COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE NEW ZEALAND MINISTRY OF BUSINESS INNOVATION & EMPLOYMENT'S REQUEST FOR COMMENTS ON ITS TARGETED REVIEW OF THE COMMERCE ACT 1986

February 10, 2024

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as presenting the position of the Association.

I. Introduction

The Antitrust Law Section and the International Law Section (the "Sections") of the American Bar Association appreciate the opportunity to comments to the New Zealand Ministry of Business Innovation & Employment's (MBIE's) document entitled *Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986* (*Targeted Review*).[1]

The Antitrust Law Section ("ALS") is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy, as well as related aspects of economics. ALS members, numbering over 10,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, and federal and state government agencies, as well as judges, professors, and law and economics students. The ALS provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous ALS members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For more than 30 years, the ALS has provided input to enforcement agencies around the world conducting consultations on topics within the ALS's scope of expertise.[2]

The International Law Section (ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint

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[1] MINISTRY OF BUS. INNOVATION & EMP., PROMOTING COMPETITION IN NEW ZEALAND A TARGETED REVIEW OF THE COMMERCE ACT 1986 (Dec. 2024), https://www.mbie.govt.nz/dmsdocument/29866-discussion-document-promoting-competition-in-new-zealand-a-targeted-review-of-the-commerce-act-1986-pdf.

[2] *Antitrust Comments, Reports & Amicus Briefs*, ABA ANTITRUST L. SEC, https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs.

ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[3]

The Sections are providing comments on select issues and questions posed by the *Targeted Review* on which they believe they are best positioned to comment. These comments reflect the expertise and experience of the Sections' members with antitrust laws and enforcement practices around the world. The Sections are available to provide additional comments, or otherwise to assist the MBIE or the Competition Commission (Commission), as may be appropriate.

II. Issue 1 – The Substantial Lessening of Competition Test

Question 4a: Should the 'substantial lessening of competition' test be amended or clarified including for:

a) Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services?

The substantial lessening of competition (SLC) test is one of the two major tests deployed by competition authorities across the globe to determine whether a merger is anticompetitive.[4] An assessment under the SLC test is generally the same as the test of whether there is an increase in market power – the ability to raise price above the price that would exist in a competitive market or reduce non-price factors such as quality or service below competitive levels.[5]

Similar to Section 47 of New Zealand's Commerce Act 1986 (Commerce Act),[6] Australia correspondingly has Section 50 of the Competition and Consumer Act, 2010, which prohibits acquisitions that are likely to substantially lessen competition in any market.[7]

With respect to Australia, the list of factors included in Section 50 of the Competition and Consumer Act, 2010 to determine whether there is a SLC already helps the ACCC examine the market structure, regardless of the past history of prior acquisitions. We understand that under Australian law if the result of the latest in a series of acquisitions may cause a SLC, then Section 50 was considered to have prohibited that transaction, regardless of the size of that latest acquisition.[8] However, the Australian Treasury also announced in April 2024 that to respond to

[3] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

[4] *Test SLC (merger)*, CONCURRENCES, https://www.concurrences.com/en/dictionary/merger-slc-src-sdc-tests.

[5] N.Z. COM. COMM'N, MERGERS AND ACQUISITIONS GUIDELINES (May 2022), https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-May-2022.pdf.

[6] Commerce Act 1986, s 47 (N.Z.), https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM88421.html.

[7] *Competition & Consumer Act 2010* s 50 (Austl.), https://www.legislation.gov.au/C2004A00109/2024-12-11/2024-12-11/text/original/epub/OEBPS/document_4/document_4.html#_Toc185505995.

[8] Am. Bar Ass'n, Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on Australian Commonwealth Government Treasury's Discussion Paper on Creeping Acquisitions 5 (Oct. 2008), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2008/comments-creeping.pdf.

concerns regarding serial or creeping acquisitions and roll up strategies, Australia's reformed merger system will require that all mergers by the acquirer or the target within the previous three years will be aggregated for the purposes of assessing whether a merger meets the notification thresholds, irrespective of whether those mergers were themselves individually notifiable.[9]

