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LOCAL NEXUS AND JURISDICTIONAL THRESHOLDS IN MERGER CONTROL

-- Background Paper by the Secretariat --

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

*More documentation related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

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Abstract

The increasing number of cross-border mergers, the proliferation of merger control regimes, and the limited resources competition authorities have to enforce competition law make it important that authorities only review those mergers that have an impact on their jurisdiction. The 2005 OECD Council Recommendation on merger review included recommendations on notification and review procedures, jurisdictional thresholds and appropriate local nexus criteria. In 2013, the OECD prepared a Report on Country Experiences that looked at the Recommendations impact in practice. The present paper builds on this work and assesses the local nexus criteria of a number of OECD and non-OECD jurisdictions by reference to Recommendation. It is found that all countries have local nexus criteria, and that in most countries these criteria comply with the Recommendation. A trend towards greater compliance in this respect since 2005 is also observed. The present paper also unearths some patterns in the design of merger control thresholds that raise questions regarding the possibility of greater compliance with the OECD Recommendation and the adequacy of its recommendations for some jurisdictions.

* This background paper was prepared by Pedro Caro de Sousa with comments from Ruben Maximiano and Despina Pachnou, OECD Competition Division.

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1. Introduction

1. The OECD Competition Committee has for a long time focused on a broad range of issues related to the review of mergers under national competition laws. Effective merger review is an important component of antitrust regimes, preventing transactions that would result in consumer harm. A number of concerns have been raised regarding the increasing number of merger control regimes around the world, including the possibility of divergent decisions, the risk of the strictest merger regime becoming the de facto standard for cross-border mergers, and the increase of costs for companies.¹ In 2004, the ICN identified four main types of unnecessary costs arising from merger control: costs associated with ascertaining whether notification and filing requirements are met; costs associated with compliance with notification requirements for transactions that lack an appreciable nexus to the notified jurisdiction; costs associated with complying with unduly burdensome filing requirements; and costs associated with unnecessary delays and differentiated timing in the merger review processes.² A fifth relevant type of unnecessary cost may be added here: costs for competition authorities that devote resources that could be used for other enforcement activities to the review of mergers that do not materially affect the jurisdiction.

2. In light of this, increased international cooperation and convergence on merger control has long been at the forefront of the Competition Committee's efforts. Building on extensive prior work by the Committee, on 23 March 2005 the OECD Council adopted a Recommendation on merger review that aimed to contribute to greater convergence of merger review procedures (OECD, 2005) (the "Recommendation"). Amongst the issues covered in this Recommendation were notification and review procedures, including jurisdictional thresholds and appropriate local nexus criteria to ensure that only transactions with an appropriate link to the reviewing jurisdiction – as measured by, e.g., local assets or turnover – were subject to notification and review.

3. In 2013, the OECD prepared a Report on Country Experiences (OECD, 2013) that looked at the Recommendation's impact in practice. It found that a number of economies, including in non-OECD countries, have amended their notification thresholds in line with the Recommendation, thereby strengthening local nexus and ensuring only those mergers that are capable of distorting competition within their territory will be reviewed.³

4. Three years later, this paper seeks to provide a detailed overview of merger control thresholds and local nexus criteria in various countries, and to compare them with international recommendations on the topic. The paper is structured as follows: chapter 2 will provide some background on the topic of merger control thresholds and local nexus criteria; chapter 3 will describe the various types of notification thresholds and local nexus criteria adopted in different countries; chapter 4 will compare current practices to international guidelines, and identify the main developments since the Recommendation was adopted in 2005; and, finally, chapter 5 will summarise and analyse the main findings.

2. Background

2.1 The Role of Jurisdictional Thresholds and Local Nexus Criteria

5. There are two commonly used jurisdictional thresholds that determine whether any given transaction is subject to merger review: (1) notification thresholds, which most commonly refer to the size of the transaction or of the merging parties, and seek to exclude from review transactions that most likely have no material impact in a given jurisdiction; and (2) the definition of a merger transaction, which seeks to identify transactions that are "suitable" for merger review. In 2013, the OECD studied the definition of a merger transaction, as described in Box 1.⁴ In this paper, the focus will be on notification thresholds.

Box 1. Definition of Transaction for the Purpose of Merger Control Review

The OECD Competition Committee held a roundtable on the Definition of Transaction for the Purpose of Merger Control Review in June 2013 (OECD, 2013b). The Committee found that the definition of a merger transaction plays an important role in well-functioning merger review regimes that seek to be effective, efficient, and transparent. While notification thresholds are used to identify transactions that have a sufficiently material nexus to a given jurisdiction, the definition of a merger transaction seeks to identify those transactions that result in a more durable combination of previously independent businesses or assets and have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime.

Definitions of what constitutes a “merger transaction” can be based either on “objective” or on “economic” criteria. An “objective” approach to the definition of a “merger transaction” typically relies on percentage thresholds for share acquisitions, such as the acquisition of a 50% or of a 25% interest in the target. “Economic” criteria concern the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of influence over a previously independent firm. Different legal systems look at different levels of intensity of influence, such as “decisive influence,” “significant influence,” “material influence,” or “competitively significant influence.” Each approach has its own advantages and shortcomings. Both objective and economic approaches are commonly used in merger review regimes, and some merger review regimes use a combination of the two approaches.

The roundtable also addressed a number of difficulties in delimiting the concept of merger transaction. Many jurisdictions have been dealing with the question of whether minority shareholdings that confer less than outright control over the target should be deemed a merger transaction – the key question being whether sufficiently clear lines can be drawn between those instances of minority shareholdings that could lead to harmful effects, and those that most likely will not and therefore should stay outside the notion of a merger transaction in order to avoid unnecessary costs. A second question relates to the acquisition of assets: when they relate to less than the entire assets of a firm or of a line of business, many merger review regimes require a determination of whether the acquired assets are sufficiently material to potentially have adverse competitive effects in order to determine whether the acquisition is considered a merger transaction. Lastly, joint ventures tend to raise more difficult jurisdictional questions in jurisdictions that rely on the acquisition of control/decisive influence standards in their definitions of a merger transaction. In these cases, there is a need to determine whether the parent companies can exercise the requisite level of “control” and, in most cases, whether the joint venture is a sufficiently independent market player.

