Six Easy Steps to Better Merger Control Reviews: Recommendations for Competition Agencies Across the Globe

Hugh Hollman and Benjamin Geisel

A central component of any competition law system is merger control. Today, the vast majority of the 142 member agencies that comprise the International Competition Network (ICN) have merger control filing requirements for transactions that meet certain requirements and most prohibit those transactions from closing until formally cleared.[1]

While merger control has recently spread like wildfire across the globe,[2] a number of jurisdictions have decades of accumulated experience in merger control. We are coming up to the 30th anniversary of the EU Merger Regulation (EUMR),[3] which adopted a mandatory system of merger control in the European Union. The U.S. Congress passed the Hart-Scott-Rodino Act, which established the pre-closing merger notification regime in the United States, almost 45 years ago. This combined agency experience, coupled with the ICN's valuable work in this area, is enormously useful—in particular to younger agencies—in promoting "best in class" merger control standards that can enhance the accuracy, consistency, and efficiency of any jurisdiction's merger reviews.

This article, while not claiming to be exhaustive, identifies six areas that we believe have led to less than efficient merger regimes. In response, we also identify six potential solutions drawn from ICN guidance and current agency practice that we believe will directly improve merger control reviews across the globe if implemented consistently by all agencies: (1) focus on transactions that lead to a change of control; (2) base notification thresholds on the parties' turnover; (3) only review transactions with a local nexus; (4) provide for flexibility regarding the identity of the notifying party; (5) only request the provision of documents that are necessary for the review; and (6) apply a two-step review process to quickly clear no-issue transactions.

We consider these recommendations as pragmatic solutions that will allow competition authorities to more efficiently obtain the information they need to make quicker, better, and more informed decisions whether or not to challenge a transaction while at the same time reducing the burden on merging parties. We believe these recommendations are nothing short of win-wins for all.

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1. Focus on Transactions That Lead to a Change of Control

Employing European parlance, all "concentrations" constitute transactions but not all transactions necessarily constitute concentrations. The specific definition of a concentration determines the

1 Templates, International Competition Network, https://www.internationalcompetitionnetwork.org/working-groups/merger/templates/ (last visited December 6, 2019) (the ICN website for a non-conclusive list of jurisdictions and their merger control requirements).

2 From 2008 to 2018, the number of merger control regimes that are either active or in development has almost doubled from around 80 to over 150 (including also non-ICN member jurisdictions). Peter Alexiadis, Elsa Sependa & Laura Vlachos, *Merger Control: "Around the World in 80 Days: Management of the Merger Review Process of Global Deals,"* 19 Bus. L. Int'l 202 (2018).

3 Council Regulation (EC) No. 139/2004 of 20 January 2004 O.J. (L 24) (on the control of concentrations between undertakings).

types of transactions a competition agency can review. Unfortunately, those definitions vary widely among jurisdictions.

The most common concept that drives the definition of concentrations in merger control systems worldwide is the acquisition of control on a lasting basis. Some jurisdictions have a more formalistic approach than others as to exactly what constitutes control. For example, control may be defined as the ownership of 50 percent of the voting shares in another company or, irrespective of the percentage of shareholding, the ability to exercise decisive influence over another company's strategic conduct. While the precise definition may vary, the concept itself is relatively uncontroversial.

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However, there are always exceptions to the rule. A number of jurisdictions employ other or additional definitions of concentrations to capture transactions that fall well short of the usual majority control threshold. Germany[4] and Austria[5] require, for example, notification of share acquisitions of less than majority ownership (25 percent or more) of the voting or equity shares in a target. Other jurisdictions capture minority shareholdings as low as 10 percent as is the case for Brazil (with the added complication that the threshold requires the analysis of whether there is a horizontal or vertical overlap with the target).[6] In South Korea, all transactions that render the purchaser the largest shareholder in the target will require notification.[7] The most extreme example may be Egypt, where no minimum level of shareholding is required for a transaction to constitute a concentration. Instead, virtually every share acquisition of a company is notifiable where parties trigger the—very low—Egyptian turnover thresholds.[8]

Finally, another example of a jurisdiction with merger control provisions that apply to transactions with very low shareholdings (below the above mentioned 25 percent) is again Germany, capturing acquisitions of what is termed "competitively significant influence."[9] This provision requires a filing whenever an acquirer obtains a level of influence over the target that goes beyond that of a regular minority shareholder. This is considered most likely to occur where the acquirer is active in the same or an adjacent market to the target and obtains certain representation and/or information rights, although there are no guidelines defining exactly when influence rises to the level of competitive significance.

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[4] Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints of Competition], June 26, 2013, Federal Law Gazette 1, at 1750, § 37(1), no. 3, *as amended*, Article 1 of the Act of June 1, 2017 (Ger.), https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html.

[5] Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen [Federal Act Against Cartels and other Restrictions of Competition], Federal Law Gazette 1 No. 61/2005, *as amended*, § 7(1), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004174 (Austria).