With respect to the approach in the United States, Guideline 8 of the 2023 Merger Guidelines states that the agencies may consider a series of multiple acquisitions collectively under any or all of the core Guidelines 1-6 and may evaluate "multiple acquisitions in the same or related business line" as part of an "industry trend" or "overall pattern or strategy of serial acquisitions by the acquiring firm."[10] To capture information related to sequential acquisitions, the Federal Trade Commission (FTC) recently issued revisions to its pre-merger notification rules which now require both the buyer and target companies to report prior acquisitions within the last five years that are related to a business overlap between the transacting parties, even if those prior transactions were not reportable transactions when consummated.[11]

In sum, both Australian and U.S. antitrust authorities have been viewing sequential acquisitions with renewed focus. In light of the new U.S. pre-merger notification rules' 5-year look-back period regarding prior acquisitions in overlap markets, and the Australian approach of aggregating all acquisitions by the acquiring and acquired parties over the past three years, the Sections believe that applying the proposed three-year look-back period by the Commission in applying the SLC test and assessing the cumulative effect of a series of acquisitions would not be unreasonable.

However, the Sections defer to the Commission on whether and, if so, how such an approach should best be reflected in its rules or legislation. It may well be that similar to the suggestions provided in 2024 regarding proposed amendments in Australia, the Commission already has adequate powers to review prior transactions that proceeded without authorization or clearance in the context of determining whether a series of acquisitions cumulatively has a SLC effect. To the extent that it does, the Commission should retain the discretion to consider this issue on a case-by-case basis, providing it with the flexibility to consider prior transactions where it considers them to be relevant.[12]

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9 AUSTL. GOV'T THE TREASURY, MERGER REFORM: A FASTER, STRONGER AND SIMPLER SYSTEM FOR A MORE COMPETITIVE ECONOMY, GOVERNMENT RESPONSE 6 (Apr. 10, 2024), https://treasury.gov.au/sites/default/files/2024-05/p2024-518262-merger-reforms-paper.pdf.

10 U.S. DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, MERGER GUIDELINES 23 (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [hereinafter U.S. MERGER GUIDELINES].

11 *See* Acquiring Person Instructions and Acquired Person Instructions for HSR premerger notification rules , Final Rule on amendments to Premerger Notification: Report and Waiting Period Requirements, 16 CFR Parts 801 and 803, 89 Fed. Reg. 89216, 89376 and 89392 (Nov. 12, 2024). The Section notes, however, that the FTC's action to issue these amendments to the HSR premerger notification rule has been challenged in federal court by a coalition of industry associations. *See* Complaint for Declaratory and Injunctive Relief, Chamber of Commerce of the United States et al v. FTC & Lina Khan, No. 6:25-cv-009, (E.D. Tex. Jan. 10, 2025), ECF No. 1, https://www.uschamber.com/assets/documents/Complaint-Chamber-of-Commerce-v.-FTC-E.D.-Tex.pdf.

12 Am. Bar Ass'n, Comments of the American Bar Association Antitrust Law Section and International Law Section on The Australian Treasury's Proposed Merger Law Reforms 8 (Sept. 17, 2024),

b) Entrenchment of market power (e.g. including acquisitions relating to small or nascent competitors)?

The Sections will limit comment here to acquisitions of small or nascent competitors.

Acquisition of small or nascent competitors is properly subject to competition law analysis. U.S. antitrust law has long recognized theories of liability based on potential competitive effects of acquisitions ("actual" potential competition[13] and "perceived" potential competition doctrines).[14] These theories address threats to competition that may arise from acquisitions by firms with substantial market power of entities that are not yet actual competitors in any well-defined relevant market. Where such acquisitions may lead to a SLC, they are properly subject to enforcement action.

Guideline 6 of the 2023 U.S. Merger Guidelines discusses the acquisition of nascent competitors.[15] A nascent competitive threat is defined as a "firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in its power."[16] Nascent competitors can promote competition and protect the competitive process in a variety of ways. For example, the Guidelines state that the most likely successful nascent competitive threat can be "firms that initially avoid directly entering the dominant firm's market, instead specializing in (a) serving a narrow customer segment, (b) offering services that only partially overlap with those of the incumbent, or (c) serving an overlapping customer segment with distinct products and services."[17] Such nascent competitive threats "may be able to add features or serve additional customer segments, growing into greater overlap of customer segments or features over time, thereby intensifying competition with the dominant firm."[18]

However, given the forward-looking character of the competitive analysis required under these doctrines, an element of caution is required. Small firms may possess a particular asset or capability – valuable intellectual property, a unique understanding of or approach to a particular product or market, a superior management team, etc. – that can be employed by the acquiring firm to expand (perhaps to a substantial degree) the competitive benefits that result from the broader use of such assets by the acquiring firm. These competitive benefits should be considered in determining the net competitive effect of such an acquisition.