6. All merger control regimes face a tension between using criteria that are objective and transparent, and more supple criteria that target potentially harmful transactions. The latter tend to be flexible standards that allow fact-specific inquiries but can undermine the goal of greater transparency and predictability. Objective criteria, on the other hand, can provide greater clarity as to which mergers should be reviewed, but do not focus on whether a transaction is likely to prove anticompetitive.

7. From a cost/benefit standpoint, jurisdictional thresholds serve to limit the expenditure of public and private resources by avoiding the notification and review of mergers that are unlikely to raise any competition concerns.⁵ It is commonly recognised that the setting and adjustment of notification thresholds needs to balance between the desire to review most transactions that may harm competition in specific markets, and the need to keep the process and costs manageable, predictable and reasonable for all sides involved.⁶

8. This cost/benefit balancing is not an exact science, as good data on benefits and costs are not available, nor are these benefits and costs easy to calculate. When setting jurisdictional thresholds, the analysis must take into account factors that vary from jurisdiction to jurisdiction, including: the mandatory or voluntary nature of the notification, the criteria used to identify transactions susceptible of durably changing the market structure, initial information requirements (and the use of short and long forms), the speed of review, assumptions about the potential competitive harm of certain types of transactions, and the effectiveness of alternative competition law tools to review potentially anti-competitive transactions that are not subject to merger control.⁷

9. The interdependence of these factors explains why there is no international consensus on what an optimal merger review regime would look like. It also explains why, despite the development of internationally recognized best practices for the merger review process, jurisdictional thresholds differ substantially across jurisdictions. Nevertheless, a cost/benefit approach emphasises that the goal of an effective merger review regime should not be to subject all transactions to merger control, but merely to review those mergers where the marginal benefits of increased enforcement are likely to exceed its marginal costs.

2.2 *The Recommendation and the 2002 ICN Recommended Practices*

10. According to the Recommendation, the criteria to determine whether a merger must be notified (or, in countries without mandatory notification requirements, to determine whether a merger will qualify for review) should be clear and objective. At the same time, OECD members should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction, and review only those mergers that could raise competition concerns in their territory. Since it is virtually impossible to determine *ex ante* which mergers raise competition concerns, the ultimate objective in setting merger control thresholds is to minimise the number of merger notifications that raise no competition concerns, while simultaneously capturing the maximum number of mergers that raise competition concerns.⁸

11. While the Recommendation does not define what is an “appropriate nexus” with the jurisdiction, the 2002 ICN Recommended Practices for Merger Notification and Review Procedures (the “2002 ICN Recommended Practices”) lists some general guiding principles.⁹ Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the territory concerned – and determination of a transaction's nexus to the jurisdiction should be based on activity within the territory, as measured by reference to the activities of at least two parties to the transaction in the territory and/or by reference to the activities of the acquired business in the territory.

12. The 2002 ICN Recommended Practices also provides guidance on the type of notification thresholds which are to be used when establishing local nexus. Notification thresholds must be clear, understandable, easily administrable, bright-line tests that allow parties to readily determine whether a transaction is subject to notification – such as data on sales and/or assets of the parties or the size of a transaction. This type of notification thresholds should be adopted even if they may not be always effective at predicting whether a transaction might raise competitive concerns. In particular, it is recommended that notification thresholds should be based on objectively quantifiable criteria (i.e. assets and sales or turnover) and on information that is readily accessible to the merging parties.

13. Turnover and asset values are the ICN’s preferred type of notification thresholds, since they allow authorities to target transactions involving parties above a certain economic size and with sufficient local nexus.¹⁰ Examples of criteria that are not objectively quantifiable or readily accessible to the parties are market share and transaction-related effects.

14. Market shares may be a better predictor than other types of notification thresholds for whether a transaction is likely to raise competitive concerns, and thereby recourse to them as notification thresholds may require the filing of fewer non-problematic mergers. However, using market shares as notification thresholds imposes serious costs on all transactions – the parties to any merger would have to calculate their market shares regardless of whether the transaction ultimately needs to be notified, and this when parties are usually not in possession of data on market shares and may lack the ability to properly define markets in the first place.

15. Thus, the use of market shares or transaction-related effects as notification thresholds gives rise to considerable uncertainty and the possibility of costs and substantial delays. As a result, the 2002 ICN

Recommended Practices conclude that notification thresholds based on market shares and other subjective criteria are not appropriate for making the initial determination as to whether a transaction should be notified. Market shares may instead be appropriate for later stages of the merger control process – such as to determine the amount of information the parties are required to provide in their notifications and the ultimate legality of the transaction.

2.3 *Setting the Level of the Notification Thresholds*

16. The actual level of notification thresholds is crucial to well-functioning merger control systems. If thresholds are set too high, a number of anticompetitive mergers may evade merger control scrutiny. If thresholds are set too low, though, there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities.¹¹

17. The Recommendation and 2002 ICN Recommended Practices are quite clear regarding the need for a material local nexus and for clear, objective and quantifiable thresholds. However, they are not specific regarding the appropriate standard of materiality for local nexus which should be required. To address this, the ICN issued in 2008 a second set of recommended practices (the “2008 ICN Recommended Practices”) providing more detailed guidance on how countries should set appropriate notification thresholds.¹²

18. According to the 2008 ICN Recommended Practices, a range of factors will determine how effectively and efficiently a merger review system works; these factors may in turn influence the choice of appropriate notification thresholds. Thus, countries may want to consider such factors as initial information requirements; the ability to quickly clear transactions that do not raise competition concerns; whether a competition authority retains the ability to review transactions that fall below notification thresholds; whether some economic sectors are problematic or unlikely to give rise to competition issues.

19. Countries may also want to consider what their goals are when setting notification thresholds. For example, countries may want to set as a goal to have an appropriate or desirable percentage of notified transactions that are considered problematic – a number of jurisdictions sets such a goal at 5%–, or to diminish the number of problematic mergers that escape control. Countries may consider whether to review more mergers in potentially problematic sectors, as Ireland has done with mergers in the media sector.¹³

20. Lastly, after taking into account the various goals and factors that influence merger control systems, countries need to determine the method for setting their notification thresholds. They may take into account previous experience, the size of their economy or of certain industries, benchmarks derived from historical information, the experiences of similarly situated jurisdictions, and stakeholder feedback. The 2008 ICN Recommended Practices further suggest that countries adopt mechanisms that facilitate future changes of thresholds.¹⁴

21. To the best of the Secretariat’s knowledge there is very little literature on whether merger control notification regimes are efficient.¹⁵ Most literature focuses on the outcome of merger analysis and not on the design of merger control regimes¹⁶ – though there are some theoretical papers on how to set optimal notification thresholds.¹⁷ One can, however, provide some examples of how some countries have gone about setting their notification thresholds in practice.