[6] Lei nº 12.529, de 30 de novembro de 2011, Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); Artigo 10 da Resolução nº 2, de 29 de maio de 2012, Diário Oficial da União [D.O.U.] de 31.05.2012 (Braz.).

[7] Dokjumgyujae Mit Gongjunggoeraeae Gwanhan Bupryul [Monopoly Regulation and Fair Trade Law], Act No. 3320, Dec. 31, 1980, *amended by* Act No. 15784, Sept. 18, 2018, art. 12 (S. Kor.) (translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=25816&lang=ENG).

[8] Law No. 190 of 2008 (To Amend Provisions of the Egyptian Competition Law, No. 3 of 2005), *Official Gazette*, vol. 25, bis (a), 23 June 2008, art. 19. In Egypt, a filing is required where the combined domestic turnover of the merging parties exceeds EGP 100 million (approximately USD 5.6 million). Law No. 3 of 2005 (Law on Protection of Competition and the Prohibition of Monopolistic Practices), *Official Gazette*, vol. 6 bis, 16 May 2005, art. 19 § 2 (Egypt); Prime Ministerial Decree No. 1316 of 2005 (Issuing the executive regulations of Protection of Competition and Prohibition of Monopolistic Practices law No. 3 of 2005), *Official Gazette*, vol. 32 bis, 18 August 2005, art. 44 (Egypt); Egyptian Competition Authority's Board Resolution of July 3 2018, 2018, Anti-trust Notification Filing, *Circular Regulating Mergers and Acquisitions Notification Form* (Sept. 1 2018).

[9] GWB, *supra* note 4, at no. 4.

Recommendation. Competition authorities should only focus on transactions that result in a lasting change of control. This concept of an acquisition of control is widely recognized as a bedrock concept for assessing the applicability of merger control rules since it is generally considered as most likely to directly impact the structure of a market.[10]

2. Base Notification Thresholds on the Parties' Turnover

The assessment of whether certain thresholds are met is a practical tool for competition authorities to filter out transactions that will have no or only negligible anticompetitive effects. Setting the bar at the optimal level can be tricky. The bar has to be low enough to capture transactions having an actual impact on competition but high enough to avoid overburdening transactions that will only have negligible effects, if any, on the competitive landscape.

Turnover based thresholds: the best approach, if done right. The ICN specifically recommends that mandatory notification thresholds should be based on objectively quantifiable criteria.[11] Turnover (but also asset-based) thresholds are the best examples of such an approach. They are also usually readily available and relatively straightforward in their application. A good example of such a test is the European Union's merger control regime, which does not only provide clear turnover thresholds in the EUMR[12] but also provides guidance on the calculation and allocation of the relevant turnover in the European Commission's Consolidated Jurisdictional Notice.[13]

The lack of clear definitions makes it very difficult for merging parties to determine whether a filing is required. One of the most common definitional issues is whether a given turnover threshold relates to a company's global or domestic activities. By way of example, a notification in Pakistan is required where the annual turnover of the acquirer reaches at least approximately USD 4.1 million[14] or the combined turnover of the acquirer and the target reaches approximately USD 8.2 million or more.[15] But Pakistani competition law is not clear whether this relates to local or global turnover. While such low thresholds only seem to make sense when the relevant turnover is local, the authority's view may differ. With such low turnover thresholds, it is almost a foregone conclusion that turnover thresholds are met if any foreign sales are included in the calculation.

Another awkward definitional issue is that a few jurisdictions require that seller turnover is included in the turnover calculation, although a seller is never party to a concentration (albeit to the transaction). This is the case for Brazil, with the added complication that it seems unclear whether only controlling sellers, as established by Brazilian law, or sellers with shareholdings as

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[10] When considering widening the scope of transactions that would be subject to merger control review, authorities should bear in mind that including acquisitions of minority shareholdings and transactions with any possible competitively significant influence (regardless of degree) is likely going to exponentially expand the range of possible transactions requiring notification to transactions that raise little or no competitive concerns. On balance, it is arguably preferable to exclude them from merger control on efficiency grounds or, at the very least, provide clear written guidance to allow merging parties to accurately assess whether their transaction is covered.

[11] *ICN Recommended Practices for Merger Notification and Review Procedures*, Int'l Competition Network, May 2017, at 6, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[12] Council Regulation 139/2004, *supra* note 3, at 1.

[13] Section IV ("TURNOVER"), Notice under Council Regulation 139/2004 on the control of concentrations between undertakings, 2008 (C95) 35, 43 (EC).

[14] As a general remark, in this article, figures in U.S. dollars are converted based on average of the daily rates for the period from January 1, 2018 to 31 December 31, 2018.

[15] The thresholds require, inter alia, an annual turnover of the acquirer of at least PKR 500 million (approx. USD 4.1 million) or the combined turnover of the acquirer and the target of at least PKR 1 billion (approx. USD 8.2 million). Competition (Merger Control) Regulations (2016), S.R. & O. 1176, 4(2)(a), 4(2)(b), 4(2)(c), and 4(2)(d) (Pak.).

low as 20 percent, as sometimes suggested by the Brazilian authority, need to be included.[16] Yet another example is Ukraine, where—in the extreme case—notifications are triggered by the seller's domestic turnover alone, i.e., even when neither the acquirer nor the target is actually active in Ukraine.[17] It is difficult to see how such a transaction might possibly have a negative impact on competition in Ukraine and why it would be in the interest of the Ukrainian competition authority to review it.

