the product market that leads to the identification of competitive harm in a conglomerate merger with portfolio effects, but rather the interaction of related product markets.[4] The Sections therefore respectfully suggest that the Authority consider deleting this sentence or revising it to eliminate the reference to conglomerate mergers and portfolio effects.

c. Paragraph 2.5

The first sentence of ¶2.5 states that "market definition is likely to be an important part of the Authority's analysis" when there are significant horizontal and/or vertical overlaps between the merging parties. The Sections believe that the Authority may wish to clarify whether, under such circumstances, it will treat market definition as *essential* rather than merely *important*.

d. Paragraph 2.15

Paragraph 2.15 indicates that the Authority will consider zero sunk cost supply side substitution in identifying current market participants "where most, if not all, competitors produce the full range of supply-side substitutes". We note that the scope and scale of supply side substitution is not necessarily related to the percentage of competitors that supply particular substitutes, or *all* substitutes. For example, such substitution might have a substantial competitive impact even if carried out by only a small percentage of firms that produce substitutes (or even partial substitutes), and even if only a limited number of firms produced particular substitutes. The key question, we submit, would appear to be the overall impact on market supply and price due to the substitution. Thus, the Sections respectfully suggest that the Authority consider clarifying this paragraph in light of this observation.

Section 3. Market Concentration

a. Paragraph 3.9

Market share information is difficult to obtain. Accordingly, the Sections respectfully recommend that the Authority consider including language similar to the formulation in section 2.2 of the US HMG, which states that "[t]he [United States antitrust enforcement] Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers." While it is important that market data from the parties be supported, other sources including industry trade associations may have better data about competitors.

b. Paragraph 3.11

---

[4] *See generally* OECD, "Policy Roundtables: Portfolio Effects in Conglomerate Mergers (2001)," http://www.oecd.org/competition/mergers/1818237.pdf, for a fulsome discussion of portfolio effects.

Paragraph 3.11 states that markets with HHI greater than 1,000 "may be regarded as concentrated and highly concentrated if greater than 2,000." The sections note that although the U.S. Federal Trade Commission and Department of Justice had long used an HHI of 1,000 for their concentration "safe harbor," in 2010, that number was increased to 1,500. This change was based on almost 30 years of experience with the existing HHI thresholds and data demonstrating that the 1,000 HHI safe harbor was catching too many non-problematic mergers. Accordingly, the Sections respectfully suggest that the Authority may wish to take into account this experience in examining whether the DMGs' proposed HHI levels are consistent with current merger enforcement practice in Ireland.

c. Paragraph 3.13

The Sections believe it is unlikely that a merger that falls below the HHI thresholds but involves the merger of a "potential entrant or recent entrant with a small market share" would raise competitive concerns. If the HHI thresholds are at or below 1,500, it is likely that market entry is relatively easy. Further, the potential entrant should be included in the HHI calculation in any case, which would drive the number even lower. Accordingly, we respectfully suggest that the Authority consider deleting the third bullet in ¶3.13. We also respectfully question, with regard to the second bullet, whether an acquisition involving a "maverick" firm is likely to raise substantial competitive issues in an unconcentrated market.

Section 4. Horizontal Mergers

a. Paragraph 4.2

The Sections note the broad recognition that, as stated in section 10 of the US HMG, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." In addition, as section 1 of the US HMG explains, it is important for merger guidelines analysis to "avoid[] unnecessary interference with mergers that are either competitively beneficial or neutral." Thus, the Sections believe that the statement in ¶4.2 that "not all mergers are harmful to consumers" may inadvertently convey an overly negative impression as to the merits of horizontal mergers. Accordingly, we respectfully suggest that the Authority may wish to modify this language, perhaps, for example, by stating that "as a general matter, it should not be presumed that mergers are harmful to consumers."

b. Paragraph 4.5

Paragraph 4.5(b) helpfully lists a number of quantitative techniques that the Authority may employ in assessing evidence. Since other quantitative techniques may also prove relevant to the evaluation of particular mergers, we believe that the Authority may wish to consider

adding clarifying language that explains the techniques listed are not intended to be exhaustive, merely illustrative.

c. Paragraph 4.24(b)

Paragraph 4.24(b) states that a reduction in competition can occur when "one or more of the merging parties posed a credible threat of entering the market at some unspecified time." However, while merger analysis by necessity (given imperfect knowledge of the future) generally assesses short term effects, this language might be read to suggest that enforcers are concerned with the acquisition of a firm that had a mere possibility of entry far off in the future. Accordingly, the Sections respectfully suggest that the Authority consider deleting the "unspecified time" language, or, at the very least, revising it to reduce the time dimension and refer to a high likelihood of entry. In addition, particularly with regard to potential competition, the Authority may wish to craft language adopting a sliding scale analysis – that is, the more remote in time and lower the probability of entry, the stronger must be the potential anticompetitive effect to give rise to a merger challenge.