Therefore, the Sections recommend that the Commission be authorized to review the acquisition of small or nascent competitors in circumstances where such an acquisition may lead to a SLC. The potential procompetitive benefits of such an acquisition should also be evaluated in determining whether there is, on balance, a likely SLC from the transaction. Further, any legislation permitting competition law review of small or nascent competitor acquisitions should

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https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2024/comment-australian-merger-reforms.pdf.

13 United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

14 United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

15 U.S. MERGER GUIDELINES, *supra* note 10, at 20-21.

16 *Id*. at 20.

17 *Id*.

18 *Id*.

also consider adopting safeguards against potential unintended adverse effects as described above.[19]

III. Issue 2: Substantial Degree of Influence Test

Question 7. Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.

Question 8. Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.

The Sections understand that while the Commission does acknowledge that partial acquisitions may amount to a "merger," there is limited guidance on when such a partial acquisition would confer a "substantial degree of influence" and thereby be considered a "merger." In this regard, such lack of guidance may impede the ability of firms to determine whether their transactions ought to be notified to the Commission. Given New Zealand's voluntary merger regime, the Sections respectfully submit that the Commerce Act should be amended to delineate between the different instances of when the "substantial degree of influence" test may be satisfied. In this regard, where firms are unable to assess their proposed transaction against any objective framework or guidance, it is likely that a number of transactions will not be notified to the Commission despite the "substantial degree of influence" test in fact being met.

Broadly, partial acquisitions refer to the acquisition of minority shareholdings. Importantly, it is typically when such a partial acquisition confers on an acquirer an appreciable control over the target that the proposed transaction would be regarded as a "merger." While not all jurisdictions include partial acquisitions under their respective merger control regimes, those jurisdictions that do have slightly differing approaches to the standards for determining whether a partial acquisition confers sufficient control to be considered a merger under their law.

In the EU, partial acquisitions may amount to a "concentration" where such acquisition allows the acquirer to exercise "decisive influence" over the target.[20] The European Commission's Notice on the Concept of Concentration (EC Notice) describes "decisive influence" in this sense to mean "the power to block actions which determine the strategic commercial behaviour of an undertaking."[21] In the context of joint ventures, the EC Notice makes clear that this can include veto rights, but only if those veto rights apply to strategic decisions on the business policy of a venture. The EC Notice points out that veto rights which confer joint control typically include veto

[19] Susan Woodward, *Antitrust Enforcement Over-deters Acquisitions, Squeezing Smaller Startups and Venture Capital Investors*, CCIA (Jan. 24, 2025), https://ccianet.org/research/reports/antitrust-enforcement-over-deters-acquisitions-squeezing-smaller-startups-and-venture-capital-investors/.

[20] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1, art. 3(2).

[21] Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998 O.J. (C 66) 5, ¶ 19 [hereinafter EC Notice].

rights on issues such as (i) budgets; (ii) business plans; (iii) major investments; or (iv) the appointment of senior management.[22]

For South Africa, section 12(2)(g) of South Africa's Competition Act provides that control arises where a firm has "the ability to materially influence the policy" of another undertaking.[23] In interpreting section 12(2)(g), South Africa's Competition Tribunal adopted an interpretation that is consistent with the approach of the European Commission.[24] In this regard, for purposes of establishing joint control, veto rights of the minority shareholder must pertain to strategic decisions on the business policy of the target undertaking and must extend beyond veto rights that ordinarily are associated with safeguarding the financial interests of minority shareholders. The veto rights which are usually seen as conferring joint control on minority shareholders include decisions on business issues such as: budget, business plan, major investments, or the appointment of senior management.

More generally, the International Competition Network's (ICN) *Joint Venture Survey Report 2021*,[25] consisting of responses from forty national competition authorities, found that most jurisdictions would consider the existence of at least one of the below veto rights as "control" that is relevant to an undertaking's strategic commercial behavior:

- Annual business plan;
- Investment or financing plans;
- Appointment of senior management;
- Termination of senior management;
- Multiannual strategic plans; or
- Budget.[26]

In this context, the Sections respectfully submit that in developing the Commission's guidance on when a partial acquisition may satisfy the "substantial degree of influence" test and ensuring that such guidance is consistent with international best practice, the power to veto at least one or more of the above listed items ought to be included. Additionally, the Sections recommend that these veto rights not necessarily be considered dispositive on whether there is a "substantial degree of influence" and that the Commission retain the right to consider whether partial acquisitions give rise to a "substantial degree of influence" on a case-by-case basis.[27] For example, where a partial acquisition only confers the acquirer those veto rights normally afforded to minority shareholders to protect their financial interests, such veto rights should not be considered

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[22] *Id*. ¶ 23.

