

INTERNATIONAL CHAMBER OF COMMERCE
The World Business Organization

ICC RECOMMENDATIONS ON PRE-MERGER NOTIFICATION REGIMES

A policy statement prepared by the ICC Commission on Competition

I. INTRODUCTION

The introduction of pre-merger control regimes in the United States¹ and later in Europe² and other countries³ created a framework which companies must consider when they are contemplating mergers, acquisitions, or joint ventures. Scrutiny must be applied in order to determine whether the proposed transaction must be notified to the relevant competition authority. For jurisdictions where the notification is mandatory and a standstill obligation exists, the transaction must be suspended until an authorisation is granted. This process can take some time (depending on the difficulty of the project from a competition law point of view). After a reasonable period an authorisation is generally obtained, except in the most difficult cases, and sometimes at the cost of commitments to divest part of the acquired company or restrict the behaviour of the combined post-merger entity.

The International Chamber of Commerce (ICC) Commission on Competition conducted a survey (hereinafter “ICC Survey”) with the aim of understanding the views of business on the subject of merger control regimes around the world. The results to the ICC Survey set forward a number of concerns expressed by ICC members that will later be discussed in this policy statement.

The business community has recognised the importance of such regimes because they ensure that no company will acquire a monopoly or other kind of excessive market power. However, the business community has also insisted that merger control regimes increase transaction costs and potentially delay transactions. These costs⁴ and delays make it necessary to balance the upsides and downsides of merger control regimes by carefully drafting their processes and requirements.

During the last decade, two trends have strongly impacted the way companies have to deal with merger control regimes: first, an increasing number of countries have created their own regimes; and second, as a result of globalization, mergers and acquisitions are impacting far more countries than in the past. As a result, transactions are now impacted by merger control in a way that was difficult to anticipate only a few years ago.

More than 146 jurisdictions around the world currently have some form of merger control regime under their antitrust laws.⁵ This proliferation increases transaction costs in itself but this is exacerbated by the lack of convergence and the resulting “patchwork” of review, (because multiple analyses must be performed under separate methodologies.) Not only are merger control regimes heterogeneous, in many countries they have particular features that make notification mandatory even if the transaction has no visible impact on the particular territory; this trend contributes to increasing transaction costs. Costs are incurred even if the project does not threaten in any way the functioning of the local market, which is an unfair additional burden on companies engaged in welfare-enhancing mergers.

This dynamic is also important because it creates legal uncertainty, which itself causes an increase in transaction costs. This legal uncertainty has two origins. First, when a company is verifying in which jurisdiction a particular project should be notified, it is practically and financially challenging, in particular for mid or small cap operations, to instruct dozens of local law firms in order to conduct this verification. Second, some regimes have special features, like the unpredictability of their timeline or

¹ The 1914 introduced Clayton Antitrust Act was later supplemented by the Hart Scott Rodino Antitrust Improvements Act of 1976.

² Merger control in the European Union was formally introduced by Regulation 4064/1989. However The Commission's first proposition of a regulation for the control of mergers goes back to 1973 (*Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentrations between Undertakings* OJ [1973] C92/1; for successive drafts see OJ [1982] C36/3, OJ [1984] C51/8; OJ [1986] C 324/5; OJ [1988] C 130/4.

³ The most notable exception of a western country which has remained merger control-free is Luxembourg.

⁴ In their answers to the survey (hereinafter “Survey results”), over 30% of the participants indicated that with respect for transactions for which they have made at least one merger control filing in the last five years, the approximate total costs exceeded USD 500,000., Survey results, Q 15

⁵ Daniel Sokol & William Blumenthal, “Merger Control: Key International Norms and Differences” (2012) in *International Research Handbook on Competition Law*, Ariel Ezrachi, ed., at 1.

the lack of precedent allowing for a legal assessment, that render the whole process uncomfortable, uncertain, and thus costly.

Finally, many regimes impose notification fees which can be very significant (especially when added to the fees also imposed by other jurisdictions) in particular for small or middle cap operations. In aggregate, excessive filing fees could discourage potentially procompetitive deals from moving forward. Large filing fees also may have the effect of dissuading notification where the companies are able to voluntarily decide whether to notify.⁶

The ICC Competition Commission considers that the current trend not only introduces delay, it also discourages, undermines, or prevents welfare-enhancing mergers,⁷ thus threatening to hurt the global economy. Since there is no global authority responsible for international merger control, ICC thought it would be useful to prepare a policy statement on these topics. ICC is in no way opposed to the existence of merger control regulations but expresses the view that continued convergence towards minimal common standards and best practices could dramatically improve the current situation, without precluding each jurisdiction from determining the attributes of its particular regime.

The ICC Competition Commission's membership is global, which means that its views are not biased towards one particular approach. Its recommendations favour efficiency and legal certainty rather than alignment with any particular tradition of merger control.

This policy statement highlights a number of specific issues, based on feedback from ICC members which have been identified and encountered with pre-merger notification regimes. The policy statement divides these issues into two broad categories: i) issues with the current pre-merger notification regimes; and ii) longer term perspectives and issues with multi-jurisdictional pre-merger notification.

II. ISSUES WITH CURRENT PRE-MERGER NOTIFICATION REGIMES

A. Expansive Definitions of Concentration Must Be Avoided

When checking whether a particular transaction must be notified, companies must firstly determine whether their transaction is considered a “merger”, “concentration”, or otherwise a notifiable transaction under each of the relevant local regimes. As globally accepted definitions of these terms are not in place, the response may differ from country to country. This is especially difficult when a transaction does not constitute a notifiable concentration in the majority of the jurisdictions, which in theory should allow avoiding any regulatory hurdle: the mere fact that one or two countries may impose a notification process on a particular type of transaction is sufficient to delay the whole project.

The need for a greater consistency and convergence between merger control regimes worldwide as regards the substantive assessment was highlighted by survey respondents as a top priority.⁸ Furthermore, respondents indicated that the type of transactions subject to review is of crucial importance to their business⁹ while 77% of the respondents answered that in the past 5 years they had encountered difficulties to ascertain whether a particular transaction was subject to one or more control regimes.¹⁰

⁶ Survey results, Part II, Q 45.2.