Another practical concern is how thresholds are calculated. Currency fluctuations can quickly change thresholds that would otherwise serve as effective screens against transactions that are unlikely to have competitive effects within the jurisdiction. Of course, the opposite is also true. Currency appreciation may result in possibly anticompetitive transactions being screened out from consideration. A possible solution is automatic indexing of turnover thresholds.[18] Differing rules between jurisdictions for how turnover (and asset value) is calculated (e.g., book vs. fair value, and incorporation of goodwill) may also reduce the effectiveness of thresholds.

Market share tests are burdensome . . .

Thresholds should not require a substantive pre-assessment. The ICN Recommended Practices explain that merger notification tests should be straightforward to reduce transactional costs on the parties while also benefiting the competition agencies by limiting the need for them to review transactions with no or limited anticompetitive effects.[19] According to the ICN, market share-based thresholds may be suitable for later stages of the merger review process but they are not suitable as merger screens because they are inherently subjective and fact-intensive.[20] Market share tests are burdensome because they require the parties to expend considerable effort to define relevant markets (often absent any clear market definition precedent) and assess the parties' presence in such markets prior to even knowing whether a transaction is notifiable or not.

Spain's merger control laws are an example. Whenever the turnover threshold test is not met in Spain, an alternative market share threshold test applies. That test requires notification where a concentration results in the acquisition (i.e., no overlap) or increase (i.e., overlap) in market share of at least 30 percent of a relevant product market in Spain.[21] This puts a huge burden on the parties, for a number of reasons. First, they have to identify and define all relevant product and geographic markets in which the parties are active locally. This usually requires extensive research of the local competition authority's case precedents (if any). Second, the parties need to assess their market power in each of those local product markets. This requires a party to invest considerable time, money, and effort to accumulate, analyze, or purchase from external providers the available data to calculate market shares.

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16 Lei nº 12.529, *supra* note 6; Resolução nº 2, supra note 6.

17 Zakon Ukrainy "Pro zakhyst ekonomichnoi konkurentsii" [Law of Ukraine on Protection of Economic Competition] No. 2210-III, dated 11 January 2001, art. 1 and 24 / Ukraine Official Journal dated 02.03.2001—2001, No. 7, p.51, art. 260, act code 17835/2001 (Ukr.). While there seem to be efforts to change Ukrainian merger control rules to abandon the requirement to include the seller's turnover and assets value on the side of the target for the calculation of the thresholds, it is currently unclear what the scope of changes would be and when exactly such changes may become effective. See, in that regard, the draft order of Zminy do Polozhennia pro poriadok podannia zaiav do Antymonopolnoho komitetu Ukrainy pro poperednie otrymannia dozvolu na kontsentratsiiu subiektiv hospodariuvannia (Polozhennia pro kontsentratsiiu) [Amendments to the Regulation on the rules for submission of applications to the Antimonopoly Committee of Ukraine for the prior approval of a concentration of undertakings (Regulation on Concentration)] (Ukr.).

18 *Exchange rates*, Org. for Econ. Co-operation and Dev., https://data.oecd.org/conversion/exchange-rates.htm.

19 *ICN Recommended Practices for Merger Notification and Review Procedures*, *supra* note 11, II. B.

20 *Id.* II. E.

21 Competition Act, art. 8(1)a (B.O.E. 2007, 15) (Spain).

Parties also need to ensure that their approaches and calculations are aligned to obtain consistent and credible results. Only after all of these time-consuming steps can the transacting parties assess whether their concentration is notifiable. While it could be argued that this market share assessment may save time during the next phase of notification preparation, this will, of course, only apply should the transaction actually trigger the relevant 30 percent threshold.

Filing thresholds should take account of the economic reality of the transaction. Apart from whether the relevant turnover (or asset value) tests are easy to apply, another possible complication is identifying the party which has the relevant turnover to satisfy the applicable merger control test for filing. Even the timing of the transaction can make a difference. This is best explained with an example from Ukraine.