d. Paragraphs 4.27-4.29

The Sections note that these paragraphs may not sufficiently clarify the difference between bargaining leverage and monopsony. For example, we believe that the reference in ¶4.27 to the "ability and incentive to influence product prices (or other factors such as terms and conditions of sales)" may sweep too broadly and encompass some cases of efficient exercise of bargaining leverage, rather than true monopsony. References to "buyer power" in ¶4.29 may also benefit from clarification. The Sections suggest that the Authority may wish to consult the discussion in section 8 of the US HMG, which deals with powerful buyers, if it chooses to revise ¶¶4.27-4.29. It may also wish to review section 7 of the DMG ("Countervailing Buyer Power") in light of section 8 of the US HMG.

Section 5. Barriers to Entry and Expansion

The Sections applaud the DMG provisions related to barriers to entry and expansion, which are in general consistent with those articulated in the US HMG.[5] We believe, however, that a few minor language adjustments would further enhance the DMGs' excellent treatment of this topic.

a. Paragraph 5.7

In some markets changes in technology may also affect the likelihood of important new entry. Accordingly, the Sections suggest that the Authority might wish to add a reference to the role of innovation in entry analysis to ¶5.7.

---

[5] We note that the US HMG consider a potential entrant to be a "market participant" when analyzing market concentration (see § 9, ¶1 and § 5.1 of the US HMG).

b. Paragraph 5.8

Paragraph 5.8 states that "entry must also be of a sufficient scale and scope to prevent *any* harm to competition" (emphasis added). The Sections respectfully suggest that the Authority consider deleting the word "any," which we believe might be misconstrued as an absolute, whether or not the harm is of significant concern.

c. Paragraph 5.17

Paragraph 5.17 appears to establish a potentially unreasonably high burden on the parties to demonstrate that actual or threatened entry would be a significant competitive constraint. We respectfully recommend that the Authority consider endorsing a somewhat more flexible approach, which takes into account other valuable sources of information when and if they are available. In that light, the Authority may wish to consider the US HMG discussion of sources of evidence regarding entry: "[T]he "Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency." Notably, as detailed in section 2.2 of the US HMG, in investigating potential mergers, the Federal Trade Commission and Department of Justice frequently speak with competitors, potential market entrants, and other third parties to gather information about market conditions, including factors bearing on potential market entry.

Section 6. Efficiencies

a. Paragraph 6.3

Paragraph 6.3 notes that cost reductions "include economies of scale and/or scope that involve reductions in marginal cost" and states that "[r]eductions in fixed costs are less likely to be passed through to consumers" and are therefore accorded less weight *a priori* by the Authority. In certain circumstances, however, fixed cost efficiencies (which represent real resource savings) may yield organizational improvements that bestow benefits on consumers not only in the long run, but sometimes in the short run as well. Moreover, even efficiencies that will be realized in the long run may merit being weighed in appropriate circumstances, as recognized by the US HMG.[6] We also suggest that the Authority consider adding language to this paragraph recognizing that in appropriate circumstances in non-horizontal mergers reductions in transactions costs may be merger-specific and cognizable.

b. Paragraph 6.10

---

[6] Section 10, fn. 15 of the US HMG states: "The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. . . . Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive."

Paragraph 6.10 requires that the parties must provide "convincing evidence" that any efficiencies "cannot be accomplished by another feasible means less restrictive of competition". The Sections respectfully submit that this paragraph may establish too high a burden with respect to efficiencies, which should be regarded as an integral part of the analysis of the merger's likely competitive effects, rather than as a "defense" subject to a disproportionate burden of proof. We accordingly recommend that the authority require "evidence verifiable by reasonable means"[7] in lieu of "convincing evidence." (The Authority might similarly consider adopting such an alternative formulation in paragraph ¶6.7 and ¶6.14 (in lieu of the requirements that efficiencies be demonstrated "to a high degree of certainty" and by "convincing evidence").)