[23] Competition Act, 89 of 1998 § 12(2)(g) (S. Afr.), https://www.saflii.org/za/legis/consol_act/ca1998149/.

[24] Tiger Equity (Pty) Ltd and Murray & Roberts (Pty) Ltd/Competition Commission, No. 019074 (July 24, 2014), *available at* https://www.comptrib.co.za/case-detail/6258.

[25] INT'L COMPETITION NETWORK, JOINT VENTURE SURVEY REPORT 19 (2021), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/02/MWG-Survey-Report-Joint-Ventures.pdf.

[26] *Id*. at 18.

[27] For example, agreements between minority shareholders which enable the achievement of a stable majority and/or the existence and effect of Put, Call or Convert Options.

as the ability to exercise a "substantial degree of influence."[28] Such ordinary minority protections rights would, for example, include the ability to veto a change in an undertaking's capital or the liquidation or sale of an undertaking.[29]

IV. Issue 5: Behavioral Undertakings

Question 14: Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?

The Sections understand that currently the Commission can only accept structural remedies to address anticompetitive effects arising from a proposed merger and, in this regard, the MBIE wants to understand (i) whether the Commission should be able to accept behavioral undertakings; and (ii) if so, in what circumstances.

The *Targeted Review* notes that the country's merger regime provides a pathway for a merger to proceed that includes clearance granted subject to structural undertakings by the parties to dispose of assets or shares.[30] While a preference for structural remedies often is expressed by competition law regulators (particularly in horizontal mergers),[31] the Sections caution against the adoption of an overly narrow view of the circumstances in which behavioral remedies (particularly in vertical mergers) can be effective, and therefore supports providing the Commission with flexibility in considering behavioral remedies.[32] The Sections note that there are many circumstances where behavioral remedies would be efficient and effective.

There are reports that in the United States merging companies often are willing to agree to behavioral remedies sought by competition enforcers in order to avoid time-consuming litigation,

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[28] EC Notice, *supra* note 21, ¶ 22.

[29] *Id.*

[30] Commerce Act 1986, s 66 (N.Z.), https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM88421.html.

[31] *See, e.g.*, Barry Nigro, A Partnership to Promote and Protect Competition for the Benefit of Consumers, Address Before the GC Live 7th Annual Antitrust Law Leaders Forum 7 (Feb. 2, 2018), www.justice.gov/opa/speech/file/1030711/download.

[32] For a discussion of the use of behavioral remedies at the FTC, *see Interview of FTC Deputy Director Elizabeth Kraus*, CONCURRENCES (Nov. 30, 2018), https://www.eventbrite.fr/e/interview-with-elizabeth-kraus-deputydirector-for-international-antitrust-us-ftc-i-6th-global-tickets-53055799324.

In addition, the International Competition Network notes that "behavioral remedies may be appropriate where, for example:

- 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 multijurisdictional constraints) or
- the competitive detriments are expected to be limited in duration owing to fast changing technology or other factors or
- the benefits of the merger are significant as, for example, in some vertical mergers the jurisdiction permits these benefits to be taken into account, and behavioural remedies are substantially more effective than divestitures in preserving these benefits in the relevant case."

INT'L COMPETITION NETWORK, MERGER REMEDIES REVIEW PROJECT ¶ 3.24 (June 2005), www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesReviewReport.pdf.

realize efficiencies related to the transaction, and end a costly inquiry.[33] Between 1994 and April 2020, the U.S. Department of Justice Antitrust Division (DOJ) and FTC together conducted in-depth reviews of deals involving vertical integration. Of these fifty-eight deals, six were abandoned prior to the imposition of remedies, and one (AT&T/Time Warner) was approved without conditions following a loss by the DOJ at the trial court level. Of the fifty-one deals in which remedies were imposed, six resulted in both structural and behavioral remedies; eight resulted in structural remedies only; thirty-six resulted in behavioral remedies only; and one did not require any remedies to address vertical concerns (although divestitures were required to resolve horizontal overlaps).[34]

Concerns over the effect of behavioral remedies on the merged firm's incentives can be addressed by the structure of the remedy itself and ongoing monitoring, as well as potentially significant fines and other exposure from non-compliance. While behavioral remedies may certainly be more complex than structural remedies in some cases, they are an important option for addressing the anticompetitive concerns with certain transactions for which they may be able to obviate divestiture of assets that likely would generate efficiency gains in the hands of the merged firm.