Assume that there are two investors, A and B, which plan to acquire a joint venture company located outside of Ukraine in which each of them will hold 50 percent. Investor A has turnover in Ukraine in excess of USD 9.4 million. Investor B is not active in Ukraine. Each of the two investors meets the global turnover threshold of USD 177 million. According to Ukrainian merger control laws, such a transaction will constitute two distinct concentrations: the investment of Investor A and the investment of Investor B.[22] A filing requirement will only exist should Investor A (which has turnover in Ukraine) acquire its stake in the joint venture before Investor B. Only then would Investor A's turnover be included in the joint venture's turnover and both the domestic and the global turnover threshold would be met. However, as long as both acquisitions take place at the same time or Investor B acquires its joint venture stake prior to Investor A, no filing obligation arises, since Investors A and B would not be parties to the same concentration and each of them (together with the joint venture) would not meet all relevant notification thresholds.[23]

This example illustrates that companies can theoretically structure parts of a transaction and change their timing to avoid a filing requirement in Ukraine. Thus, the end result ultimately depends on an arbitrary technical filing distinction instead of a careful assessment of competitive effects. An approach that better reflects reality is to assess multiple transactions as one economic concentration. The merger control thresholds then apply to the entire concentration and all parties involved. This method is followed by the European Commission, as explained in its Consolidated Jurisdictional Notice.[24]

Parties value legal certainty. Legal uncertainty is another criticism often leveled at voluntary merger filing regimes. Australia and Singapore recommend a filing if certain turnover and/or market share thresholds are met.[25] This approach may appear to be in the parties' best interests by

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[22] Law of Ukraine on Protection of Economic Competition No. 2210-III, dated 11 January 2001, art. 22/Ukraine Official Journal dated 02.03.2001—2001, No. 7, p.51, art. 260, act code 17835/2001 (Ukr.).

[23] *Id.*

[24] Section 1.5 ("Interrelated transactions"), Notice under Council Regulation 139/2004, *supra* note 13, at 12, 15.

[25] While the Australian Competition and Consumer Act 2010 does not provide for any thresholds in its Section 50, which prohibits acquisitions that would have the effect or likely effect of substantially lessening competition in any market in Australia, the Australian Competition and Consumer Commission (ACCC) Merger Guidelines November 2008 (as amended November 2017) state that notification of a contemplated merger is encouraged where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share greater than 20 percent in the relevant market (§ 2.9). Competition and Consumer Act 2010 (Cth) s. 50 (Austl.); ACCC Merger Guidelines 2008, as amended November 2017, s. 2.9 (Austl.). Likewise, the Singapore Competition Act (Chapter 50B) does not provide any thresholds. Competition Act (Cap 50, 2006 RevEd). The Competition and Consumer Commission of Singapore (CCCS) recommends in part three of its CCCS Guidelines on Merger Procedures 2012 that parties are recommended to make a notification where the merged entity will have a market share of at least 40 percent or the merged entity will have a market share of between 20 percent to 40 percent and the post-merger combined market share of the three largest firms (CR3) is 70 percent or more (§ 3.6). Guidelines on Merger

providing them with the freedom to decide whether they prefer to notify or not. But this is arguably a misperception. A voluntary filing regime does not mean the parties can engage in concentrations without any review. Instead the lack of a clear filing obligation means that a voluntary regime puts more of a burden on the parties to assess whether to file. As with jurisdictions with market share tests, parties are required to make a substantive pre-assessment, i.e., how high the risk is that the authority may initiate a merger control review ex officio.[26] Voluntary filing regimes, therefore, most often result in greater uncertainty for merging parties. In our experience, merging parties would prefer to avoid that uncertainty more than they would choose the greater flexibility of voluntary filings.[27]

Recommendation. Notification thresholds should be based on the parties' turnover, as they are straightforward to apply and make use of information generally readily available. They also form objectively quantifiable criteria. Thresholds that are opaque or require a substantive pre-assessment of the transaction are best avoided to prevent unnecessary burdens on merging parties and potentially diverging conclusions. Additional written guidance to define the relevant terms and calculation methods further increases their user-friendliness. Equally, for voluntary filing regimes, the agency's notification recommendation should be based on turnover thresholds in combination with clear written guidance as to when a transaction is likely to raise potential competition concerns to reduce the legal uncertainty for the parties.

[T]he lack of a clear filing obligation means that a voluntary regime puts more of a burden on the parties . . .

3. Only Review Transactions with a Clear Local Nexus

A fundamental principle underlying merger control is that jurisdiction should only be asserted over transactions that impact competition within a reviewing jurisdiction's territory.[28] Merger control thresholds should, therefore, be developed to screen out those transactions that will have no or only negligible local effects. This requires a material nexus between the jurisdiction, the proposed transaction, and the transacting parties.

Under the merger control rules of many jurisdictions, this local nexus requires at least two of the transacting parties to have substantial commercial activities within the reviewing jurisdiction's territory. As these two parties will often be the acquirer and the target there will be a clear link between jurisdiction and the transaction. However, there are circumstances where even two-party thresholds do not fulfill the nexus requirement. For example, where two companies create a joint venture to manufacture products for a specific local market, that concentration can trigger filings in a number of other jurisdictions based solely on the parent companies' turnover in those jurisdictions even though the proposed joint venture will have no revenues or assets in those other

Procedures 2012, Competition and Consumer Commission of Singapore, (1 July 2012), s 3.6. In addition, § 3.5 of the CCCS Guidelines on Merger Procedures 2016 states that it is unlikely to investigate a merger that only involves small companies (each of the parties' turnover the previous financial year in Singapore being below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties being below S$50 million). Guidelines on Merger Procedures 2012, Competition and Consumer Com'n of Singapore (1 July 2012), s 3.5.