22. Belgium faced a flood of notifications regarding non-problematic mergers that diverted resources from other enforcement activities in the early 90’s as a result of the merger control thresholds requiring the notification of transactions with insufficient local nexus. In light of this, the national competition authority pursued an “impact analysis” which concluded that revised thresholds based on local turnover would reduce the number of merger notifications by around 80%. The notification thresholds were accordingly

amended in 1999. In 2005, the thresholds were further reviewed, with the reform process being led by a group of experts (the “Group of Experts”) from members of the private bar, the national competition authority, academics, and members of the Federation of Enterprises in Belgium. Research carried out by the Group of Experts involved a full consideration of various threshold systems, and of the thresholds applicable in neighbouring and similarly sized economies. Further work was carried out on individual turnover threshold levels to determine, based upon previous filing data, the number of likely filings that would result at differing threshold levels. Currently, Belgium’s merger thresholds are reviewed regularly and subject to an evaluation by the competition authority every three years. (ICN, 2008)

23. In 2006, the Swedish competition authority prepared a report to investigate the effectiveness of the notification thresholds in the light of previous experience and international comparisons. A goal was to reduce the level of non-problematic mergers that had to be reviewed, and increase convergence with both the Recommendation and the 2002 ICN Recommended Practices. It was found that the upper turnover thresholds were too high given the size of the Swedish economy, and the lower turnover threshold too low by comparison to comparable jurisdictions. While exact numbers were impossible to come by, the report found that the increase in the number of notifications resulting from lowering the higher worldwide turnover threshold could be broadly offset by raising the lower local turnover thresholds. Thus, while ultimately the absolute number of notifications might not be reduced by the proposed changes, the revised thresholds were expected to better target transactions more likely to raise competition problems. (ICN, 2008)

24. More recently, in 2013 Italy introduced a cumulative merger control test that combined the thresholds that had been previously in place. This was expected to substantially improve the local nexus of the Italian merger notification system in line with the Recommendation, to reduce the number of non-harmful mergers notified, and ultimately to lead to a more efficient use of the competition authority’s resources and time.

3. Notification Thresholds and Local Nexus – An Overview

25. The Secretariat conducted a review of notification thresholds across 53 jurisdictions¹⁸, including all OECD members, the EU and Competition Committee Associate (Romania) and Participants¹⁹, and the People’s Republic of China. The detailed contents of this review can be found in Annexes I and II.

26. It is common to use the term “notification thresholds” to refer both to the legal tests used to determine whether a merger must be notified and to the criteria used in these tests. For clarity’s sake, henceforth the legal tests used to determine whether a merger should be notified will be referred to as “merger control thresholds”; and the various types of criteria used in merger control thresholds will be referred to as “notification criteria”.

27. Another clarification must be made regarding the terms “company” and “business”. Merger control thresholds seek to identify the economic reality underlying a transaction, regardless of the legal form of that transaction. Thus, merger control thresholds usually focus not on the legal person entering into a merger transaction, but on the economic group to which that legal person belongs. “Company” and “business” will be used in this sense throughout this paper.

28. This section will focus exclusively on jurisdictions which have mandatory notification systems. As described in Box 2, only four OECD countries adopt voluntary merger control systems. The present section will provide a typology of the main types of notification criteria currently in place in mandatory notification systems, and describe how they establish an appropriate nexus between a transaction and the jurisdiction. The main types of notification criteria identified are: (i) sales or turnover; (ii) assets; (iii) market shares; (iv) the value of the transaction. We also consider a number of other, less common notification criteria that are used.

Box 2. Voluntary Notification Systems

Voluntary notification systems are a minority of merger control systems. In the OECD, only four jurisdictions adopt this system, i.e. Australia, Chile, New Zealand, and United Kingdom. Chile is currently considering adopting a mandatory notification regime.

In most voluntary notification systems there are no prima facie thresholds for notification: as long as a transaction is likely to give rise to competition issues, the parties should file for merger control. The exception to this is the UK, where the jurisdiction of the national competition authority is only triggered when either the turnover of the target in the UK exceeds £70 million, or when the merger will lead to the creation or enhancement of a share of at least 25% of the supply or purchase of goods or services of any description in the UK or a substantial part of it.

However, even where there are no jurisdictional thresholds the countries have adopted guidelines indicating which transactions are likely to give rise to potential issues, in which case voluntary notification is encouraged. These guidelines tend to rely on market shares or related criteria. Thus, in Australia the 2008 Merger Guidelines encourage voluntary notification when: (a) the parties' products are either supplementary or complementary; and (b) the merged firm will have a post-merger market share of greater than 20 per cent in the relevant markets. In Chile, a filing is recommended when: (a) the Herfindahl Hirschman Index post-merger is between 1500 and 2500 and the delta from the transaction exceeds 200; or (b) the Herfindahl Hirschman Index post-merger exceeds 2500 and the delta from the transaction exceeds 100. In New Zealand, there are safe harbours for transactions: (i) where the combined market share of the three largest firms post-merger (the "CR3") is less than 70% and the market share of the merged entity is less than 40%; or (ii) where the CR3 is more than 70% and the market share of the merged entity is less than 20%.

29. While sometimes a jurisdiction makes use of only one of the main types of notification criteria (e.g. the EU relies exclusively on turnover), it is not uncommon for countries to rely on two or more criteria simultaneously, either cumulatively (e.g. the US takes into account the size of the transaction and, when the transaction is of a certain size, the parties' turnover or assets) or alternatively (e.g. Israel has a merger control threshold that requires a merger notification whenever the transaction leads to or involves a company with a market share in excess of 50%, and another merger control threshold requiring a merger filing whenever certain local turnover values are met). Some countries have multiple merger control thresholds, each of which may in turn combine a variety of notification criteria (e.g., Portugal requires a notification to be made whenever: the merging companies achieve a certain local turnover; whenever the companies' market share exceeds 50%; or when the companies' market shares exceed 30% and a certain local turnover value).