While the U.S. antitrust agencies have expressed a preference for structural remedies, they have also recognized that, in appropriate cases, "behavioral or conduct remed[ies] can prevent competitive harm while allowing the benefits of integration," particularly in the context of vertical transactions.[35] A 2017 study of the FTC included four orders relating to vertical mergers and concluded that each one succeeded in maintaining competition at premerger levels.[36]

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33 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 47 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("In practice, merging companies most often consent to relief sought by the agencies in order to avoid time-consuming litigation that would delay closing the transaction and the realization of related efficiencies.").

34 Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ANTITRUST SOURCE, Feb. 2019, https://ssrn.com/abstract=3273344 (analyzing publicly available agency documents to calculate the number of the various types of remedies used), citing data from study by Steven C. Salop & Daniel P. Culley, Vertical Merger Enforcement Actions: 1994 - July 2018 (2018). That study was subsequently updated. See Steven C. Salop & Daniel P. Culley, Vertical Merger Enforcement Actions: 1994-April 2020 (2020). https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2541&context=facpub.

35 D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, Address Before the Credit Suisse 2018 Washington Perspectives Conference 8 (Jan. 10, 2018), www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf. However, the leadership of the Antitrust Division of the U.S. Department of Justice has expressed concerns about the efficacy of behavioral remedies as a remedy in merger transactions. *See* Makan Delrahim, Antitrust and Deregulation, Address Before the American Bar Association's Antitrust Fall Forum 5 (Nov. 16, 2017), www.justice.gov/opa/speech/file/1012086/download ("Our goal in remedying unlawful transactions should be to let the competitive process play out. Unfortunately, behavioral remedies often fail to do that. Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.").

36 FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

Behavioral undertakings may also be useful for addressing certain anticompetitive effects of a merger, such as increased barriers to consumer switching, which may not be adequately prevented by structural remedies alone. Providing the Commission with authority to grant clearance of a merger transaction based on behavioral undertakings of the parties can ensure that the Commission has a broad range of options and tools for addressing the likely anticompetitive effects of a merger through the least intrusive means available that will guarantee that the efficiencies of the transaction will still be realized to the benefit of consumers.

Providing the Commission with authority to consider behavioral undertakings does not mean that the Commission would be required to accept such undertakings. The Commission can and should determine in each case whether the proffered behavioral undertakings will adequately redress any anticompetitive concerns of the transaction. If not, then the Commission should insist on structural remedies. As a related matter, the Sections recently submitted comments on Ukraine's Draft Competition Law, commending proposed amendments that would authorize its antitrust agency to impose behavioral (as well as structural) remedies that would address in advance the anticompetitive aspects of certain proposed mergers.[37]

The Sections recognize that there may be costs of monitoring proposed behavioral remedies which will fall on the Commission, and which could, in some circumstances, make behavioral undertakings unattractive or unworkable. However, the Sections recommend that the Commission not reject behavioral remedies as a matter of course just because they may require some monitoring. As we have noted, behavioral undertakings and remedies have been useful and effective in the United States in remedying the anticompetitive effects of some proposed merger transactions while still preserving the efficiencies and other consumer benefits offered by a proposed merger. With regard to monitoring costs, in the United States, monitoring responsibilities for behavioral remedies are increasingly being outsourced to independent third-party firms. In the Sections' view, if a behavioral remedy can address the competitive concerns identified by the Commission without imposing any significant material monitoring burden on it going forward, the mere fact that some level of monitoring may be required (particularly if at the parties' expense) should not necessarily disqualify a behavioral remedy from consideration.[38]

Therefore, the Sections support amendment of the Commerce Act to allow the Commission to consider and accept behavioral undertakings offered by merging parties in determining whether to clear a proposed merger, where such remedies by themselves are likely to address any

[37] Am. Bar Ass'n, Comments of the American Bar Association Antitrust Law Section and International Law Section on the Development By the Antimonopoly Committee of Ukraine of the Draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Activities of the Antimonopoly Committee of Ukraine" (Sept. 29, 2024), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2024/joint-comments-ukraine.pdf (The authority to impose behavioral and structural remedies "has been important to the enforcement efforts of numerous jurisdictions (including the United States), [and] should substantially help to restore competition.").