⁷ Sokol & Blumenthal, *supra* note 5 at 3. See also Julie Clarke, *International Merger Policy: Applying Domestic Law to International Markets* (Cheltenham, UK: Edward Elgar Publishing, 2014).

⁸ Survey results, Part 1, Q 20.8.

⁹ Survey results, Part 1, Q 21.1.

¹⁰ Survey results, Part 2, Q 28.1.

For example, in Brazil and China, the acquisitions of interests as low as 15% are subject to review under certain circumstances.¹¹ In Canada, acquisitions of interests of as low as 20% can trigger a notification requirement in certain circumstances. In Germany, an investor must notify the competition authorities of an acquisition of more than 25% of the capital in a company and then must notify again should it cross the 50% threshold.

Jurisdictions that use a “control in fact” test in assessing notification requirements may find that the test is difficult to administer and very fact specific, resulting in less certainty to the parties.¹²

The current trend is worrying, since the EC is now considering extending its reviews to minority shareholding.¹³ A notification obligation with regard to minority shareholdings is unnecessary and disproportionate since the EC (as well as the national competition authorities) is already vested with the powers to intervene with respect to the anticompetitive outcomes triggered by such transactions pursuant to Articles 101/102 TFEU. The proposition of the recently published White Paper of the Commission would give the EC power to review acquisitions of non-controlling stakes – essentially those that allow the exercise of material influence over commercial policy or access to commercially sensitive information.

Recommendation: *ICC recommends that a concentration should only be subject to notification when a change of control on a lasting basis is clearly identified, be it by the ability to solely govern the acquired entity through the acquisition of the majority of the voting rights, of shares or of share capital within the target (in case of sole control) or the possibility to exert joint control when the control is acquired by more than one undertaking.*

B. Threshold Type – Market Share vs. “Minimum Turnover” or Assets

Practically all merger control regimes require companies to notify a projected merger or acquisition only if its size is above a particular threshold. ICC approves of this approach since it allows very small transactions to avoid the heavy administrative burden and the delay implied by a notification. However, ICC considers that companies should be able to easily determine whether their project meets or does not meet the notification thresholds.

As a consequence, market share based thresholds are problematic because market share numbers are not “clear cut,”¹⁴ but more of an “art,” which exacerbates uncertainty. 41% of the respondents to the survey indicated that the market share threshold is the type of threshold which raises most difficulties.¹⁵

Market share thresholds require that, for the purposes of determining whether a merger notification is required by law, parties determine the product and geographic markets in which they compete. However, determining the appropriate scope of these markets is necessarily uncertain, as it requires an assessment of a number of criteria (such as substitutability, opportunity for price discrimination, and trade patterns) that are difficult to predict.

- In fact, even in markets where products are homogenous, markets that satisfy the necessary assumptions may be difficult to identify.¹⁶ Furthermore, market share thresholds are uncommon, complicated, and inconsistent with modern economic thinking. Finally, it may

¹¹ Fiona Schaeffer & Michael Culhane Harper, “A Fundamental Shift: Brazil’s New Merger Control Regime and Its Likely Impact on Cross-Border Transactions” (2012), *The Antitrust Source*, ABA 1 at 5.

¹² For further discussion regarding the very concept of control, see Richard Whish, “Competition Law” (2009), page 824 and following.

¹³ See the EC’s White Paper “Towards more effective EU merger control” dated 9 July 2014. See also Etienne Pfister, Raphael de Coninck and Susan Hinchliffe, “Minority shareholdings and interlocking directorates”(2013), *Concurrences*.

¹⁴ Survey results, Part 2, Q 34.

¹⁵ Survey results, Part 2.2, Q.31.2

¹⁶ Sokol & Blumenthal, *supra* note 5.

require the exchange of sensitive commercial information, increasing the likelihood and risk of gun jumping.¹⁷

An additional difficulty with market shares is that different authorities may delineate them in different ways. Under “new” merger control regimes, it often happens that there is no precedent helping companies or lawyers to assess their market definition.

Finally, even when a market definition is reached, it is still difficult to measure one's market share because public information about the sales of all the firms participating in a particular market is often unavailable. Admittedly, once a merger has been notified, companies must always find ways to circumvent this difficulty, since market shares are an essential element of the subsequent analysis. But while it is acceptable to bear the costs of market definition and market data gathering in the limited number of countries where the project is to be notified, ICC considers it inappropriate to impose such a burden at the early stage of notifiability verification.

This view is shared by other organizations. According to the International Competition Network's (ICN) Recommended Practices for Merger Notification Procedures, clarity and simplicity should be “essential” features of notification thresholds so as to permit parties to readily determine whether a transaction is notifiable.¹⁸ Furthermore, notification thresholds should be based “exclusively on objectively quantifiable criteria,” such as assets and sales, and identify the scope of the geographic area to which the measurement tool is applied.¹⁹ Indeed, the business community, competition agencies, and the efficient operation of capital markets are “best served by clear, understandable, easily administrable, bright-line tests.”²⁰

A threshold expressed in turnover or asset levels that are objectively measured (e.g., by accounting standards) “removes the source of the size ambiguity measure.”²¹ Moreover, if information exchange is required, information about turnover or asset values is far less competitively sensitive.

Although competition jurisdictions are increasingly adopting minimum turnover standards, market share thresholds are used in more than 40 countries. For instance, they are partly used in Russia, Turkey and the UK, while in Spain and Portugal a compulsory market share threshold still exists.²² Minimum turnover, often based on the target's entire economic group or combined worldwide turnover or assets, is now used in Brazil, Canada, China, India, the US, and most other jurisdictions.²³ However, one deficiency in some minimum turnover jurisdictions is the inclusion of all members of the corporate group of the seller, not just the target (see below for further discussion on this point).²⁴ Moreover, as a general proposition, asset and turnover level thresholds should be proportionate to the size of the economy of the domestic jurisdiction. Otherwise, smaller jurisdictions with high thresholds see fewer mergers and larger jurisdictions with lower thresholds see many more.