26 *See, e.g.*, *ACCC Merger Guidelines 2008*, *as amended* November 2017, s. 2.9 (Austl.) *Competition Act* (Cap 50, 2006 RevEd), div 5, s 62; *ACCC Merger Guidelines 2008*, *as amended* November 2017, s. 1.7 (Austl.).

27 *ICN Recommended Practices for Merger Notification and Review Procedures*, *supra* note 11, at II. A.

28 *Id.*

jurisdictions. For example, this is the case in Turkey,[29] the European Union,[30] and China.[31] This can place a huge burden on parties in terms of timing and transaction costs, in particular where the applicable turnover thresholds are set at a very low level, as is the case for Turkey, which only requires a combined domestic turnover of more than approximately USD 20.7 million in addition to two of the parties involved reaching a turnover in excess of USD 6.2 million each.[32] The equitable solution is requiring a local nexus, i.e., the joint venture only needs to be filed in the jurisdictions in which it will be active. This approach is followed in Canada[33] and Germany.[34]

The local nexus requirement should also directly form part of the merger control threshold test to avoid unnecessary filings from the outset, and not part of the substantive review of the transaction after the parties have already had to incur the time and expense of a filing.

Recommendation. Correctly calibrated turnover thresholds that require a minimum level of domestic sales from—at least two of—the merging parties, one of which should be the target, is the most straightforward way of ensuring a local nexus between the jurisdiction, the transaction, and the transacting parties.

4. Provide for Flexibility Regarding the Identity of the Notifying Party

A number of jurisdictions adopt the highly formalistic approach of requiring a specific entity to act as the notifying party. A common notification condition that can unnecessarily burden merging parties is the requirement that only the directly acquiring entity can notify. Special purpose vehicles (SPVs) are often created specifically for a transaction and end up as the directly acquiring entity. SPV creation is usually driven by tax considerations, and they do not otherwise engage in any economic activity and have no turnover or personnel. By definition, therefore, such an SPV cannot possibly have an economic impact or be relevant to the competitive effects of the transaction.

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[29] A notification is required where either, combined domestic turnovers of the parties exceed TL 100 million (approx. USD17.6 million) and domestic turnovers of each of at least two of the transaction parties exceed TL30 million (approx. USD5.28 million) or (i) in case of an acquisition, domestic turnover of transferred assets or business exceeds TL30 million and world-wide turnover of at least one of the other parties exceeds TL500 million (approx. USD 88 million), or (ii) in case of a merger, domestic turnover of any of the parties exceeds TL30 million and worldwide turnover of at least one of the other parties exceeds TL500 million. 4054 Sayılı Rekabetin Korunması Hakkında Kanun [Turkish Law on Protection of Competition No. 4054] (Turk) in conjunction with 2010/4 sayılı Rekabet Kurulundan İzin Alınması Gereken Birlesme ve Devralmalar Hakkında Tebliğ [2010/4 Sayılı Tebliğ] [Communiqué No. 2010/4] (Turk), as amended from time to time.

[30] Article 1 of the EUMR which usually requires a combined worldwide turnover of the transacting parties of more than EUR 5 billion (approx. USD 5.9 billion) and a community-wide turnover of at least two parties of more than EUR250 million (approx. USD295.4m). However, for greenfield joint ventures outside of the EEA, the EUMR does not provide any exemption. Council Regulation 139/2004, *supra* note 3, at 1, 6.

[31] Fanlongduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 517, art. 21 (China); Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators] (promulgated by the St. Council, Aug. 3, 2008, effective Aug. 3, 2008, amended Sept. 18, 2018) State Council Gaz. 5 (China); Guojia Shichang Jiandu Guanli Zongju Fanlongduanju Guanyu Jingyingzhe Jizhong Jianyi Anjian Shenbao de Zhidao Yijian (国家市场监督管理总局反垄断局关于经营者集中简易案件申报的指导意见) [Guiding Opinions of the Anti-monopoly Bureau of the State Administration for Market Regulation on Declaration for Simple Cases of Concentration of Business Operators] (promulgated by the St. Admin. for Market Reg., Sept. 29, 2018, effective Sept. 29, 2018), http://gkml.samr.gov.cn/nsjg/bgt/201901/t20190102_279605.html (China).

[32] Sayılı Tebliğ, *supra* note 29, art. 7.

[33] Competition Act, R.S.C. 1985, c. C-34, amended by S.C. 2018, c. 8, s. 116 (Can.). (The example relates to an acquisition of the target by its two parents.).

[34] GWB, *supra* note 4, § 185(2).

SPVs are frequently replaced in multi-jurisdictional transactions prior to closing as they can involve long periods of preparation. Once again, tax considerations often drive such changes, which may lead to a reshuffling of the entities. In the process, the basic entity structure of the transaction then changes before closing but without any actual market effects.