[38] We note that the UK Competition Markets Authority recently announced that it was launching a review of its approach to merger remedies, including when behavioural remedies may be appropriate. See speech by Sarah Cardell, *Driving growth: how the CMA is rising to the challenge* (published 21 November 2024) https://www.gov.uk/government/speeches/driving-growth-how-the-cma-is-rising-to-the-challenge.

anticompetitive concerns with the transaction and where monitoring compliance with the behavioral undertakings should not be unduly costly or complex to the Commission.

V. Issue 7: Anti-Competitive Concerted Practices

Question 19: What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?

The Sections recognize that there may be several types of activities that may raise issues related to "tacit collusion." However, the Sections will focus comments here just on information exchanges, which are specifically mentioned in the *Targeted Review* as an example of "tacit collusion."

The Sections encourage the Commission to consider carefully the unique challenges posed by the potential procompetitive and anticompetitive effects of information exchanges between competitors in determining the legality of concerted practices. The experience of the United States may provide a helpful guidepost.

Potential violations of the Sherman Act are assessed under two legal standards: per se violations and the "rule of reason." Per se violations of the Sherman Act are limited to the most serious types of antitrust violations, including agreements to fix prices, rig bids, or allocate markets. These types of agreements are presumed to be anticompetitive without further analysis and may be criminally prosecuted by the DOJ. When a potential Sherman Act violation qualifies for per se treatment, the government or a private plaintiff need only prove the existence of an agreement to participate in the conduct.

Under U.S. law, an ordinary information exchange between competitors may in some circumstances violate Section 1 of the Sherman Act or Section 5 of the FTC Act and lead to enforcement actions by DOJ or the FTC. State attorneys general or private plaintiffs may also pursue actions against information exchanges between competitors that allegedly violate antitrust laws.

In the United States, information exchanges between competitors are not typically considered per se violations. The current approach of U.S. courts is to assess information exchanges under the rule of reason, requiring a fact-intensive analysis to determine whether the likelihood of anticompetitive harm outweighs the procompetitive benefits of the information exchange.[39] Courts have recognized that the "exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[40] On the other hand, the U.S. Supreme Court also opined in that case that

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[39] We note, however, that the DOJ under the Biden Administration recently took the position that information sharing through the common use of a pricing algorithm should be subject to the per se unlawful standard, and that position is currently being explored in pending litigation. *See, e.g.*, Statement of Interest of the United States, Cornish-Adebiyi v. Caesars Entertainment, No. 1:23-cv-2536 (D.N.J. Mar. 28, 2024), EC No. 96, https://www.justice.gov/d9/2024-04/420931.pdf.

[40] United States v. U.S. Gypsum Co., 438 U.S. 422, 441, n.16 (1978).

information exchanges could be prosecuted criminally (a category of offenses usually reserved for per se unlawful conduct) if there is evidence of criminal intent to fix prices.[41] And the Court noted that "[e]xchanges of current price information . . . have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."[42] Moreover, the exchange of competitively sensitive information between or among competitors may be used as circumstantial evidence of a per se agreement, such as a price-fixing agreement.[43]

The Supreme Court's decision in *American Column & Lumber Co. v. United States* is instructive.[44] There, the Government alleged that participants in a trade association of competing lumber producers engaged in a conspiracy to fix lumber prices based in part on their collection and distribution of reports relating to anticipated production levels and market conditions.[45] The reports were based on current data, including information collected on a daily basis but were not aggregated or anonymized.[46] The Supreme Court held that the purpose and effect of defendants' coordination was to restrict competition in violation of Section 1 of the Sherman Act.[47] The Court explained that "[g]enuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals"[48] and that the exchange had the intended purpose (and actual effect) of increasing prices in the market, including through letters telling members of the trade association that "values must increase."[49] The Court accordingly took into account the current and detailed nature of the information shared, as well as its anticompetitive effects, in determining that the exchange was unlawful.