It should be noted that turnover and asset thresholds may not fully accomplish all of the objectives of merger notification. For instance, smaller transactions (that would not be caught by a strict turnover or asset test) can still present problematic issues for competition authorities. There are, however, other potential ways to address such concerns such as the use of a voluntary notification regime for

¹⁷ See *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange*, William R Vigdor, ed., (Chicago: ABA Publishing, 2006).

¹⁸ ICN, Recommended Practices for Merger Notification Procedures, II.A [ICN, “Recommended Practices”]. See also Yavuz Karagök & Samuel Rutz, “Towards optimal merger notification regimes: evidence from Switzerland” (2014) *J Antitrust Enforcement* 1 at 4.

¹⁹ ICN, Recommended Practices, *ibid*, II.B.

²⁰ ICN, Recommended Practices, *ibid*, II.A.

²¹ Nicolas Harle, Philippe Ombregt & Karel Cool, “Merger Control and Practice in the BRIC Countries vs. the EU and the US: Review Thresholds” (2012), INSEAD Faculty & Research Working Paper at 1.

²² Pedro Callol, “How to Deal with Market Share Notification Thresholds in International Transactions – The Iberian Experience” (April 7, 2014), TerraLex Newsletter, online: <<http://www.terralex.org/publication/p24656b74d6/how-to-deal-with-market-share-notification-thresholds-in-international-transactions-the-iberian-experience>>.

²³ Schaeffer & Harper, *supra* note 11 at 5.

²⁴ Schaeffer & Harper, *ibid*.

transactions that do not meet the relevant thresholds, or specific lower notification thresholds applicable to certain sectors of the domestic economy.²⁵

Recommendation: *ICC recommends the harmonization of thresholds above which mergers are reviewable (but not their level), by retaining only thresholds expressed in terms of objectively measurable turnover or asset levels reached by the undertakings to the mergers, and eliminating the use of market share thresholds.*

C. Threshold Level – “Materiality”

Filing/jurisdictional thresholds were highlighted by survey respondents as the third least satisfying aspect of the notification process.²⁶ One of the factors emphasized by respondents was excessively low notification thresholds.²⁷

The survey also highlighted problems with unclear thresholds in Mexico, India, and other jurisdictions.²⁸

It is acknowledged that notification regimes must strike a balance:

- A notification regime that is too permissive may have detrimental effects on social welfare by allowing the implementation of anti-competitive mergers.
- However, a notification regime that is too strict may put unacceptably high administrative and financial burdens on merging parties and the competition authority, ultimately hampering welfare-enhancing merger activity.²⁹
- Therefore, an optimal notification regime should capture the mergers with “significant potential” for anti-competitive effects from the set of all consummated mergers with a nexus to a certain economy.³⁰

According to the ICN’s Recommended Practices, jurisdictions should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory, thus avoiding unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.³¹

The thresholds should therefore incorporate appropriate standards of materiality as to the level of “local nexus” required, such as turnover or asset levels.³²

Recommendation: *ICC considers that it is not its responsibility to recommend a specific level of materiality, particularly because the size of the relevant economy and its individual features must be*

²⁵ See France and Italy as examples of jurisdictions with special turnover thresholds for important markets. Articles L.430-2 II and III of the French Commercial Code impose special, lower thresholds for transactions in the retail sector and in French overseas territories. At least two of the parties to transactions in these sectors must have turnover of at least €15 million rather than the usual €50 million established under Article L.430-2 I. As concerns Italy, Article 13(1) of Law no. 153 of 1 March 1994 (which was replaced by Article 26(1) of Legislative decree no. 28 of 22 January 2004) requires prior notification of any concentration as a result of which, in any one of the films distribution's 12 head-zone towns (i.e. Rome, Milan, Turin, Genoa, Padua, Bologna, Florence, Naples, Bari, Catania, Cagliari and Ancona), an undertaking will hold, directly or indirectly, a market share larger than 25% of the turnover stemming from both, films distribution and, simultaneously, the cinemas therein operating.

²⁶ Survey results, Part 1, Q 22.2.

²⁷ Survey results, Part 1, Q 24.2.

²⁸ Survey results, Part 2, Q 29.1.

²⁹ See Paul K Gorecki, “Too many unnecessary merger notifications in Ireland?” (2011) 7:3 J Competition L Econ 651 at 664; Karagök & Rutz, *supra* note 18 at 3.

³⁰ Karagök & Rutz, *ibid* at 3.

³¹ ICN, Recommended Practices, *supra* note 18, I.B.

³² ICN, Recommended Practices, *ibid*, I.B.

taken into account. But it insists that the thresholds must be such that they avoid the creation of “catch all” regimes under which a notification is necessary even if the local presence is limited to some very modest turnover.

D. Notification Should Be Based on Activity Within Jurisdiction by Both Parties³³

Whatever the level of the threshold, a merger control regulation may create a “catch all regime” if the threshold is based on the activity of only one (either the purchaser or the target) instead of both parties³⁴.

It is extremely unlikely that an acquisition in which only one party is active in the relevant jurisdiction can have any negative impact on competition.

In this regard, where possible, merger control regimes with minimum turnover thresholds also should move towards assessing the economic impact of the specific target’s activity within the jurisdiction, rather than the seller’s overall activity. Thresholds based on the activity of the seller within the jurisdiction, including other businesses that may not be related to the transaction, risk capturing transactions that would otherwise have no substantial economic impact.³⁵

However, the turnover of the “Selling Group” or the “Selling Entity” is irrelevant if it is generated by assets or subsidiaries that are not being transferred in the proposed transaction and such turnover should not provide a basis for a “local nexus” to the transaction. The ICN Recommended Practices are clear that jurisdictions should look only to the turnover of the “target” and not the selling entity or group in order to have an appropriate “local nexus” to the transaction.³⁶

Joint ventures create a particular problem in this respect. Under some regimes (e.g., in the EU), the creation of a full function joint venture or the acquisition of a joint control over an existing company is notifiable if at least two of the parent companies and the joint venture meet the thresholds.³⁷ As a result, the creation or acquisition of joint ventures outside the EU is often notifiable to the European Commission even if the project has no nexus with the European economy.³⁸ This feature has been reproduced by other jurisdictions (e.g., China).