The Sections are further concerned with the burden imposed on the parties of demonstrating that efficiencies "cannot be accomplished *by another feasible means*" less restrictive of competition (emphasis added), given the large number of alternative business arrangements that are "feasible," even if they may not be practicable. It may be that in some cases, efficiencies could be achieved by a less restrictive means. But if those means were unrealistic (not business practical) or significantly less efficient, they would not be pursued. The Sections therefore respectfully recommend that the Authority consider revised language that takes business practicalities into account, consistent with the formulation in section 10 of the US HMG: "Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical." The Authority might, for example, modify the existing language to state that it will only consider efficiencies that "cannot be realized by another practicably achievable means that is less restrictive of competition."

c. Paragraph 6.15(e)

Paragraph 6.15(e) states that "[e]fficiencies that reduce prices in one market cannot compensate for price increases in another market and are not considered to be pro-competitive efficiencies." However, suppose that the realization of efficiencies in Market B is inextricably intertwined with the effects in Market A and the consumer welfare benefits in Market B substantially outweigh the consumer harm in Market A. In that case, the Sections respectfully submit that the efficiencies in Market B should justify the merger, because on balance consumer welfare rises. The key point is that under the counterfactual (no merger), the efficiencies in Market B could not practicably be achieved, and thus consumer welfare would be lower under the counterfactual. The Sections accordingly recommend that the Authority consider inserting language that recognizes this possibility, particularly in cases in which consumer harm is projected in a very narrow market or where the two products are linked so that those suffering any competitive harm will also be the ones enjoying the competitive benefits. In crafting

[7] Section 10 of the US HMG, for example, states that "it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."

language, the Authority may, for example, wish to consider the formulation found in footnote 14 to section 10 of the US HMG: "The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall."

Section 8. Non-Horizontal Mergers

The Sections applaud the Authority for its helpful discussion of non-horizontal mergers, particularly the efficiencies they engender. We believe, nevertheless, that a somewhat more expansive discussion of efficiencies and of the limitations on theories of anticompetitive harm, consistent with the latest economic thinking, could prove helpful. Specific suggestions follow.

a. Paragraph 8.5

Paragraph 8.5 of the DMG correctly notes that "non-horizontal mergers are generally less likely than horizontal mergers to generate competitive concerns". The Sections believe, nonetheless, that the DMG could be more explicit in confirming that non-horizontal mergers only infrequently give rise to competitive concerns. Given the importance of this background for the assessment of vertical cases, the Sections respectfully suggest that the DMG expand this section by highlighting in greater detail the competitive benefits that may result from non-horizontal mergers. Furthermore, we suggest that the Authority also consider specifically recognizing such efficiencies as transaction-cost reductions, improved coordination between complementary goods, and reduction of vertical "incomplete contract" and hold-up problems as significant efficiencies that arise from non-horizontal (and, in particular, vertical) mergers.[8]

b. Paragraphs 8.7-8.17

The Sections believe that the DMGs' very helpful discussion of potential anticompetitive unilateral effects of vertical mergers could benefit from a greater emphasis on the countervailing factors that should be taken into account when assessing the probability and likely magnitude of such effects.

---

[8] *See generally* OECD, "Policy Roundtables: Vertical Mergers (2007)," http://www.oecd.org/competition/mergers/39891031.pdf.For a discussion of the efficiencies and competitive effects of vertical mergers. In particular, the United States contribution to this Roundtable stresses how vertical mergers can help overcome incomplete contract, hold-up, and vertical coordination problems. *See id.,* at 239-247.

First, the potential harm to consumers in the downstream market due to foreclosure strategies will generally operate through discouraging entry or future investment or encouraging exit. Regardless of the markets concerned, this effect will likely take some time to materialize and therefore the potential competitive harm may be difficult to assess when reviewing a vertical merger. Accordingly, we suggest that the Authority may wish to state that it will be less inclined to intervene in situations where the potential harm to consumers is unlikely to materialize in the short term, in particular in view of likely consumer benefits resulting from efficiencies generated by the vertical integration.

Second, we suggest that the Authority may wish to acknowledge that the risk of customer foreclosure will depend heavily on whether the merged entity has the capacity to satisfy most, if not all, the additional internal demand generated by the merger. In the absence of such capacity, supplying the merged entity's additional downstream demand would displace sales to external customers, which would inevitably switch to other upstream competitors and thus maintain effective competition in the upstream market.

Third, the Authority may wish to consider recognizing more explicitly in ¶8.13 that competitors may use the "foreclosure" argument in cases where the combination will create a more efficient player, given the procompetitive effects that usually result from vertical mergers (as discussed above). Thus, we suggest that the Authority may wish to state explicitly that it will focus on consumer welfare, not on harm to competitors, in weighing competitors' complaints.