Courts have continued to evaluate these factors in assessing the legality of information exchanges. For example, in *In re Broiler Chicken Antitrust Litigation*, the Northern District of Illinois rejected private class action claims alleging that Agri Stats facilitated a conspiracy to fix the prices of broiler chicken by publishing benchmarking reports containing competitively sensitive price and output information for producers.[50] The court granted summary judgment to Agri Stats after finding that Agri Stats did not enter into any agreement with the producers, explaining that the benchmarking reports were anonymized and only reflected the production and pricing information for the subscriber.[51] Although plaintiffs argued that the information exchange was unlawful under the rule of reason because producers could "deanonymize" the reports and "infer their competitors' production plans," the court found that "the fact that the defendant

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41 *Id.* at 443.

42 *Id.* at 441, n.16 (citing, among other cases, Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921)).

43 *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Settles Airlines Price Fixing Suit, May Save Hundreds of Millions of Dollars (Mar. 17, 1994), https://www.justice.gov/archive/atr/public/press_releases/1994/211786.htm.

44 Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

45 *Id*. at 409.

46 *Id.* at 394-95.

47 *Id.* at 411.

48 *Id.* at 410.

49 *Id.* at 410.

50 *In* re Broiler Chicken Antitrust Litig., 702 F. Supp. 3d 635 (N.D. Ill. 2023).

51 *Id.* at 675, 678.

producers were making educated guesses about their competitors' production plans by analyzing or deanonymizing Agri Stats reports is not evidence that Agri Stats agreed with the defendant producers to restrict supply and increase price."[52] The court explained that "information exchange alone does not demonstrate a conspiracy" and that it would be "irrational . . . to refrain from participation in Agri Stats when all your competitors are doing so."[53] The court upheld claims against certain defendant producers, however, based on evidence that they exchanged their own company-specific Agri Stats reports directly with competitors.[54]

The DOJ (alongside several states) is currently also pursuing its own civil enforcement action against Agri Stats, arguing that the company distributes competitively sensitive information among competing meat processors and, in some instances, encourages them to raise prices and reduce supply in response.[55] The U.S. District Court in Minnesota denied Agri Stats' motion to dismiss the DOJ's claims, noting that "the *Broilers* opinion will certainly be helpful" to its analysis but will not deprive the court of "the opportunity to consider the evidence and arguments that will be developed during discovery in this highly complex antitrust action."[56]

While similar litigation will continue to shape U.S. law, the rule of reason analysis used in the United States may serve as a useful reference to the Commission in evaluating its policy toward information exchanges as concerted practices. The analysis allows for more nuanced considerations about the market at issue, the nature of the conduct (or the information at issue), and the intent and effects of the conduct rather than an outright prohibition like the per se standard. Of particular relevance is whether the information being exchanged involves only historical, rather than current or future data; whether the industry is highly concentrated; whether the data are aggregated to summarize the prices or output of at least three (and preferably at least five) competitors to prevent competitively-sensitive information of individual competitors from being ascertained; and whether the competitively-sensitive information is collected, tabulated and disseminated by an independent third party rather than directly between competitors. Although the DOJ has withdrawn the "safe harbors" that previously provided assurance that information exchanges using historic, aggregated, and anonymized data managed by neutral third parties would not be subject to prosecution,[57] these practices remain relevant to the rule of reason analysis used by courts. This flexibility is particularly important in light of the rapidly evolving technology that will enable information exchanges that may facilitate concerted practices, as well as the procompetitive benefits of certain business collaborations.

Therefore, the Sections recommend that the Commission cautiously expand the scope of "concerted practices" covered by the Commerce Act to cover information exchanges among

[52] *Id.* at 676.

[53] *Id.* at 674.

[54] *Id.* at 679.

[55] Press Release, U.S. Dep't of Justice, Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors (Sep. 28, 2023), https://www.justice.gov/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat.

[56] United States v. Agri Stats, Inc., No. CV 23-3009, 2024 WL 2728450, at *8 (D. Minn. May 28, 2024).

[57] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

competitors where the procompetitive benefits of an information exchange are outweighed by its effect of contributing to or facilitating a price-fixing agreement.

VI. Issue 8: Industry Codes or Rules

Question 21: Do you consider that industry codes or rules could either:

a. Fill a gap in the competition regime or

b. Provide a more efficient and appropriate response to addressing sector-specific competition issues rather than developing primary legislation?