Recommendation: *ICC’s recommendation is that: i) merger thresholds should not be dependent on the activities of the seller group or the seller entity but rather should focus on the activity of the target; ii) merger control regimes should not be applicable to joint ventures that are to be active only outside the relevant jurisdiction, being understood that the parent companies should take all necessary precaution in order to avoid undue coordination between themselves in countries where the joint venture will not be active, and iii) should merger control regimes be applicable to such joint ventures, the notification should take the form of a simple notice.*

E. Timing and Length of Process Should Be Efficient and Reasonable

Timing and length of process was highlighted by survey respondents as the second most important to their business and the least satisfying aspect of the notification process.³⁹ One of the factors

³³ ICN, Recommended Practices, *ibid*, I.C.

³⁴ Survey results, Part 2, *inter alia* Q.35.

³⁵ Survey results, Part 2, Q 29.1.

³⁶ ICN, Recommended Practices, *supra* note 18, I.C.

³⁷ Respondents to the Survey strongly advocate in favour of the removal of any filing obligation of a joint venture, regardless of the location of its turnover. Survey results, Part 1. Q 25.

³⁸ Please note that the EC’s White Paper “Towards more effective EU merger control” dated 9 July 2014 proposes changes to the current situation, with regard to joint ventures. In this respect ICC welcomes the proposals of the EC as regards the possible exemption from review of full-function joint ventures located and operating outside the EEA with no effect on EEA markets.

³⁹ Survey results, Part 1, Q 21.3 and 22.3.

emphasized for both the most satisfying and the least satisfying jurisdictions was efficiency or lack thereof.⁴⁰

Efficient, timely, and effective review is one of the ICN's Guiding Principles. It states that the merger review process should "not impose unnecessary costs on transactions" and should be made "within a reasonable and determinable time frame."⁴¹ According to the ICN's Recommended Practices, merging parties should be permitted to notify transactions without undue delay, facilitating coordination of multi-jurisdictional filings.⁴²

Indeed, it is generally difficult, if not impossible, to close a transaction at different dates for different countries. Authorities should be aware that the provisional period between the signing of a transaction and its closing is very sensitive for companies. First, the financing of the deal has generally been agreed to for a limited period. Second, the management, the employees, and the client of the target often find this intermediate period to be uncomfortable. An unexpected extension of this period, coming for instance from a small country, can by itself harm the target or even make the transaction undesirable.

Merger reviews should be completed within a "reasonable period of time," and jurisdictions should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise competitive concerns (typically known as "waiting periods").⁴³

Unfortunately, in reality, many jurisdictions struggle with lengthy or unpredictable review periods. For example, in Brazil, the maximum statutory period is 330 days, and it lacks a waiting period for the review and approval of non-problematic deals.⁴⁴ The length of the process in China and Ukraine, while limited, is often unpredictable.⁴⁵

Recommendation: *ICC considers that transactions that do not raise competition concerns should in principle be cleared in less than five weeks. Even the most difficult cases should not trigger a verification period longer than six months. In any event the process should be transparent, reasonable and predictable and companies should be informed about the status in the process on a regular basis.*

In order to keep the merger control procedure in a reasonable timing, the National Competition Authority (NCA), while retaining the discretion and freedom to ask additional information it deems important or relevant in assessing complex or problematic mergers, shall ask for data and information which are strictly necessary for the assessment of the transaction. The NCAs shall refrain from using the clearance procedure as a sort of "sector enquiry", asking the notifying parties for complex information which go beyond the scope of the transaction for clearance purposes.

F. Merger Review Processes Should Converge Towards Best Practices⁴⁶

Requirements for submission to antitrust authorities were highlighted as the area most requiring convergence across jurisdictions, as well as most important to respondents' businesses and the least satisfying aspect of the notification process.⁴⁷

In some jurisdictions, filing requirements remain "vague, subjective or otherwise difficult to interpret," and the lack of transparency has been identified both as an impediment to tracking notification requirements worldwide and as an unnecessary cost and burden to merging parties.⁴⁸

⁴⁰ Survey results, Part 1, Q 23.2 and 24.2.

⁴¹ ICN, Guiding Principles for Merger Notification and Review [ICN, "Guiding Principles"].

⁴² ICN, Recommended Practices, *supra* note 18, III.A.

⁴³ ICN, Recommended Practices, *ibid*, IV.A. and B.

⁴⁴ Schaeffer & Harper, *supra* note 11 at 6.

⁴⁵ Survey results, Part 1, Q 24.2.

⁴⁶ ICN, Guiding Principles, *supra* note 41.

⁴⁷ Survey results, Part 1, Q 20.6, 21.5 and 22.5.

This situation is especially harmful in cases of multi-filing because the information necessary to respond to the different authorities' requests must often be gathered by the same persons and from the same sources. If the requests are heterogeneous and unpredictable, the burden for this limited group of persons, who in addition must respond in a limited period of time, is almost impossible to bear.

According to the ICN's Recommended Practices, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process, and practices should be implemented to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.⁴⁹ Competition authorities should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties.⁵⁰

Initial waiting periods and simplified notification have been implemented in many jurisdictions. However, the onerous notification forms required for most transactions in Brazil, China, and Ukraine – despite theoretical separation into “complex” and “non-complex” or “long-form” and “short-form” categories – have also been targets of criticism.⁵¹

In order to reduce the legal costs and burdens inherent in pre-merger notifications involving small and medium enterprises (SMEs), filing fees for SMEs should be abolished or at least significantly reduced. Accordingly, notification forms for this kind of operations should be further simplified, in terms of quantity and quality of information required and of documents to be attached.

ICC acknowledges that a key challenge of competition policy is to ensure that regulatory intervention is based on accurate information.⁵² The nature and volume of required information affects the merging parties and the ability of the competition agency to conduct an adequate merger review: too little information may require the commitment of resources to independent fact-checking or the issuance of a supplementary information request; too much information can drown staff in paperwork.⁵³ In this respect, a standardized notification form – structured in such a way as to provide NCAs with all the information they need in order to conduct an adequate merger review – could help reducing transaction costs.