30. In order to represent this multiplicity of tests as clearly as possible, we will review each main type of notification criteria individually in the sub-sections below. Simultaneously, we will review how the various types of notification criteria interact with each other to create different merger control thresholds. A list of all notification criteria applied in each of the countries reviewed can be found in Annex I.

31. Sub-sections will be illustrated by tables identifying the OECD members', and the EU's, merger control thresholds to which that sub-section refers. These tables are composed of extracts of Annex I. Columns in tables refer to the various notification criteria; since, as pointed out, jurisdictions and even merger control thresholds can apply various notification criteria simultaneously, these are all included in order to describe how notification criteria interact in practice. Rows identify countries. When countries have only one merger control threshold, they will be identified by their name alone. Whenever a table identifies both a country and a threshold (e.g. Denmark, Threshold B), this indicates that this country has more than one merger control threshold; the individual threshold is identified in Annex II.

3.1 *Sales or Turnover*

32. Sales and turnover are thought to provide an objective measure of the potential impact of a transaction on the market, and information is usually available in the ordinary course of business. Furthermore, notification thresholds which look at the domestic, as opposed to global, turnover or sales of one or more companies involved in the transaction are helpful in determining whether a sufficient local nexus exists.²⁰

33. For the purposes of this paper, sales and turnover are interchangeable concepts that broadly refer to a company's revenue from the sale of goods or services. If set at an adequate level, thresholds based on sales or turnover should be able to catch transactions with the potential to substantially impact competition, while simultaneously increasing legal certainty and minimising costs for companies.

34. As a rule, turnover can be identified by reference to a company's audited accounts; as such, it is easy to establish and susceptible of being calculated in accordance with widely accepted accounting practices. A more detailed description can be found in Box 3 below.

Box 3. The Notion of Turnover

Under EU law, the concept of turnover comprises 'the amounts derived [...] from the sale of products and the provision of services'. In the USA, the authorities look at the sale of products or services in the normal course of business, and generally exclude those items which are listed under the headers 'financial income' or 'extraordinary income' in the company's accounts. Other countries adopt similar concepts of turnover in their merger control thresholds.

Use of turnover and sales is based on a presumption that these metrics provide good proxies for the real economic weight of the relevant group of companies involved in a merger. The objective of this notification criterion is to capture the total volume of the economic resources that are being combined through the operation, instead of focusing merely on the legal entities that formally entered into the transaction. Consequently, the relevant turnover or sales are usually those of the business groups to which these legal entities belong. This implies that the turnover and sales are those of all of the entities of the participating business groups; it also leads to taxes and the proceeds of business dealings within a group being excluded from the relevant turnover (as to avoid double counting), in order to provide a better picture of the real economic weight and power of the merging parties.

Another reason underpinning the use of turnover or sales as a notification threshold is that they are easy to ascertain and companies can obtain them quickly. Generally, they are identified in the audited accounts, prepared income statement or balance sheet which relate to the closest financial year to the date of the transaction – and, hence, the relevant turnover and sales are almost universally those of the most recent financial year.

It is also common for jurisdictions to have specific turnover thresholds, or specific rules regarding their calculation, for companies active in specific sectors such as banks, insurance or media. For example, in the EU, Article 5(3) (a) of its Merger Regulation provides for a differentiated turnover calculation for credit and other financial institutions. In place of sales, turnover is the gross banking income calculated by the sum of the following income items: interest income and similar income, income from securities, income from shares and other variable yield securities, income from participating interests, income from shares in affiliated undertakings, net profit on financial operations and other operating income. The underlying reason for this is that banking income reflects financial institutions' economic reality more accurately.

35. Two types of turnover-based thresholds can be found in mandatory notification systems: local turnover and global turnover.

3.1.1 Local Sales or Turnover

36. A number of countries focus exclusively on local turnover, or use local turnover interchangeably with local assets.²¹ Merger control thresholds based solely on local turnover or assets are well-suited to assess whether a sufficient local nexus exists, and are among the easiest notification criteria to apply. They are listed in Table 1 below.²²

Table 1

Country	Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
	Worldwide	Local	Worldwide	Local					
Belgium	-	X	-	-	-	-	-	-	-
Canada	-	X	-	X	-	-	-	X	X
Czech Republic Threshold B	-	X	-	-	-	-	-	-	-
Denmark Threshold B	-	X	-	-	-	-	-	-	-
Estonia	-	X	-	-	-	-	-	-	-
Iceland	-	X	-	-	-	-	-	-	-
Ireland	-	X	-	-	-	-	-	X	-
Israel Threshold A	-	X	-	-	-	-	-	X	-
Italy	-	X	-	-	-	-	-	-	X
Japan	-	X	-	-	-	-	-	X	X
Norway	-	-	-	-	-	-	X	X	X
Poland Threshold B	-	X	-	-	-	-	-	-	-
Portugal Threshold A	-	X	-	-	-	-	-	-	-
Slovenia	-	X	-	-	-	-	-	-	-
Spain Threshold A	-	X	-	-	-	-	-	-	-
Sweden	-	X	-	-	-	-	-	X	-

* Under the Norwegian Competition Act, all “concentrations” must, in principle, be notified to the national competition authority. However, pursuant to Section 18 (2) of this Act, concentrations between undertakings which local turnover does not exceed certain thresholds are exempted from this obligation. This exemption is indistinguishable, for practical purposes, from a merger control threshold based solely on local turnover.

37. It is not uncommon for merger control thresholds that are based on local turnover to also have ancillary criteria that further strengthen local nexus (see “Other” in Table 1 above). For example, under Canada’s Competition Act, even when the local turnover thresholds are met a merger notification will only be needed if the target also carries on an ‘operating business’ in Canada, either directly or indirectly, through a subsidiary it owns.²³ Italy does not require notification of a transaction involving the acquisition or merger through incorporation of a company in Italy – which could be considered to suffice to establish local nexus – unless at least one of the buyers is also active in Italy.²⁴

38. Countries may also grant discretion to authorities to review certain transactions which fall below the local turnover thresholds. This is the case for a significant number of jurisdictions listed in Table 1 (see section 3.5.2 and “Residual Jurisdiction” in Table 1). Just to provide some examples, in Iceland and Sweden the competition authority can review transactions whenever the aggregate turnover of the parties exceeds a certain level if there is a risk that the transaction will substantially reduce competition. In Ireland, the Minister for Jobs, Enterprise and Innovation may specify certain classes of mergers or acquisitions which must be notified even if the primary local turnover thresholds are not met; the Minister has done so in relation to media mergers involving companies that: (a) have a physical presence in Ireland, including a registered office, subsidiary, branch, representative office or agency, and making sales to

customers located in the State; or (b) have made sales in Ireland of at least EUR2 million in the most recent financial year.