According to the *Targeted Review*, the goal of developing industry-specific codes or rules would be for New Zealand to adopt a more flexible and proportionate response to addressing competition concerns as recommended in the 2024 *OECD Economic Survey of New Zealand*.[58] The *Targeted Review* considers, for example, whether industry-specific codes or rules could be a flexible and efficient tool to address barriers to competition or harmful conduct in concentrated sectors where current competition tools are known to be insufficient. As a general matter, the Sections caution against the adoption of industry-specific competition rules or standards by competition enforcement agencies because doing so could stifle competition and innovation and increase barriers to entry.

First, the creation of competition codes or rules by the Commission for a specific industry assumes that the Commission knows best how the competitive process should work in that industry. Such an approach can lack flexibility especially in industries that are evolving quickly and where the competitive process can change over time. The use of industry-specific rules instead of general, well-defined competition laws and guidelines, risks harming the competitive process, as it would require competition authorities to predict how competition would evolve in an industry and therefore could lead to errors with such prediction. In some cases, such errors could stifle innovation as firms reduce innovation to remain compliant with ill-defined, ill-conceived, or outdated rules.

Second, industry-specific codes of conduct by the Commission may create problems for firms that are vertically integrated or need inputs from multiple industries. For example, a car manufacturer may be active in a wide range of industries in which it needs to purchase inputs. If these various industries are defined by different sets of codes and rules, firms that need to interact with multiple industries may need to be aware of and comply with multiple sets of codes. This can raise the costs of doing business and can create uncertainty as to how to remain compliant with various industry codes. Such increased costs can lessen competition by forcing some firms to exit. Some of these higher costs may also be passed on to consumers in the form of higher prices.

Finally, such industry-specific codes or tools risk having the perverse effect of advantaging large incumbents at the expense of smaller competitors and potential new entrants. For example, increased costs and complexity in understanding and adhering to an industry-specific code, as well as ex-ante limitations on the ways in which new entrants can enter and compete in an industry, can

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[58] OECD, OECD ECONOMIC SURVEYS: NEW ZEALAND 2024 (May 6, 2024), https://www.oecd.org/en/publications/oecd-economic-surveys-new-zealand-2024_603809f2-en.html.

increase entry barriers and entrench incumbents. Large incumbents can often absorb regulatory compliance costs more effectively than new entrants. Understanding and adhering to industry-specific rules can thus impose disproportionate additional costs on new entrants and reduce their likelihood of entering an industry.

Therefore, the Sections generally recommend against the adoption of industry-specific competition codes by the Commission. Rather, the Sections recommend that the Commission focus on issuing generally applicable guidelines and regulations that are flexible enough to address sector-specific competition issues.

VII. Issue 9: Modernizing Court Injunction Powers

Question 24: Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons.

The Commission is considering seeking amendment of the Commerce Act to provide additional powers to the Courts to issue injunctions to remedy anticompetitive conduct or anticompetitive mergers to reflect modern practices by drawing on recent legislation that has broadened the Commission's responsibility. The *Targeted Review* indicates that the injunction powers in the Commerce Act currently do not support various sector-specific regimes for which the Commission is responsible.

The Sections note that updating the injunction powers in the Commerce Act would allow the courts to seek affirmative ("performance") injunctions. In contrast to prohibitory or negative injunctions, affirmative, or "performance," injunctions are court orders that require a party to take a specific action. For example, an injunction ordering partial divestiture of certain assets after a merger has been consummated is considered an affirmative or "performance" injunction. Such injunctions would empower the court to grant equitable relief as it deems appropriate and would be a powerful tool for strengthening the Commission's ability to seek effective remedies for addressing anticompetitive conduct. For example, as the *Targeted Review* observes, there are circumstances where behavioral remedies that would require a "performance" injunction would more efficiently address anticompetitive harm or conduct than a simple prohibitory injunction. As mentioned in the *Targeted Review*, aligning the courts' injunctive powers with the powers granted to the courts in other legislation would standardize court injunctive powers across all the legislation for which the Commission is responsible.

The Sections therefore respectfully recommend that the Commerce Act be amended to provide courts with the power to impose "performance" or affirmative injunctions on parties where necessary to ensure that the anticompetitive effects of the challenged conduct or transaction will be eliminated, and that competition will be restored to the status quo ante.

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The Sections appreciate having had the opportunity to comment on select aspects of the MBIE's *Targeted Review of the Commerce Act 1986* and remain available to respond to any questions regarding these comments or to provide additional assistance to the MBIE or the Commission as may be appropriate and helpful.