

Proposals for Improving the Merger Review Process

Prepared by the Antitrust and Trade Regulation Committee of
The Association of the Bar of the City of New York
For the FTC “Merger Best Practices Workshop” (June 12, 2002)

I. The Initial Waiting Period

The current system works well in most cases. The FTC and the Antitrust Division should continue to expedite clearance so that as much of the waiting period as possible is available for substantive discussions.

II. The Content and Scope of Second Requests

- A. Production by Specification: Parties should not be required to produce documents organized by specification. That imposes a significant burden on the parties and, since documents are often responsive to multiple specifications, often produces results of doubtful accuracy. The Committee recommends that the parties be permitted to produce documents organized by file owner and to provide a list of all file owners with their respective titles.
- B. Cut-Off Dates and “Updated” Searches: The staff is usually quite reasonable in modifying the requirements for updated searches. We recommend that the model second request be modified to reflect the reality of these modifications – *i.e.*, making it clear that only one search will be required for most individuals.
- C. Data Request Interrogatories: Second requests often include quite burdensome data requests for sales, costs, volumes, etc. broken down by divisions or subdivisions for many time periods. While the staff is often willing to entertain requests for modifications to these requests, the requests should be limited in the first instance. Discussing a reasonable scope for data requests may be a useful topic of discussion at the workshop.

III. Negotiating Modifications to Second Requests

- A. Timing Agreements and Rolling Production: The staff is often eager to obtain timing agreements early in an investigation and may expressly or implicitly link harshness or leniency in the modification process to a favorable timing agreement or a rolling production. We believe that such linkage is inappropriate. Congress has established a set of time tables for the second request process (and recently extended the time available to the Commission). Limitation issues should be resolved on their merits. Where appropriate, the parties and the Commission may agree to extend the Commission’s time or a rolling production.

- B. Electronic Data: Review and production of electronic data is typically the most burdensome aspect of complying with a second request. While the staff is often helpful in agreeing to modifications that reduce this burden, a consistent approach would also be helpful. Among the most important limitations are the following:
1. No or limited review or production of material on back-up tapes
 2. A limitation on the personnel subject to electronic search
 3. A limitation on the time frame for the electronic search
 4. Electronic documents can be produced in one common format (*e.g.*, TIFF), not in the heterogeneous “native” formats in which they were created, except where particular files are requested in their native format by the agency

We would like to discuss the parameters of such limitations at the workshop.

- C. Foreign Language Documents: We believe that the Commission should not impose an across-the-board requirement of translating foreign-language documents. Reasonable limitations that can be included in the model second request would be welcomed. Possible limitations include a translation requirement that is restricted to the files of important foreign executives or to the production of a “translation log.”
- D. Appeals Process: Both the Commission and the Antitrust Division have recently revised the processes for appealing staff decisions in the second request process. While the revisions are improvements, the procedures still do not appear to be frequently used. We recommend that the agencies consider permitting an independent mediator to be retained by the agency and the parties from a pool of approved mediators to resolve disputes.

IV. Other Second Request Issues

- A. Third-Party Information Gathering: If the agency staff uses affidavits in recommending a challenge, the parties should have the right to examine and comment on them.
- B. Access to Transcripts: Basic fairness and reliability require that transcripts of depositions be made available to the parties immediately for use in the advocacy process. The decision-making process at the agencies will only benefit from all parties having substantive access to the transcripts.