3.1.2 Worldwide Sales or Turnover

39. A system that adopts merger control tests that look exclusively at worldwide sales or turnover will trigger a merger notification duty whenever the merging entities have an aggregate volume of business across the world that exceeds a certain threshold. Such an approach would require a merger to be notified whenever the parties have a certain size, regardless of whether the transaction has any connection with the reviewing jurisdiction. The issues this raises are similar to those of tests based on worldwide assets or on the value of the transaction, which we will review below.

40. None of the jurisdictions reviewed has a system with merger control thresholds based purely on worldwide sales or turnover. According to Table 2 below, whenever merger control thresholds are based on worldwide turnover or assets, or on the value of the transaction, these notification criteria are always applied cumulatively with other criteria susceptible of establishing local nexus. Table 2 below reviews the OECD members that apply worldwide turnover.

Table 2

Country	Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
	Worldwide	Local	Worldwide	Local					
Austria	X	X	-	-	-	-	-	-	X
Czech Republic	Threshold A	X	X	-	-	-	-	-	-
Denmark	Threshold A	X	X	-	-	-	-	-	-
Finland		X	X	-	-	-	-	-	-
France		X	X	-	-	-	-	-	-
Germany		X	X	-	-	-	X	-	X
Greece		X	X	-	-	-	-	-	-
Hungary		X	X	-	-	-	-	-	X
Korea		X	X	X	X	-	-	X	-
Netherlands		X	X	-	-	-	-	-	-
Poland	Threshold A	X	X	-	-	-	-	-	-
Slovakia		X	X	-	-	-	-	-	-
Switzerland	Threshold A	X	X	-	-	-	X	-	-
Turkey	Threshold A	X	X	-	-	-	-	-	-
United States	Threshold B	X	-	X	-	X	-	X	X

41. By far the notification criterion most often used in tandem with global turnover is local turnover. A large number of the countries reviewed have composite merger control thresholds that require both minimum global and local turnover thresholds to be met – the global turnover is, in these cases, always higher than the local turnover. The EU, which is not listed in Table 2 but above certain thresholds has exclusive competence instead of its member states, also relies on a combination of worldwide and local turnover. Some countries – such as Austria, Germany and Switzerland – may further impose a domestic effects test.

42. In some cases, such as those of Czech Republic, Denmark, Poland, Switzerland and Turkey, a merger control test looking only at local turnover is applied side-by-side with an alternative composite

merger control test that focuses on both global and local turnover. Outside the OECD, this system has, for instance, been adopted in the People's Republic of China and India.

43. In some jurisdictions that use global turnover as part of their merger control tests, local nexus can be established by means other than local turnover, such as by requiring the transaction to have local effects or through exemptions. Within the OECD, the main example of this approach is the United States, where a merger notification is only required if either the acquiring or acquired party are engaged in US commerce or in any activity affecting US commerce;²⁵ additionally, a number of exceptions are in place to ensure that only mergers with sufficient local nexus are filed.

44. One alternative mechanism to establish local nexus is to use worldwide turnover as the sole notification criterion relevant for purely domestic transactions, but couple it with local turnover thresholds whenever the transaction has a foreign element – as is the case with Hungary and Korea.²⁶

3.1.3 Additional criteria used cumulatively or in alternative to sales or turnover

45. Some jurisdictions have merger control tests that couple turnover with other notification criteria. The main examples of this are assets, the value of the transaction and market shares. Each of these notification criteria will be discussed in greater detail below, and the OECD members falling within this category are listed in Table 3.²⁷

Table 3

Country	Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
	Worldwide	Local	Worldwide	Local					
Canada	-	X	-	X	-	-	-	X	X
Korea	X	X	X	X	-	-	-	X	-
Mexico	Threshold B	-	X	-	X	-	X	X	-
	Threshold C	-	X	-	X	-	X	X	-
Portugal	Threshold C	-	X	-	-	X	-	-	-
Spain*	Threshold C	-	-	-	-	X	X	-	-
USA	Threshold B	X	-	X	-	X	X	X	X

* In Spain local turnover and assets are used to exempt mergers which would normally have to be notified because they meet a certain market share threshold – so this is identified as an exemption in the table. In practice, however, this is indistinguishable from a local turnover threshold.

3.2 Assets

46. Assets within the territory of the jurisdiction concerned are also listed by the ICN as an appropriate and objective standard to assess the "local nexus" of a transaction. Worldwide assets should not be sufficient to trigger a merger notification requirement in the absence of a local nexus (e.g., revenues or assets in the jurisdiction concerned) exceeding appropriate materiality thresholds.²⁸ Like turnover, assets provide objective measurement criteria that are usually available to companies in the ordinary course of business and provide a good proxy for the level of local activity.

47. Assets can function as autonomous notification thresholds, but this is rare. None of the OECD countries reviewed had a merger control threshold based solely on asset value.²⁹ In practice, assets are always used cumulatively or alternatively to a number of other notification criteria. Turnover is the notification criteria most commonly coupled with assets³⁰, but they can also be associated with market shares or transaction value. This is reflected in Table 4, which lists the merger control tests in the OECD that use assets as a notification criterion.

Table 4

Country	Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
	Worldwide	Local	Worldwide	Local					
Canada	-	X	-	X	-	-	-	X	X
Korea	X	X	X	X	-	-	-	X	-
Mexico	Threshold B	-	X	-	X	-	-	X	-
	Threshold C	-	X	-	X	-	-	X	-
Spain*	Threshold C	-	-	-	-	X	X	-	-
USA	Threshold B	X	-	X	-	X	X	X	X

* In Spain local turnover and assets are used to exempt mergers which would normally have to be notified because they meet a certain market share threshold – so this is identified as an exemption in the table. In practice, however, this is indistinguishable from a local turnover threshold.