Fourth, we note that DMG ¶8.9 states that, in addition to the risk of foreclosure, potential unilateral effects can also be raised by vertical mergers that involve a maverick firm either upstream or downstream. The Sections believe that the potential for harm from such cases is extremely rare and rather difficult to assess. Therefore, we recommend that this section be deleted. If, however, this discussion is retained, we respectfully suggest that the Authority consider providing examples or explaining the specific circumstances under which it believes that vertical integration involving a maverick may raise a competitive problem.

c. Paragraphs 8.18-8.20

The Sections believe that these paragraphs, dealing with potential anticompetitive coordinated effects, could benefit from a clear statement of the fact that vertical mergers are often more likely to destabilize than support coordination among market participants. Indeed, vertical mergers are very rarely blocked due to concerns of increased likelihood of coordination at one level.[9] The Sections therefore recommend that the Authority explicitly state that it is

[9] One rare example of a coordinated effects vertical challenge was the U.S. Department of Justice's ("U.S. DOJ") 2001 challenge to the merger of Premdor and Masonite. Premdor was the world's largest producer of interior molded doors, while Masonite was a major producer of interior molded doorskins, a key input into the production of interior molded doors. Although the merger was primarily vertical, it also had a significant horizontal component, as Premdor had recently acquired some capacity to produce doorskins in competition with Masonite. While Premdor's presence upstream in the doorskin market was small, the firm had the potential to expand doorskin production in

unlikely to challenge a merger on such ground unless, at a minimum, the merger clearly impacts the horizontal structure of a market in some significant way. More specifically, the DMG could clarify that a high concentration in one of the vertically-related markets should not be considered as a presumption of likely coordination in the adjacent market where that second market is not concentrated.

d. Paragraphs 8.21-8.24

The Sections are concerned about the degree of emphasis given to conglomerate mergers. While we recognize that conglomerate mergers may in theory impose harm due to anticompetitive tying and bundling, or coordination across non-substitutable products or services (see ¶¶8.21-8.24), we believe that there is a dearth of empirical evidence demonstrating actual instances of such harm. In short, theories of competitive harm due to conglomerate mergers are controversial and far less well established than horizontal and vertical theories of harm. Accordingly, we fear that the amount of attention given to conglomerate transactions in the DMG could suggest a greater focus on enforcement in this area than actually intended by the Authority, thereby inadvertently chilling potentially efficient or neutral conglomerate transactions that would have benefitted consumers. Thus, we respectfully suggest that the Authority consider deleting all references to conglomerate mergers in section 8, and focusing that section solely on vertical mergers. If, however, the Authority chooses to continue to treat conglomerate mergers in section 8, we respectfully recommend that it emphasize potential efficiencies, acknowledge the lack of significant empirical support for conglomerate merger-related harm, and explain that conglomerate enforcement is unlikely to be a primary focus of the Authority's enforcement agenda. More specific comments on particular DMG statements regarding conglomerate mergers follow.

i. Paragraph 8.21

Linking the purchase of products or services through a conglomerate merger may well benefit consumers, and is generally not anticompetitive. We are concerned, however, that the statement in ¶8.21 that "[t]ying or bundling does not *necessarily* imply competition concerns" (emphasis added) might inadvertently be read to suggest that those practices generally or frequently are anticompetitive. Given the extensive literature supporting the proposition that tying and bundling frequently are efficient and consumer welfare-enhancing,[10] we respectfully

---

response to any explicit collusion between Masonite and the other major doorskins supplier. Doorskins are homogeneous products, concentration in this market was high and entry was difficult—characteristics that tend to make explicit collusion possible. The U.S. DOJ concluded that the merger of Premdor and Masonite would remove a substantial impediment to explicit collusion in doorskins. Pursuant to a consent decree, the merged entity divested a doorskins production facility and other assets to restore competition in the doorskins market. *See* US v. Premdor, Inc., No. 1:01CV01696 (D.D.C. 2001).

[10] *See, e.g.,* Erik Hovenkamp & Herbert Hovenkamp, "Tying Arrangements and Antitrust Harm," 52 ARIZ. L. REV. 925 (2010); Alden F. Abbott & Joshua D. Wright, "Antitrust Analysis of Tying Arrangements and Exclusive Dealing," George Mason Law and Economics Research Paper No. 8-37 (2008),

suggest that the Authority may wish to consider language emphasizing the benefits of those practices. Such language might indicate, for example, that "tying and bundling are widespread commercial practices that typically enhance competition and consumer welfare. Accordingly, linking the purchase of complementary products through a merger may well be beneficial to consumers and generally is not anticompetitive."

ii. Paragraph 8.22

Paragraph 8.22 states as a possible competitive concern that "[t]he cost of establishing the capacity to supply both [tying and tied/bundled] goods could be a barrier to entry and/or expansion." This statement implicitly assumes a market imperfection that raises the costs of entry into multiple markets, which, though conceivable, will often not be the case. We suggest that the authority may wish to consider deleting this point.

iii. Paragraph 8.24

The Sections respectfully question whether the threat of anticompetitive coordination in conglomerate mergers is sufficient to warrant mention. If, however, the Authority chooses to retain its discussion of this threat, we suggest that it consider stating that it is unlikely to challenge a conglomerate merger on coordination ground unless, at a minimum, the merger clearly impacts the horizontal structure of a market in some significant way (see discussion of ¶¶8.18-8.20, above).