Treating the directly acquiring entity as the notifying party may result, therefore, in an unnecessary additional notification of a transaction that has already been reviewed by an antitrust authority. Of course, an additional notification includes another filing fee and statutory waiting period. This is all the more cumbersome since the parties will also have to once more gather all the relevant formal documents for the new entity, even though it could again be nothing more than another SPV. Unfortunately, Japan follows this approach.[35]

The ICN could promote the interests of the global antitrust community by endorsing specific standardized forms and supporting documents . . .

Recommendation. Abandon the requirement of having the directly acquiring entity as the notifying party and replace it with what is most common in other jurisdictions—any entity in the control chain from the direct acquirer up to the ultimate parent entity. This change is universally beneficial as the competitive impact of a transaction should be assessed in any event by considering a corporate group's activities and certainly not only the acquiring entity's activities, especially if, like an SPV, it does not have any. This flexibility would allow parties to make changes to their transaction structure without the fear of losing time and resources or breaching contractual obligations (often in the context of long stop dates). It would also spare competition authorities from having to re-review filings that although already fully assessed, still need to go through the regular review and clearance procedure.

5. Only Request the Provision of Documents That Are Necessary for the Review

Once parties identify the jurisdictions where merger control filings are required, next steps are preparing and collecting the initial notification requirements. Apart from the information required to complete the filing forms, various supporting documents are often required by the reviewing agencies, such as corporate documents, financial statements, and powers of attorney. The ICN has advised agencies to limit these requirements to ensure proportionality with the competitive concerns likely presented by each transaction.[36] However, even the basic initial notification requirements can already be unnecessarily burdensome. For example, Ukraine consular officials require powers of attorney to be hole-punched, stamped, and even folded in a specific way before they will certify the documents.

This is an area that lends itself to standard templates and requirements, but more often than not, most jurisdictions have their own unique requirements. The ICN could promote the interests of the global antitrust community by endorsing specific standardized forms and supporting documents, perhaps even by providing basic templates.[37] While jurisdictions do, of course, have different systems of law, recommended models would definitely promote convergence and limit the burden on parties. Sometimes, national administrative law may oblige an agency to request doc-

[35] Shiteki-dokusen no Kinshi oyobi Kōseitorihiki no Kakuho ni Kansuru Hōritsu [Dokusen Kinshihō] [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan] Act No. 54 of 1947, art. 10, sec. 2 (Jap.) (regarding the acquisition of shares; the applicable provision will be different depending on the type of the transactions).

[36] *ICN Recommended Practices for Merger Notification and Review Procedures*, *supra* note 11, at V.

[37] While there is consolidated information available for a number of jurisdictions on the ICN website under the headline "Templates," this collection does not provide actual templates used in these jurisdictions but presents the necessary information in a more structured format. *Templates*, *supra* note 1.

uments in a certain form, irrespective of whether this adds any real value to the review procedure. In such cases, national legislators may want to consider including provisions in their competition laws exempting merger control procedures from such formalization requirements.

Required formal documents. The following are examples of formality requirements increasing time and expense without having much relevance to the assessment of the competitive effects of a transaction:

Some jurisdictions, including Russia, require the submission of articles of association (AoA) for the notifying party.[38] Others, such as Indonesia, even go as far as to require the submission of the AoA of each of the notifying party's group entities having sales or assets in Indonesia.[39] By contrast, a number of other jurisdictions (e.g., the European Union and China) do not require the submission of any AoA.[40] This is surely an indication that the added value of such documents is limited.

Financial statements can be helpful for the competition assessment. But there are jurisdictions that require financial statements for each notifying party's group entity with sales or assets in the jurisdiction. Indonesia has this "every entity" approach.[41] While it is understandable that a competition authority may want proof, for example, that an undertaking concerned does meet the jurisdiction's turnover threshold, it likely would make more sense to focus on the notifying party's consolidated annual group report, especially when financial statements of a holding company are submitted. Since the latest financial statements suffice for most jurisdictions, we recommend that competition authorities in jurisdictions that require submission (and translation) of financial statements for previous years consider removing this requirement.[42]

A number of jurisdictions, including South Korea, require the parties to provide signed minutes of the board of directors meeting during which the transaction was discussed and agreed.[43] This requirement is likely intended to ensure that competition authorities only need to review those transactions that are relatively advanced and likely to proceed. But where parties submit signed purchase and/or shareholders agreements, the parties' intentions are clear and the provision of board minutes becomes redundant.

Many jurisdictions, including China and the European Union, require the submission of a signed power of attorney (PoA) on behalf of the notifying party,[44] despite it being highly unlikely

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38 *Федеральный закон от* 26 *июля* 2006 N 135-ФЗ "*О защите конкуренции*" [On Protection of Competition], *Российская газета* [РГ] Ros. Gaz 27 July 2006, N162 (Rus.).

39 Penggabungan atau Peleburan Badan Usaha Dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat, Elucidation of Article 8 § (3) of Government Regulation No. 57 of 2010 on Merger, Consolidation, or Share Acquisition of Company that Could Cause Monopolistic Practices and Unfair Business Competition (GR 57/2010), State Gazette No. 69 of 2010 (Indon.).