48. Furthermore, and as with turnover, merger control thresholds based on assets may refer solely to worldwide assets, solely to local assets, or cumulatively to worldwide and local assets. If a country relies solely on worldwide assets, this will require the application of additional local nexus criteria, as in the case of the merger control thresholds based exclusively on worldwide turnover.

3.3 Market Shares

49. Market shares are better predictors of whether a particular transaction is likely to raise competitive concerns than other notification criteria. Furthermore, as they refer to a relevant market that includes both product and geographic dimensions, market shares are well suited to establish local nexus.

50. In practice, however, a mandatory notification system based on market shares poses many difficulties and costs that outweigh its potential benefits. Since parties usually do not have this information available, or even the ability to define markets accurately, such a system injects costs and burdens into all transactions regardless of whether they are problematic or require notification, while also creating considerable uncertainty and the possibility of substantial delays.

51. As such, international recommendations are that market share thresholds should not be used because market shares are not clear and objective notification criteria; and that the analysis of market shares is better suited for later stages of the merger control process (e.g. to determine the amount of information required in the parties' notification and help assess the ultimate legality of the transaction).³¹

52. In OECD members with mandatory notification systems – listed in Table 5 –, market shares are never the sole notification criteria. In some cases there are merger control thresholds that rely exclusively on market shares³² – but, in those cases, the country will also have other merger control thresholds, usually based on turnover or assets.³³ Furthermore, some countries adopt composite merger control thresholds according to which merger notification will only be required if a certain market share and a minimum turnover or asset value are cumulatively met.³⁴

Table 5

Country		Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
		Worldwide	Local	Worldwide	Local					
Israel	Threshold B	-	-	-	-	-	X	-	-	-
	Threshold C	-	-	-	-	-	X	-	-	-
Portugal	Threshold B	-	-	-	-	-	X	-	-	-
	Threshold C	-	X	-	-	-	X	-	-	-
Spain	Threshold B	-	-	-	-	-	X	-	-	-
	Threshold C	-	-	-	-	-	X	X	-	-

3.4 *Transaction Value or Size*

53. Another notification criterion is the value or size of the transaction. This criterion is objective, easily quantifiable and available to the parties. However, the value of the transaction is unsuitable to determine whether a transaction will have an impact on a specific jurisdiction.

54. Only two OECD members adopt this criterion in their merger control thresholds – Mexico and the United States – and in both cases transaction value or size is not the only criteria that triggers notification but is instead coupled with additional notification criteria better suited to establish local nexus. The two main tools used to ensure local nexus in these cases are rules requiring the transaction to have local effects, and exemptions that take into account local turnover or assets.³⁵

3.5 *Other Notification Criteria*

55. In addition to the notification criteria described above, the review identified a number of ancillary criteria that ensure that only mergers with a sufficient local nexus and/or susceptible of giving rise to competition issues are notified. These tend to be very jurisdiction-specific, and operate so as to diminish the number of non-problematic mergers that will be notified, while simultaneously ensuring that potentially problematic mergers can be reviewed by competition authorities.

56. These ancillary criteria can be divided into two different categories: (i) exemptions, through which mergers that meet a merger control threshold will nonetheless not have to be notified; and (ii) residual criteria, which require transactions that do not meet a merger control threshold to be notified.

3.5.1 *Exemptions*

57. Merger control thresholds that trigger notification of a large number of transactions risk straining and misdirecting the limited resources of competition authorities, while simultaneously imposing unnecessary costs on private parties. According to the 2008 ICN Recommended Practices, notification systems may benefit if parties are exempt from notifying transactions that are unlikely to raise competitive concerns.³⁶ While there are many classes of exemptions – such as those concerning the type of transaction³⁷ – the Secretariat's review, and the analysis below, will focus on exemptions that have some link to local nexus.³⁸

58. As Table 6 below shows, while this type of exemptions can be applied to a variety of notification criteria,³⁹ they are particularly common in countries which assert wide jurisdiction to review mergers, or that use notification criteria unsuitable to determine local nexus such as the size of transaction and global turnover or assets.

59. In Norway, for example, there are no thresholds for the application of merger control rules as such: under the Norwegian Competition Act, all “concentrations” must, in principle, be notified to the national competition authority. However, pursuant to Section 18 (2), concentrations between undertakings which local turnover does not exceed certain thresholds are exempted from this obligation. The United States – which has a system that focuses primarily on transaction size and, for transactions of a certain size, on the worldwide turnover or assets of the relevant parties – exempts from notification, among others, the acquisition of foreign assets⁴⁰ and the acquisition of voting securities of a non-US issuer⁴¹ which do not meet certain local turnover and asset thresholds.⁴² Similarly, while a transaction may have to be notified in Mexico merely due to its value, there is an exemption for transactions involving foreign companies which are considered non-residents (for Mexican tax purposes), as long as the underlying companies do not acquire control in Mexican companies or accumulate in Mexico stocks, shares or trusts certificates, or any other asset in addition to those held, directly or indirectly, before the transaction.

Table 6

Country	Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
	Worldwide	Local	Worldwide	Local					
Germany	X	X	-	-	-	-	X	-	X
Threshold A	-	-	-	-	X	-	X	X	X
Mexico									
Threshold B	-	X	-	X	-	-	X	X	-
Threshold C	-	X	-	X	-	-	X	X	-
Norway									
							X	X	X
Spain									
Threshold C	-	-	-	-	-	X	X	-	-
Threshold A	X	X	-	-	-	-	X	-	-
Switzerland									
Threshold B	-	X	-	-	-	-	X	-	-
Threshold C	-	-	-	-	-	-	X	-	X
United States									
Threshold A	-	-	-	-	X	-	X	X	X
Threshold B	X	-	X	-	X	-	X	X	X

60. A characteristic of exemptions which Table 6 is unable to convey is that, inasmuch as exemptions are based on the parties’ turnover or assets, as is often the case, they may be indistinguishable from notification criteria based on local assets or turnover.⁴³ This paper, however, attempts to reflect the categorisation adopted by the reviewed countries.