Recommendation: *ICC recommends in favor of a reasonable approach for information requests by the authorities. In order to address this concern, ICC suggests that competition authorities should always organize an easy access, either to the hierarchy or to open-minded ombudsmen, to which companies could express their difficulties, without this being seen as an aggression by the authorities themselves.*

G. Transparency and Procedural Fairness

Transparency also was highlighted by survey respondents as important to their businesses.⁵⁴ One of the factors emphasized for both the most satisfying and the least satisfying jurisdictions was transparency or lack thereof.⁵⁵

There is a desire for “frank and open dialogue” between merging parties and competition agencies.

⁴⁸ ICN, “Report on the Costs and Burdens of Multijurisdictional Merger Review” (2004), online: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf>>.

⁴⁹ ICN, Recommended Practices, *supra* note 18, V.A. and B.

⁵⁰ ICN, Recommended Practices, *ibid*, VI.E.

⁵¹ Survey results, Part 2, Q 40.

⁵² Marco Ottaviani & Abraham L Wickelgren, “Ex ante or ex post competition policy? A progress report” (2011) 29 Int'l J Industrial Org 356 at 356.

⁵³ Sokol & Blumenthal, *supra* note 5 at 28-29.

⁵⁴ Survey results, Part 1, Q 20.5.

⁵⁵ Survey results, Part 1, Q 23.2 and 24.2.

ICC considers that this is necessary for the following reasons:

- First, the business community needs predictability. In some respects, it is acceptable for the outcome of a process involving a concentration that was expected to be subject to close scrutiny to be uncertain. But it is generally not acceptable for the notifying parties to discover that an apparently harmless project is suddenly facing strong opposition, especially if it comes from one particular authority while all the other ones have cleared the project without difficulty and based on similar facts.
- Second, companies need to understand clearly and as early as possible the concerns triggered by their proposed transaction, in order to be able either to gather the information necessary to argue their case or to envisage practical solutions.

Transparency and procedural fairness are two of the ICN's Guiding Principles, which state that the process should be "transparent with respect to the policies, practices and procedures involved in the review [and] the substantive standard of review," and that "[r]eviewing jurisdictions should provide an opportunity for review of decisions before a separate adjudicative body."⁵⁶

Even if the possibility of post-decision review is welcome, the timing of mergers and acquisitions is such that post-decision review (e.g., judicial review) is often not seen as a practical solution, therefore, it is essential for the initial process itself to be as transparent and fair as possible.

Recommendation: *In order to achieve these goals, ICC recommends the early organization of "state of play" meetings or telephone calls and early warnings about possible decisions to open an in-depth investigation.*

H. Transparency Must Be Appropriately Balanced with Confidentiality

According to ICN's Recommended Practices, procedural fairness should be a "basic attribute" of all merger review procedures, but merger investigations should be conducted with due regard for applicable legal privileges and related confidentiality doctrines.⁵⁷

Laws should be applied with a "high level of transparency," but must be subject to the appropriate protection of confidential information.⁵⁸

In the end, rules should strike an appropriate balance between confidentiality and procedural fairness considerations.⁵⁹

To some degree, most jurisdictions pursue transparency, procedural fairness, and confidentiality, and allow for judicial review.

Recommendation: *ICC thus considers that a merger control regime should always contain specific rules relating to confidentiality. Such rules should be set out in comprehensive guidelines made binding on each competition authority. It also recommends that confidential information is only requested when strictly necessary and in particular limited to the need of the local market analysis. In addition, such requests of confidential information should be set out in a motivated decision and subject to judicial remedy.*

⁵⁶ ICN, Guiding Principles, *supra* note 41.

⁵⁷ ICN, Recommended Practices, *supra* note 18, VI.F. and VII.A.

⁵⁸ ICN, Recommended Practices, *ibid*, VIII.A.

⁵⁹ ICN, Recommended Practices, *ibid*, IX.D.

III. LONG-TERM PERSPECTIVES ON MERGER NOTIFICATION REGIMES

The above recommendations will be used by ICC in its meetings and interactions with governments and competition authorities and may be used by ICC members in their own interactions with the same authorities. They are not intended to promote a particular model, but to push forward a number of best practices and continuing convergence.

However, ICC is aware of and preoccupied by the fact that in a global economy lacking any global antitrust governance, there is a risk that the current situation could worsen rather than improve.

This is particularly true since, taken as a whole the system has not evolved towards simplification. Much to the contrary, the multiplication of merger control regimes at the national level has rendered the merger control process even more burdensome for undertakings. Stakes are high and the current regulatory fragmentation which prevails from one State to another has potentially damaging effects on outcomes of strategic importance: merger control is a key which either opens or closes the door on deals that could shape our economies.

If merger control regimes continue to become at the same time more numerous, more divergent and in a number of jurisdictions more unpredictable, in particular as regards notification requirements, mergers and acquisitions will finally become too costly and too uncertain to be undertaken, except for the largest ones for which legal costs can still be seen as a marginal burden. Such evolution would certainly be harmful to the global economy.

In the long term, ICC thus thinks that a kind of antitrust global governance, probably based on a very pragmatic and minimal approach, is necessary. Two ideas are developed in this respect: one relates to the procedural aspects of convergence and the promotion of best practices, the other to a particular substantive issue that deserves to be pushed forward.

A. Interagency Cooperation and Supranational Solutions

a. *Global cooperation*

Competition agencies have been conscious of the necessity to converge toward best practices and for that reason decided to create the International Competition Network during their meeting at Ditchley Park in 2001.

Interagency coordination is the sixth of the ICN's Guiding Principles. It states: "Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs."⁶⁰

According to the ICN's Recommended Practices, competition agencies, while not obliged to do so, should seek merger review coordination and convergence whenever possible.⁶¹ The goals of interagency coordination include fostering efficiency, effective enforcement, and consistent outcomes, as well as reducing unnecessary burdens for parties and agencies.⁶²

ICC welcomes this initiative and considers that the ICN Recommended Practices should be the basis for an improvement of the current situation. However, one cannot but note that the existence of the ICN has not prevented countries from setting up divergent merger control regimes and adopting rules that are far from being aligned with the recommended practices. One of the reasons is that merger control regulations are not created by competition authorities but by parliaments and governments who are rarely aware of the intricacies of competition law.