40 However, China does require the submission of an authentic copy of the notifying party's certificate of corporation. Fanlongduan Fa, *supra* note 31, art. 23 (China); Guojia Shichang Jiandu Guanli Zongju Fanlongduanju Guanyu Jingyingzhe Jizhong Shenbao Wenjian Ziliao de Zhidao Yijian, *supra* note 31.

41 Penggabungan atau Peleburan Badan Usaha Dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat, *supra* note 29.

42 *Id.*

43 Giupgyulhapeui Singoyoryung [Merger Notification Guidelines], Korea Fair Trade Comm'n Admin. Notification No. 1999-3, April 15, 1999, Annex 5, Attachment Section 1 (f) (S. Kor.).

44 For the European Union, the requirement is stated in the Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing the EUMR. Comm'n Reg. 1269/2013, 2013 O.J. (L 336) 1 (EU). Fanlongduan Fa, *supra* note 31, at art. 23 (China); Guojia Shichang Jiandu Guanli Zongju Fanlongduanju Guanyu Jingyingzhe Jizhong Shenbao Wenjian Ziliao de Zhidao Yijian, *supra* note 31.

that a law firm would notify a transaction without being authorized to do so by the transacting parties. To avoid what is essentially an unnecessary formality, competition authorities may want to consider requesting a PoA only in cases in which there are indications that a party's representative is acting without that party's authorization or consent.

Formalization and translation of documents. The burden on the parties increases still further where documents require translation or additional formalization such as notarization or an apostille.[45] In Turkey, for example, a PoA for a notification requires a notarization and a legalization. Where the notifying party is domiciled outside of Turkey, the PoA needs to be notarized first by a local notary in the entity's country of origin where the PoA is signed. It then needs to be legalized, i.e., either apostilled by the relevant authority in the country of origin or, where the country of origin is not a member state to the Apostille Convention, the legalization has to be done by the relevant ministry in the country of origin and the local Turkish embassy/consulate. Once the PoA arrives in Turkey, its Turkish translation also needs to be notarized by a notary in Turkey.

[C]ompetition authorities should give due consideration to the rules on legal privilege applicable in the jurisdiction in which the relevant documents were created.

The translation of documents in their entirety is an extremely time-consuming and costly exercise. Assuming that the documents are necessary for the competitive assessment of the transaction, a more practical approach is to simply limit the required translations to the relevant parts, instead of having to translate hundreds of pages of, for example, annual reports, with little added value. It would also be most appropriate for the competition authority to make such requests on a case-by-case basis instead of requesting full translations upfront under the pretext that they may prove useful.

Privileged documents. Documents (including email communications) containing legal advice from outside or in-house counsel should generally be exempt from any document request coming from a competition authority. This ensures that merging parties receive proper legal advice from their legal counsel and protects their fundamental rights. This approach is widely recognized in common law jurisdictions but unfortunately is handled differently in European continental jurisdictions[46] and elsewhere. Germany, for example, only recognizes the legal professional privilege for outside counsel and only once a criminal investigation has been started.[47]

However, in the absence of harmonized rules on legal professional privilege, and as has been recommended by the ICN following basic comity norms, competition authorities should give due consideration to the rules on legal privilege applicable in the jurisdiction in which the relevant documents were created.[48]

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[45] An apostille is only available for countries that are signatories to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 (Apostille Convention). Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33.1 U.S.T. 883, 527 U.N.T.S. 189. It allows for a certification for legal purposes (the apostille) in one Member State to be recognized in all other Member States. Where an apostille is not available, a document has to be legalised following the specific requirements of the countries involved, which usually involves the foreign ministries on both sides.

[46] Julia Holtz, *Legal Professional Privilege in Europe: A Missed Policy Opportunity*, 4 European J. Competition L. & Prac. 402–412 (2013) (discussing the approach by the European Commission towards legal professional privilege).

[47] Strafprozessordnung [StPO] [Code of Criminal Procedure], § 97 et seq., https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

[48] *ICN Recommended Practices for Merger Notification and Review Procedures*, *supra* note 11, at VI. F. Legal privilege has also been included in the ICN's international Framework on Competition Agency Procedures. *ICN Framework on Competition Agency Procedures*, Int'l Competition Network, Annex: Principles, i) iii., https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.

Recommendation. Merging parties are usually under the obligation to provide correct and accurate information. A number of jurisdictions, including the European Union,[49] make such a confirmation part of their notification forms. Therefore, in many cases, it could well be argued that no formal documents need to be submitted. All relevant information that such documents can possibly contain is also presented in the notification form itself. Therefore, competition authorities should limit their document requests to specific cases where there is real added value.

Regarding the formalization of requested documents, there seems to be no added value at all in such requirements. Where national administrative law obliges an agency to request documents in a certain form, national legislators should include provisions in their competition laws exempting merger control procedures from such formalization requirements. Furthermore, translations of requested formal documents should be limited to the parts of potential interest to the authority. Lastly, as a matter of international comity, competition agencies should refrain from requesting documents that are covered by legal privilege in the jurisdiction in which they have been created.