3.5.2 Merger Review not triggered by the main notification criteria (residual jurisdiction)

61. As noted above, clear and objective notification thresholds do not always adequately capture whether a transaction is likely to prove problematic. The main consequence is that the overwhelming majority of notified transactions do not give rise to competition issues, while some transactions that may give rise to competition issues do not have to be notified at all.⁴⁴

62. Different mandatory notification jurisdictions deal with this problem differently. Most mandatory notification regimes accept that failure to prevent some potentially anticompetitive mergers is inherent to the system. The underpinning rationales seem to be that, if a transaction falls below the merger control thresholds, it is unlikely to significantly affect the market; and the costs of adopting mechanisms to prevent anticompetitive transactions from taking place in such circumstances exceed the benefits of preventing those transactions.

63. Nonetheless, a number of countries have adopted mechanisms that allow them to review potentially problematic mergers that do not meet the main merger control thresholds.

64. The main mechanism identified consists of granting powers for competition authorities to review certain mergers that do not meet merger control thresholds (which we shall henceforth refer to as residual jurisdiction).⁴⁵ As a rule, the period for review under an authority's residual jurisdiction is limited, usually to one year or less – the United States is the only jurisdiction where the competition authorities can investigate a consummated merger that is not subject to mandatory notification without limits in time. Table 7 below identifies the OECD countries that allow for residual jurisdiction.

Table 7

Country		Turnover		Assets		Value of Transaction	Market Shares	Exemptions	Residual Jurisdiction	Other
		Worldwide	Local	Worldwide	Local					
Canada		-	X	-	X	-	-	-	X	X
Iceland		-	X	-	-	-	-	-	X	-
Ireland		-	X	-	-	-	-	-	X	-
Japan		-	X	-	-	-	-	-	X	-
Korea		X	X	X	X	-	-	-	X	-
Mexico	Threshold A	-	-	-	-	X	-	X	X	X
	Threshold B	-	X	-	X	-	-	X	X	-
	Threshold C	-	X	-	X	-	-	X	X	-
Norway			-	-	-	-	-	X	X	X
Sweden		-	X	-	-	-	-	-	X	-
United States	Threshold A	-	-	-	-	X	-	X	X	X
	Threshold B	X	-	X	-	X	-	X	X	X

65. The Secretariat has identified one other such mechanism, which allows for the inclusion of notification criteria that relate to the possibility of competition concerns. The only OECD example of this mechanism is Switzerland, where a merger notification is required if one of the participants has previously been found to be dominant.⁴⁶

3.6 Regional Systems

66. National merger control systems can be part of wider, supranational merger control systems. In jurisdictions which are part of a regional system, like the EU, the national and supra-national jurisdictional rules may need to be adjusted to ensure that the merger is reviewed by the agency best placed to assess the impact of the concentration on the market. Such systems require coordination in the application of multiple merger control thresholds, and may need to adopt additional mechanisms of cooperation which are not reflected in the Secretariat's review.

67. The best known example of a supranational merger control system is the EU, which is described in Box 4.⁴⁷

Box 4. The EU's Multi-Jurisdictional System

In 1989, the European Union introduced the EU Merger Regulation (now Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings) that provides that the European Commission holds exclusive jurisdiction over concentrations that have a Union Dimension - mainly determined by two sets of alternative turnover thresholds. Mergers that do not meet these turnover thresholds may be reviewed (if at all) by the competition authorities of the EU Member States, subject to their national merger control thresholds. A paradoxical consequence of this system is that while transactions involving larger entities may benefit from a single merger notification, smaller economic entities may have to file a transaction in multiple jurisdictions.

In order to alleviate the disadvantages that may result from too rigid an allocation of competences between the two existing levels of regulation – European and national –, various corrective mechanisms have been included in the system. Since 2004, companies have had the option of asking for a merger case to be referred to the European Commission, prior to its notification to the competent national competition authorities (“upward referrals”). Symmetrically, companies are allowed to request that a case falling within the jurisdiction of the European Commission be handled instead by one or more national competition authorities (“downward referral”). Once the notification(s) has(ve) been made, the competition authorities themselves may proceed to referring the case upwards or downwards. The conditions under which these various referrals may be made are specified in the EU’s Merger Regulation and their practical operation is further detailed in a notice published by the European Commission.

In the past years most EU countries adopted merger control regimes. These regimes have converged towards the EU “model”, but there are still differences between them. As such, the European Commission and the national competition authorities have taken a number initiatives aimed at enhancing their coordination on general issues such as “good practices”, and in relation to the handling of individual merger cases. However, and as evidenced in the Akzo Nobel / Metlac and Eurotunnel / MyFerryLink cases, there is still a risk that different competition authorities will reach opposite conclusions regarding the merger. Furthermore, and as was made clear in the Aer Lingus / Ryanair dispute, uncertainties regarding whether the EU or the Member States have merger control competence can still give rise to significant disputes, legal uncertainty and delays.

4. Trends and Developments since 2005

4.1 Current Status

68. The Recommendations and the 2002 and 2008 ICN Recommended Practices (together, the “International Best Practice Recommendations”) provide guidance for an optimal merger control framework. In doing so, they grant countries a large amount of discretion in how to establish merger control systems well-suited for them.

69. The Secretariat’s review concludes that most OECD countries comply with the International Best Practice Recommendations as regards local nexus. For example, the requirement that notification thresholds should be clear and objective – such as data on sales and/or assets of the parties or the size of a transaction – is widely adopted. Of the 29 OECD members which have mandatory notification systems, 75% adopt notification thresholds based exclusively on assets or turnover⁴⁸, while 7% rely on the size or value of the transaction⁴⁹. Of the 16 non-OECD jurisdictions reviewed with mandatory notification systems (Peru, who is a Participant in the Competition Committee, has no generalised ex ante merger control system), two-thirds adopt notification thresholds based exclusively on assets or turnover⁵⁰. Similarly, concerning the requirement that local nexus should be established based on activity within the reviewing jurisdiction – as measured by reference to the local activities of at least two parties to the transaction and/or by reference to the local activities of the acquired business –, 79% of the 33 OECD members with merger control systems (Luxembourg does not have a merger control system), and almost half of the 16 non-OECD countries reviewed, have local nexus criteria that are in line with the International Best Practice Recommendations.⁵¹