⁶⁰ ICN, Guiding Principles, *supra* note 41.

⁶¹ ICN, Recommended Practices, *supra* note 18, X.A.

⁶² ICN, Recommended Practices, *ibid*, X.A.

Therefore, ICC considers that the business community should encourage more cooperation between governments on this issue and even the adoption of binding rules at the international level to which the countries could (voluntarily) subscribe.

The World Trade Organization (WTO) is an obvious contender to promote such a global approach, even if it presently lacks the substantive knowledge and legitimacy to undertake such review.⁶³ While a number of international and regional organizations (such as Organization for Economic Co-operation and Development (OECD) Competition Committee, ICN Merger Working Group, United Nations Conference on Trade and Development (UNCTAD), Central European Free Trade Agreement (CEFTA), European Free Trade Agreement (EFTA)) are currently involved in one way or another in competition law and more specifically in merger control, none of these seem to be endowed with sufficient powers. In this context, the WTO is the international organization which has been granted significant latitude in neighboring domains and whose future intervention scope with regards to competition law should be further explored. However, such extension of the WTO's role and competence still remain to be clearly defined.

In spite of the hard work conducted at that time by the relevant working group, the integration of competition law in the WTO legal framework was not successful. At that time, the goal was to use the WTO to promote competition law within its member states and it is generally considered that there was a lack of common view of why competition law mattered and which kind of competition should be promoted.⁶⁴

However, the situation has since moved paradoxically: without any global organization, treaty or policy promoting it, competition law has actually thrived in the immense majority of the countries of the world, and with a remarkable convergence on the substance. The issues that are discussed in the present paper relate to procedural divergences rather than to real competition policy discrepancies. It thus seems that the present need is not to engage WTO member states to adopt competition laws but rather to avoid the anarchy that has presided over competition law proliferation before it ends up killing the very globalization of the economy that those countries have relentlessly created.

Recommendation: *A new and prudent approach of the WTO role could thus be envisaged, that could be limited to ensure that competition law and in particular merger control regimes, when they exist, respect some minimal standards. ICC is ready to promote this idea and suggests to its members to do the same.*

b. Regional solutions

Merger review is looking more and more like a regional endeavour. Therefore, a first and low key regional approach is the undertaking of regional convergence.

Common approaches to merger review in Canada and the United States have dovetailed in recent years. In terms of the merger review process, the Canadian Competition Act⁶⁵ was amended in 2009 in a manner that harmonized Canada's review process with the US. In March 2014, the Canada-U.S. Merger Working Group released a document entitled "Best Practices on Cooperation in Merger Investigations," highlighting the need for promoting coordination between the Competition Bureau and U.S. agencies, enhancing the consistency of outcomes, and making the practices applied transparent to merging parties.⁶⁶ The document specifically emphasizes communication between reviewing agencies, coordination on timing, and collaboration on the collection and evaluation of evidence.⁶⁷

⁶³ Sokol & Blumenthal, *supra* note 5 at 3.

⁶⁴ David J. Gerber, "Competition Law and the WTO: Rethinking the Relationship" *Journal of International Economic Law* 10.3 (2007).

⁶⁵ <http://laws-lois.justice.gc.ca/eng/acts/C-34/>.

⁶⁶ Canada-U.S. Merger Working Group, "Best Practices on Cooperation in Merger Investigations" (March 25, 2014), online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Canada-US-Best-Practices-en-2014-03-25.pdf/\\$file/Canada-US-Best-Practices-en-2014-03-25.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Canada-US-Best-Practices-en-2014-03-25.pdf/$file/Canada-US-Best-Practices-en-2014-03-25.pdf)> at 1.

⁶⁷ *Ibid* at 3-4.

The transatlantic cooperation between the United States and the European Commission is another “mega-regional” effort to move important competition authorities closer.

Bilateral cooperation of this kind leads to increased trust between agencies, builds lines of communication, and promotes more effective enforcement arising from the sharing of information and improved case handling.⁶⁸ ICC welcomes those efforts because they contribute to a certain convergence between the different regimes and limit the risks of contradictory decisions.

Recent trends indicate that the major divergences between the US and the EU that had been spectacular in the past, either on the way positions were publicly stated (see the Oracle-Sun deal⁶⁹), or, embedded into decisions (see the GE Honeywell deal⁷⁰) are now less frequent. However, opposite positions on the same cases still arise (for a recent example, see the 2014 P3 shipping joint venture case, where the MOFCOM blocked a proposed transaction⁷¹ notwithstanding the fact that both US and European authorities had chosen not to challenge the joint venture), even within regional unions and for bilateral cross-border deals (see the divergence between the French and the British authorities in the Eurotunnel / My Ferrylink case⁷²).

In addition, cooperation between authorities is not without its downsides, especially because it is not always transparent for the notifying companies.

This is why a more ambitious regional approach leading to the creation of common supranational merger control regimes, with a one-stop-shop approach, is welcome. Indeed, such supranational merger control regimes are viewed as capable of dramatically reducing the number of reviews of a merger. For example, a notification to the European Commission may avoid more than 30 notifications to EU and European Economic Area (EEA) countries. Outside of the EU context, supranational solutions to merger control have now been largely adopted in Africa where several regional institutions have their own merger control (Common Market for Eastern and Southern Africa).

Unfortunately, the regional common regimes have not lived up to the expectations.

For instance, African supranational merger control regimes, like Common Market for Eastern and Southern Africa (COMESA), have so far failed to replace the national regimes of their member states, adding one regional regime to the national ones instead of replacing them. Even in the EU, where a one stop shop exists, heterogeneous national regimes have survived, some of which are far from complying with best practices (from the market share notification threshold in Spain to the minority shareholding control in Germany or the surprise opening of phase II by prosecutors in Austria). The co-existence of the EU and the national regimes sometimes leads to more complexity than if the common regional regime did not exist (one could for example mention the complexity of cross-referrals between the Commission and the national authorities, with the additional delays they are creating).⁷³

⁶⁸ Sokol & Blumenthal, *supra* note 5 at 5.

