April 14, 2017

RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES

I. Definition of a Merger Transaction

WORKING GROUP COMMENTS
(May 2017)

A. Jurisdictions should consider carefully the types of transactions that are included within the scope of their merger laws and seek to include in the scope of their merger laws only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure.

Comment 1: Jurisdictions should not include in the scope of their merger laws transactions that are unsuitable for merger review. This applies, for example, to cooperative arrangements that can be reversed easily by the parties' future individual decisions, and other non-durable arrangements.

Comment 2: Group-internal or intra-person restructuring should not be included within the scope of merger review as it has no effect on market structure.

Comment 3: Acquisitions of a minority interest should not be included in the scope of merger review if they are unlikely to be competitively significant.

Comment 4: Jurisdictions may consider using exemptions to exclude from merger review transactions that, because of their nature, are unlikely to have durable effects on competition.

B. Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws. Such definitions may refer to categories of transactions, such as share acquisitions and acquisitions of assets, and/or to broader concepts, such as the acquisition of "control" or of a "competitively significant influence", as defined by the reviewing jurisdiction.

Comment 1: When defining what types of share acquisitions are within the scope of merger laws, jurisdictions may establish objective, numerical thresholds, such as the acquisition of at least 25% or 50% of voting or equity rights in another entity.

Comment 2: Jurisdictions should seek to clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion within the scope of their merger laws. The definition should screen out asset acquisitions that are unlikely to affect competition.

Comment 3: Jurisdictions may also rely on broader concepts, such as the acquisition of "control" or of a "competitively significant influence" to determine what transactions are within the scope of their merger laws. If so, they should seek to maximize legal certainty and predictability, in particular through a consistent and transparent decision making practice, and the use of guidelines or informal guidance.

Comment 4: Some jurisdictions may find it necessary to adopt a separate definition of joint ventures or acquisitions of interests in partnerships that fall within the scope of their merger laws. In this case, jurisdictions should use clear and predictable criteria to distinguish those transactions that are subject to merger review from those that are not.

II. Nexus to Reviewing Jurisdiction

A. Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Jurisdictions are sovereign with respect to the application of their own laws to mergers. In exercising that sovereignty, however, jurisdiction should be asserted only with respect to those transactions that have a material nexus to the reviewing jurisdiction.

Comment 2: Jurisdictions may limit the competition authority's ability to review and challenge mergers to those transactions that meet the mandatory notification thresholds. This approach provides legal certainty to the parties.

Comment 3: Jurisdictions may retain the ability to review transactions that do not meet the mandatory notification thresholds. Such "residual jurisdiction" may encompass all transactions with a material nexus to the jurisdiction or a subset of transactions with a material nexus to the jurisdiction that meet lower, non-mandatory notification thresholds. When a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority.

Comment 4: Jurisdictions may choose not to have mandatory notification thresholds and, instead, allow for voluntary notifications of proposed transactions. In these voluntary systems, jurisdictions may employ thresholds, either to provide guidance to the parties as to which transactions are viewed as likely to raise potential competition concerns and therefore should be notified or to limit the transactions that the competition authority can review. Jurisdictions employing a voluntary merger notification system should take steps to address the desire of the parties to the transaction for certainty.

B. Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without a corresponding enforcement benefit. Merger notification thresholds should therefore incorporate a material nexus requirement. A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction. The most common means of providing for a material nexus is by requiring significant local sales or local asset levels in the merger notification thresholds.[i]

Comment 2: Jurisdictions may supplement their material nexus thresholds with additional, ancillary thresholds, but those thresholds alone should not be sufficient to trigger a merger notification requirement in the absence of a material nexus to the reviewing jurisdiction. Examples of such additional and cumulative screens include thresholds based on the worldwide activities of the parties or the value of the transaction.

Comment 3: Merger notification thresholds should provide that the material nexus to the reviewing jurisdiction be based on the entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and assets of the acquired party should be limited to the sales and assets of the business(es) that are being acquired (often referred to as the "target"). The sales and assets of the selling group or the selling party that are not being transferred to the acquiring party should not be considered in applying the merger notification thresholds.

Comment 4: Jurisdictions should periodically review their merger notification thresholds to determine whether to modify them based on knowledge gained through the application of the thresholds, experiences of other jurisdictions, input from stakeholders, and other pertinent developments.

C. Determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (June 2003, May 2017)

Comment 1: Notification should not be required unless the transaction has a material nexus to the reviewing jurisdiction. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction.

Comment 2: Many jurisdictions require significant local activities by each of at least two parties to the transaction as a prerequisite for mandatory merger notification. This approach represents an appropriate material nexus screen since the likelihood of adverse effects from transactions in which only one party has a significant local presence is sufficiently remote that the burdens associated with notification are normally not warranted. As previously discussed, in the case of a proposed acquisition, one of the two parties should be the acquired business ("target") and the relevant activities of the acquired party should be limited to the sales or assets of the business(es) being acquired in the proposed transaction.