Section 9. Failing Firms and Exiting Assets

a. Paragraphs 9.1 and 9.12

Paragraph 9.1 specifies that the "failing firm" defense is "based on a counterfactual where there (sic) the target firm and its assets exit the market." This focus on the target, while consistent with the more typical invocation of the defense, is then seemingly contradicted by the subsequent ¶9.12, which indicates that the "failing firm" defense may be applied to "acquirer(s)" as well. For clarity and simplicity, the Sections respectfully suggest that the Authority should consider setting out initially that the defense may be asserted on behalf of acquirer(s) and target(s).

b. Paragraphs 9.3, 9.4, 9.5, and 9.9

Paragraph 9.3 provides that the defense would be unavailable where "a merger with an alternative buyer may be . . . more pro-competitive . . . than the proposed merger." Paragraph 9.3 further specifies that the defense likewise would be unavailable when an acquisition "by a

---

http://www.law.gmu.edu/assets/files/publications/working_papers/08-37%20Antitrust%20Analysis%20of%20Tying.pdf (reprinted in ANTITRUST LAW AND ECONOMICS (Keith N. Hylton, ed., 2009)); James C. Cooper, Luke M. Froeb, Dan O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," 23 INT'L J. INDUS. ORG. 639 (2005).

more distant competitor [is] preferable" and ¶9.4 explains that the purpose of testing the availability of the "failing firm" defense is to determine if "the proposed transaction is . . . the best possible outcome for consumers." Later, ¶9.5(d) states that for the defense to apply there must be "no credible less anti-competitive alternative outcome", and ¶9.9 then provides that this "credibility" element would include – but not be limited to – consideration of "other viable transactions" as well as the potential that there are "no other viable buyers".

The Sections note that the language in ¶¶9.3-9.4 is different from the method of assessing the availability of the "failing firm" defense adopted in the US HMG. More consistent with the language in ¶9.9, the US HMG method involves weighing the relative competitive effects of the proposed transaction against a viable purchase by an alternative buyer. Similar to the factors included in ¶9.9, the alternative buyer element may be satisfied in the United States by the failing firm showing it has made a diligent effort in good faith to identify a viable alternative purchaser that is willing to acquire the failing firm.[11] This is not the same as the Authority finding that the acquisition of the failing firm by an alternative purchaser would be "preferable" to the proposed transaction or concluding that the proposed transaction does or does not represent the "best possible outcome for consumers," which would remain potentially relevant factors given that the sub-parts of ¶9.9 explicitly represent a non-exhaustive list.

The Sections are concerned that the language in ¶¶9.3-9.4 could be read to effectively eliminate the availability of the "failing firm" defense based on consideration of conceivable but not practical alternative solutions, and that language could be invoked by the Authority to override any evidence of the type identified in ¶9.9 provided by the failing firm. As a result, we respectfully recommend that the language in ¶¶9.3-9.4 be amended to make clear that only viable alternative purchasers (as set out in ¶9.9) are relevant to the Authority's assessment of the availability of the "failing firm" defense.

c. Paragraph 9.10

Similarly, the Sections respectfully suggest that the Authority consider deleting ¶9.10, which provides that for the "failing firm" defense to apply "it must also be shown [by the merging parties] that the merger will not leave consumers worse off than if the firm and its assets had left the market." The Sections respectfully submit that that this paragraph shifts the burden onto the merging parties unreasonably. With respect to a transaction in which the counterfactual is that both parties continue to compete, the Authority has the burden of showing that the merger would be anticompetitive. It is not clear why, where one party is failing, the burden should not similarly be with the Authority to show that the merger would be anticompetitive.

*****

[11] US HMG, section 11, fn. 16 provides that "[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer[, and that] [l]iquidation value is the highest value the assets could command for use outside the relevant market."

The Sections applaud the Authority for its openness and transparency in carrying out this public consultation. We hope that the Authority finds these joint comments to be useful.