⁶⁹ "US and Europe disagree on Sun Oracle deal" Bloomberg News, NY edition 10.11 (2009)

⁷⁰ See the decision declaring the deal incompatible with the European common market Comp/M.2220, 3 July 2001 and remarks of Deborah Platt Majoras Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice Before the Antitrust Law Section State Bar of Georgia November 29, 2001

⁷¹ The MOFCOM did so rather than addressing its competition and trade policy concerns through some form of remedy. The refusal was only the second ever by MOFCOM since China passed its Anti-Monopoly Law (AML) in 2008.

⁷² French Competition Authority, 7 November 2012, *Groupe Eurotunnel / SeaFrance*, décision n° 12-DCC-154, Competition Commission (CC), 6 June 2013, *Groupe Eurotunnel S.A. & SeaFrance S.A.* and Competition Appeals Tribunal (CAT), 4 December 2013, *Groupe Eurotunnel S.A. et Société Coopérative de Production (SCOP) SeaFrance S.A. v Competition Commission*, case n° 1216/4/8/13 et 1217/4/8/13

⁷³ For further details regarding the drawbacks of such cross-referrals, see Jean-François Bellis, Porter Elliott and Johan Van Acker, "The current state of the EU Merger control system: ten areas where improvements could be made" (2011) in *International Antitrust Law & Policy*, at IV.

Recommendation: *ICC generally favours cooperation, either bilateral or regional, and especially the creation of common merger control regimes at the regional level because it leads to convergence and can lower the number of authorities that review each transaction. However, cooperation should always be conducted in a transparent way. Regional merger control regimes should ideally replace the regimes of the member states or at least create a one-stop-shop system and dramatically reduce, instead of increase, the complexity of merger control within the region. However ICC does not advocate for a global one-stop-shop system that would entirely ignore the specificities of local economies, especially when assessing mergers which only affect national markets. ICC will support any move in the direction of enhanced regional or bilateral cooperation and will try persuading governments to create regional authorities or to transform the existing ones into simple one-stop-shop systems.*

B. Pre-Notification Models – Towards non Compulsory Notification Requirements?

One of the major action steps recommended by survey respondents beyond greater clarity and transparency was a greater shift toward non-compulsory regimes.⁷⁴ However, the trend seems to be pulling in the opposite direction, and most systems are already mandatory.⁷⁵

The large majority of merger jurisdictions worldwide have mandatory notification, including the United States, Canada, China, France, India, Russia, and the European Union. However, there are a few countries that not only have but have kept for a long time (Australia and the UK, among others) non-compulsory pre-merger notifications. Parties are given the option of voluntary notification before merger consummation, or to take the risk of seeing the regulator challenge a merger that was not notified.⁷⁶

There are a number of implications associated with compulsory and voluntary notification regimes. Parties under a compulsory regime are given the opportunity to negotiate with the regulator before the merger is consummated, thereby avoiding costly litigation and the theoretical risk of having to dismantle the merger.⁷⁷ Furthermore, in some jurisdictions the adoption of a voluntary merger regime would not be sustainable, for two reasons. First, the lack of notification of a merger could lead to the implementation of problematic mergers, thus unleashing negative effects on the market. Second, absent a voluntary regime it would prove difficult for competition authorities to quickly identify that some negative trends on the market result directly from an implemented merger. Moreover, in smaller NCAs this could require engaging more staff to conduct more market studies or sector inquiries.

However, compulsory notification entails reviewing costs for the regulator and significant notification costs for the merging parties, with average external compliance costs upward of US\$4.5 million.⁷⁸ The latter is especially shocking for non-problematic transactions, which are by far the majority.

On the other hand, the parties' decision under a voluntary regime may act as a "signal" to the competition agency, an opportunity of which the parties are deprived under a compulsory regime.⁷⁹ Therefore, under a voluntary regime, considerable savings exist due to the reduction of intensive investigation of mergers that do not pose a competitive threat.⁸⁰

Ultimately, studies have found that voluntary notification does not lead to more litigation than compulsory notification, and that the cost savings under voluntary notification in fact "outweigh the welfare gains from negotiation" under compulsory notification.⁸¹ The results suggest that voluntary

⁷⁴ Survey results, Part 1, Q 25.

⁷⁵ Sokol & Blumenthal, *supra* note 5 at 23.

⁷⁶ Choe & Sekhar, "Compulsory or Voluntary Pre-merger Notification? A Theoretical and Empirical Analysis", (2006), University of New South Wales Research paper. For further comments on post-notification and post-assessment models, see III. C., below.

⁷⁷ Choe & Sekhar, *ibid* at 13.

⁷⁸ Choe & Sekhar, *ibid* at 12-13.

⁷⁹ Choe & Sekhar, *ibid*.

⁸⁰ Sokol & Blumenthal, *supra* note 5 at 23.

⁸¹ Choe & Sekhar, *supra* note 76 at 14.

notification achieves objectives similar to those achieved by compulsory systems and at much lower costs.⁸²

The biggest challenge to voluntary notification regimes is creating sufficient incentives to induce self-notification. If maximum fines for unlawful omission to notify are not large enough, the superiority of the voluntary system disappears, and the optimal solution is a mechanism contingent on the size of the transaction.⁸³

Recommendation: *ICC considers that it is not its role to systematically promote a compulsory or a non-compulsory regime, especially since the members of its Competition Commission did not achieve a total agreement on this issue. However, the current trend, which seems to consider compulsory notification as the only model is to be lamented. In particular, in jurisdictions that lack experience or whose economy is still small, a non-compulsory regime can be an efficient solution. However, a counter argument to this could be to consider that smaller NCAs lacking experience and developed procedure could benefit from voluntary notification since it might help them develop their own merger control practice in line with international best practices using mandatory notification system and thus broaden legal certainty.*

In any event, the business community overwhelmingly supports the self-assessment model over that of compulsory notification. The multi-notification costs and uncertainties will be heavily reduced should more countries choose a non-compulsory regime, a choice which should therefore be encouraged.