Comment 3: In transactions involving more than two parties, application of the "each of at least two parties" threshold approach should be adapted to the type of transaction to ensure that notification is required only when the transaction has a material nexus to the reviewing jurisdiction. An important example is the formation of a joint venture. Even if two or more of the parties forming the joint venture have significant activities in the jurisdiction, the proposed joint venture transaction is unlikely to have a material nexus to the jurisdiction unless the proposed joint venture will have significant assets in or sales in or into the reviewing jurisdiction.

Comment 4: A transaction in which the acquiring party lacks significant local activities is less likely to have adverse effects within the jurisdiction than a transaction in which both the acquiring party and the acquired business have significant local activities. Therefore, jurisdictions with notification thresholds based solely on the activities of the acquired business should set their thresholds at a substantially higher level to ensure that the transaction has a material nexus to the reviewing jurisdiction.

Comment 5: Notification should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or local assets test that may be satisfied by the acquiring entity alone irrespective of any significant local activity by the business to be acquired.

D. Notification thresholds should be clear and understandable.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Clarity and simplicity are essential features of well-functioning notification thresholds. Given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions with merger notification requirements, the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable "bright-line" tests.

Comment 2: Competition authorities can assist parties by providing publicly available written guidance on the application of their merger notification thresholds and by enabling parties to obtain guidance by contacting the staff of the authority to discuss the application of the notification thresholds.

E. Mandatory notification thresholds should be based on objectively quantifiable criteria.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.

Comment 2: The specification of objective criteria will require a jurisdiction to explicitly identify several elements. First, the jurisdiction must identify the measurement tool -- *e.g.*, assets or sales. Second, the jurisdiction must identify the scope of the geographic area to which the measurement tool is applied -- *e.g.*, national or worldwide. Third, the jurisdiction must specify a time component. In the case of certain measurement tools, such as revenues, sales, or turnover, the time component will be a period over which the measurement should be taken -- *e.g.*, a calendar year. In the case of other measurement tools, such as assets, the time component will be a particular date as of which the measurement should be taken. In either case, the above-referenced criteria may be defined by reference to pre-existing, regularly-prepared financial statements (such as annual statements of income and expense or year-end balance sheets).

Comment 3: The specified criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements. Guidance should also be given as to the proper geographic allocation of sales and/or assets. To facilitate the parties' ability to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt uniform definitions or guidelines with respect to commonly used criteria.

Comment 4: In jurisdictions utilizing a voluntary notification system, notification thresholds serve as a means to provide guidance as to which transactions are viewed as likely to raise potential competition concerns and therefore are appropriate for notification to the reviewing jurisdiction. Since such notification thresholds are a starting point for identifying potential competition concerns, it can be appropriate for voluntary notification thresholds to utilize guidance based on market share information or other more subjective criteria. However, when voluntary notification thresholds are used to determine whether the competition authority has jurisdiction to review the transaction or to provide safe harbors, competition authorities should use objective criteria or provide guidance to assist parties in determining which transactions meet the thresholds or qualify for the safe harbor protection.

F. Mandatory notification thresholds should be based on information that is readily accessible to the parties to the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (June May 2017)

Comment 1: The information needed to determine whether notification thresholds are met should normally be of the type that is available to the parties in the ordinary course of business.

Comment 2: Notwithstanding C*omment 1*, the parties can reasonably be required to report their revenues or assets by jurisdiction even if they do not maintain data in that form in the ordinary course of business. As previously discussed, however, parties should be given appropriate guidance as to the methodology to be applied in developing the specified data. This is particularly important where information must be reported in a manner that is not consistent with a party's normal business practices.

Comment 3: Local currency values will generally be superior to other economic measures for purposes of establishing financial criteria in notification thresholds -- parties are more likely to maintain their financial data in the ordinary course by reference to currency values, and published data relating to currency values are generally readily accessible and available through standard international sources. It is recognized, however, that jurisdictions facing volatile local currency fluctuation may need to adopt more dynamic economic measures, such as monthly wage multiples. The general preference for local currency values is not intended to preclude a jurisdiction from expressing financial criteria in its notification thresholds by reference to a generally-recognized global trading currency if it chooses to do so. In all events, however, the relevant criteria should be clearly defined (including applicable rules pertaining to currency conversion), transparent, and readily accessible by parties whether or not domiciled in the local jurisdiction.

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[i] As of the drafting of this revised recommended practice, some jurisdictions are examining or have examined whether certain high value transactions involving targets with no or low local sales may have a significant impact on competition in the jurisdiction and, if so, whether to modify their merger notification thresholds to address this limited class of transactions, with certain jurisdictions introducing supplementary thresholds to this end. Any such modifications to notification thresholds should ensure, inter alia, that the new thresholds are clear and understandable and that the transaction has a material nexus to the jurisdiction. It is premature to consider changes to these recommended practices in this light.