6. Apply a Two-Step Review Process to Quickly Clear No-Issue Transactions

To assess a proposed concentration and its effects on the competitive landscape, a competition authority needs to receive information that enables it to conduct a meaningful review. However, a number of jurisdictions require the provision of information that has no real connection to the notified transaction and is not proportionate to the level of potential competitive concern posed by that transaction. In Taiwan, the notifying parties need to provide detailed information on their best-selling products in Taiwan, including their sales value, sales volume and price per unit. They also need to provide information on how much those products contribute to the overall sales of the party in Taiwan, as well as its own and competitors' market shares, and information on their suppliers and customers. All this information is still required even if it is about products that are completely unrelated to the transaction.[50] Similarly, the Indonesian competition authority requires competitor, supplier, and customer information for all products sold locally by each notifying party's entities with sales or assets in Indonesia regardless of whether they are involved in the transaction.[51]

A better approach is to follow a two-step notification system. In the first step, a competition authority only requests the information that is strictly necessary to assess the basic parameters of the transaction to see whether its jurisdiction over the transaction is established and whether the transaction has the potential to have a material adverse impact on any market. Information required to perform a step-one assessment includes the following: (1) a description of the transaction structure to assess that it meets the jurisdiction's definition of a concentration; (2) the provision of the relevant turnover information of the parties to assess whether the jurisdiction's noti-

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[49] Form Co Relating to the Notification of a Concentration Pursuant to Regulation (EEC) No. 4064/89, annex, 1994 O.J. (L 377) 9, 21. (See Section 10, "Declaration," which states: "[The notifying party or parties] declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by [Short] Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.").

[50] Shiye jiehe shenbao xuzhi (事業結合申報須知) [Directions for Enterprises Filing for Merger], art. 1 (Taiwan).

[51] Penilaian Terhadap Penggabungan atau Peleburan Badan Usaha, atau Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktik Monopoli dan/atau Persaingan Usaha Tidak Sehat, Commissioners of the Business Competition Supervisory Committee (KPPU) Regulation No. 3 of 2019 on the Assessment of Merger or Consolidation or Acquisition of Shares of a Company which Could Cause Monopolistic Practices and/or Unhealthy Business Competition, State Gazette No. 1130 of 2019 (Indon.).

fication thresholds are met;[52] (3) a description of the parties, their organizational structure and their activities, in particular in the jurisdiction where the parties notify, to provide a first indication of the relevant markets and potential overlaps of activities; (4) a description of the (potential) markets to which the transaction relates; and (5) a confirmation that certain combined market share thresholds (e.g. 20 percent horizontally, 30 percent vertically) are not exceeded on such relevant markets.

Only in the event that a material market adverse impact seems possible should the transaction enter the second stage. In that second stage, the authority may then request further information and documents to make a substantive assessment of the case.

Recommendation. Since most transactions do not lead to a material negative impact on competition, agencies should adopt a two-step approach when assessing transactions. Such an approach would filter out the vast majority of transactions at step one. It would also substantially unburden both the merging parties and the competition authorities that could focus their resources on the transactions that pose actual concerns.

Conclusion

Streamlining and simplifying merger control regimes will help competition authorities to allocate their limited resources more efficiently and ensure transactions that do not have a material adverse effect on competition are swiftly cleared or, even better, do not require notification. It will also allow competition authorities to focus on those transactions that do have a material impact on the market.

Here is a brief summary of our recommendations that we believe will enhance the efficiency, accuracy, and predictability of merger control systems across the world.

(1) Focus on transactions that lead to an actual change of control. Clear, written guidance should be issued to allow merging parties to easily assess whether their transaction fits within the jurisdiction's definition of a change of control. ICN guidance and proposed best practices should be incorporated.

(2) Base notification thresholds on objective criteria that are straightforward in their application. Turnover thresholds have the most benefits and best meet these criteria.

(3) Only review transactions where a local nexus exists between the jurisdiction, the transaction, and the transacting parties. Notification thresholds should be the primary method for defining the local nexus but additional provisions/guidance may be necessary.

(4) Provide for flexibility regarding the notifying party. Any entity in the control chain from the direct acquirer to the ultimate parent company should suffice as the assessment should be of the entire corporate group in any event.

(5) Only request documents that are actually necessary for the review of the transaction. Often, this might be none at all. Additional formalization requirements usually have little added value. For documents from other jurisdictions, give due consideration to legal privilege.

(6) Apply a two-step review process to ensure that no-issue transactions can be cleared quickly.

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[52] As argued above, turnover thresholds form the most straightforward and objective criteria to assess a notification requirement. In case of other measurements, such information needs to be provided instead of turnover.

None of these recommended steps are especially hard to implement, and there is considerable agency or ICN precedent that recommend their adoption. There is always a certain amount of inertia that resists change, especially in larger organizations, but practice in peer agencies show that these recommendations are worth the investment and will result in positive returns. We hope that setting out these recommendations in a straightforward manner and in a simple list will encourage agencies to quickly convert them into operating procedures for the benefit of all stakeholders in the process—not least of whom are the agencies themselves. ●