C. Post-Merger Assessment Models

Some notification systems allow for post-merger assessment by the competition authority, in addition to pre-merger notification.

On the one hand, a voluntary mechanism with *ex post* monitoring provides the competition agency with a “discretionary advantage,” *i.e.*, the flexibility to employ all the information to decide which non-self-notified merger to inspect.⁸⁴ A post-merger assessment model also may allow the competition agency an opportunity to review categories of transactions, the vast majority of which do not raise competition concerns such as transactions with only one party active in the jurisdiction at the time of closing. Jurisdictions that retain the time-limited right to review post-closing could potentially capture anti-competitive effects that otherwise need not be notified thus providing a “safety valve” for competition authorities. Such a role would prove useful if it limited the number of transactions that did not require pre-merger notification.

However, other scholars point to a problematic “chilling effect” on *ex ante* incentives to undertake socially desirable mergers, and emphasize that once the transaction is undertaken, some of the damage is already done and it becomes costly to reverse, regardless of the fact that more precise information is available.⁸⁵

Recommendation: *While ICC does recognize that the combined pre and post-merger assessment models might entail some advantages, it considers that such advantages do not effectively counterbalance the dramatic lack in legal certainty such post-merger assessment models imply. In the view of the business community, the fact that a transaction could potentially be unwound for competition purposes after its completion is undesirable. In any event, it is of the opinion that the use*

⁸² Choe & Sekhar, *ibid* at 15.

⁸³ See Aldo Gonzalez & Daniel Benitez, “Optimal Pre-Merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes” (2009), The World Bank Sustainable Development Network, Policy Research Working Paper at 3.

⁸⁴ Gonzalez & Benitez, *ibid* at 2.

⁸⁵ Ottaviani & Wickelgren, *supra* note 52 at 359. See also *Premerger Coordination*, *supra* note 17. Jurisdictions with post-merger assessment models also should move towards allowing parties that may not meet the pre-notification thresholds to voluntarily approach the competition agency, particularly if post-closing certainty is a concern.

of a post-merger assessment should only be used under exceptional circumstances strictly defined by law. Those circumstances under which a final merger decision can be amended could include situations when the merger was assessed on the basis of incorrect information or if the concentration has been implemented contrary to the decision of the NCA.

IV. CONCLUSION

Multi-jurisdictional merger review has seen much transformation over the past several years, including a multiplication of merger control regimes and a large-scale move towards convergence both substantively and procedurally. Norms have developed across a majority of jurisdictions (e.g., the use of turnover or assets as notification thresholds, the commitment to more predictable review timetables). Interagency cooperation and coordination has accelerated, especially among regions.

ICC welcomes the adoption of merger control as a tool ensuring that mergers and acquisitions do not threaten the healthy functioning of competitive markets.

However, the variety of notification thresholds, the “catch all” features of a number of regimes, the uncertainty and unpredictability of both the notification requirements and the review of the substance (largely due to the lack of precedents and sometimes to the lack of experienced local counsel) and a lack of transparency from a variety of countries are still prompting frustration from merging parties and leading to rocketing transaction costs. Those problems have been increased by the globalization of the economy, and in particular the globalization of the companies that acquires or is acquired in the framework of mergers.

In theory, changes that address these and other concerns are available that would not detract from the effectiveness of merger review.

These changes include rejecting market share based thresholds and adopting objective turnover/asset approaches; thoughtfully considering whether mandatory or voluntary models are beneficial; raising threshold levels and honing targeted definitions of “control”; facilitating efficiency through the introduction of simplified notification and initial waiting periods; and seeking greater transparency, accountability, and cooperation among all jurisdictions, where appropriate.

ICC will advocate for these changes when meeting with governments, competition authorities or other interested organizations and invite its members to do the same.

In practice, however, promoting those changes is difficult because the globalization of the economy and the proliferation of merger control regimes are not managed by a global economic government or organization.

ICC thus considers that some governance issues should be addressed in order to facilitate convergence. Regional merger control regimes should be encouraged, provided they replace or at least coordinate and harmonize existing national ones. Moreover, the WTO should renew its interest toward competition law, with an aim limited to procedural convergence.

Moving forward without change is not an option: the multiple filing requirements have become an unbearable burden that is threatening to discourage welfare-enhancing operations. It would be regrettable if this evolution were to undermine the future of merger review. It is only if jurisdictions are poised to adapt and respond to the issues raised above, that competition institutions worldwide can expect to successfully further their goals of preserving competition and promoting public welfare.

Copyright © 2015
International Chamber of Commerce (ICC)

ICC holds all copyright and other intellectual property rights in this collective work, subject to pre-existing rights in extracts from third party texts such as case studies or best practices which shall remain vested in the copyright holder of those texts. ICC encourages the reproduction and dissemination of this work subject to the following:

- ICC must be cited as the source and copyright holder mentioning the title of the document, © International Chamber of Commerce (ICC), and the publication year if available.
- Express written permission must be obtained for any modification, adaptation or translation, for any commercial use, and for use in any manner that implies that another organization or person is the source of, or is associated with, the work.
- The work may not be reproduced or made available on websites except through a link to the relevant ICC web page (not to the document itself).

Permission can be requested from ICC through ipmanagement@iccwbo.org.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the 20th century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice. ICC also offers specialized training and seminars and is an industry-leading publisher of practical and educational reference tools for international business, banking and arbitration.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include: banking, commercial law and practice, competition policy, corporate responsibility and anti-corruption, customs and trade facilitation, the digital economy, environment and energy, intellectual property, marketing and advertising, taxation, and trade and investment policy.

ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.

INTERNATIONAL CHAMBER OF COMMERCE

33-43 avenue du Président Wilson, 75116 Paris, France

T +33 (0)1 49 53 28 28 F +33 (0)1 49 53 28 59

E icc@iccwbo.org www.iccwbo.org