70. A few jurisdictions have notification thresholds based on market shares.⁵² Further, while all OECD and non-OECD jurisdictions require some sort of local nexus to be established, a number adopt notification criteria that do not follow the International Best Practice Recommendations. In addition to some ad hoc cases in non-OECD members,⁵³ jurisdictions which rely on the size of the transaction as a notification threshold, or that adopt voluntary notification regimes, often rely local nexus criteria relating to the effects of the transaction – which does not follow the International Best Practice Recommendations.⁵⁴

71. These conclusions are illustrated below, as regard the OECD members.

Figure 1 Notification Thresholds in the OECD

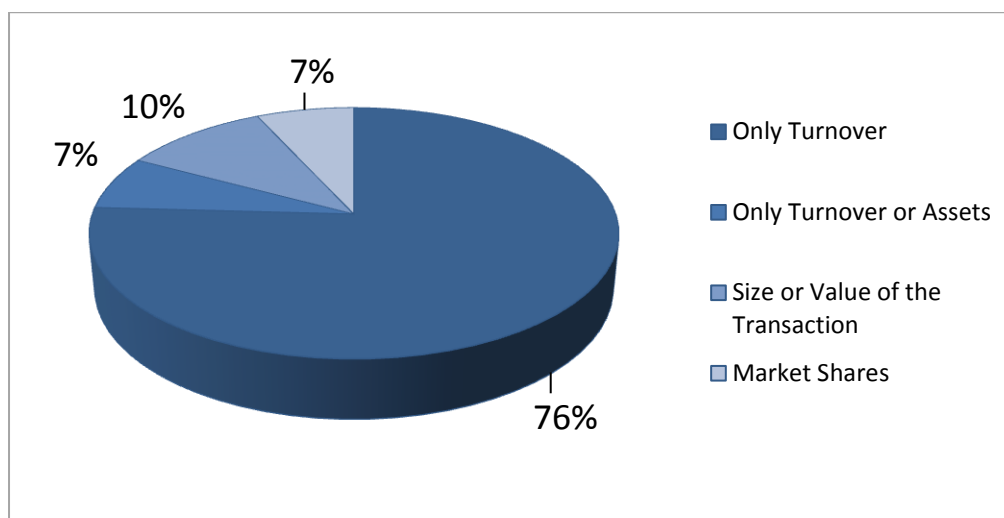
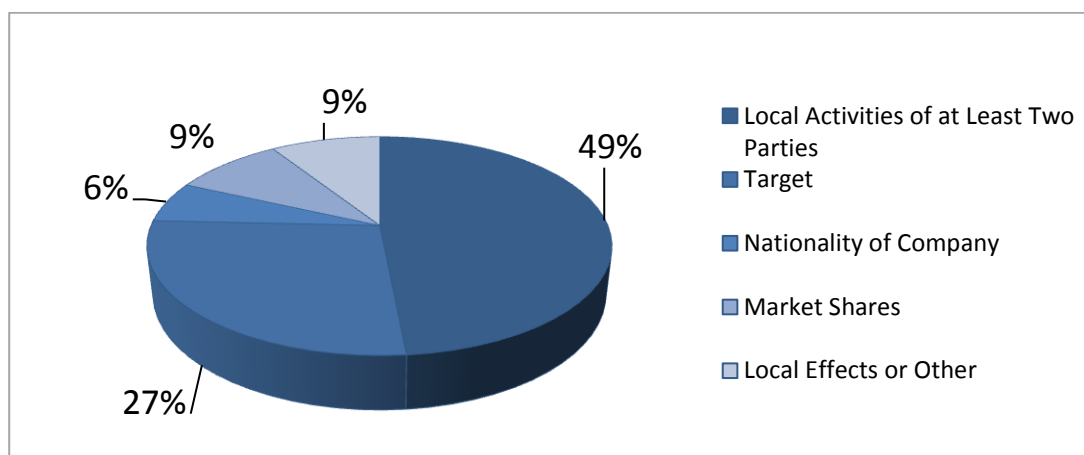


Figure 2 Local Nexus in the OECD



72. Table 8 below examines, for each OECD member, whether that country complies with the International Best Practice Recommendations regarding objective, transparent and quantifiable notification thresholds, and regarding local nexus.

Table 8 – Compliance with OECD and ICN Recommendations - OECD Countries

Country	Mandatory	Objective and Quantifiable Thresholds	Local Nexus
Australia	No	N/A	Yes
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Canada	Yes	Yes	Yes
Chile	No	N/A	Yes
Czech Republic	Yes	Yes	Yes
Denmark	Yes	Yes	Yes
Estonia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	Yes	Yes	Yes
Greece	Yes	Yes	Yes
Hungary	Yes	Yes	Yes
Iceland	Yes	Yes	Yes
Ireland	Yes	Yes	Yes
Israel	Yes	No	Yes
Italy	Yes	Yes	Yes
Japan	Yes	Yes	Yes
Korea	Yes	Yes	Yes
Luxembourg	No	N/A	N/A
Mexico	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes
New Zealand	No	N/A	Yes
Norway	Yes	Yes	Yes
Poland	Yes	Yes	Yes
Portugal	Yes	No	Yes
Slovakia	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	No	Yes
Sweden	Yes	Yes	Yes
Switzerland	Yes	Yes	Yes
Turkey	Yes	Yes	Yes
United Kingdom	No	Yes	Yes
United States	Yes	Yes	Yes

73. The countries which are identified as not following the International Best Practice Recommendations as regards objective and easily quantifiable thresholds are those that use market shares as one of their notification criteria.

4.2 Review of Changes since 2005

74. The Secretariat paper identifies a trend for growing compliance with International Best Practice Recommendations, both within and outside the OECD. All OECD countries with merger control regimes have changed their notification criteria since 2005, with the exception of the United States and Switzerland. In the United States, the Federal Trade Commission updates the US' notification thresholds annually. Switzerland proposed amendments to its competition law which were rejected by Parliament in 2014. Annex II lists countries which have amended their competition rules, and their merger control thresholds.

75. Of the OECD members which have amended their competition rules, and not counting amendments to notification thresholds in countries which already complied with the International Best Practice Recommendations, changes to the rules on merger notifications in Greece, Ireland, Italy, Mexico, Poland, Slovakia, Slovenia and Turkey resulted in systems more in line with International Best Practice

Recommendations. Furthermore, Chile is currently amending its system from voluntary to mandatory merger notification following an OECD assessment of its merger control system.⁵⁵

76. Of the non-OECD jurisdictions reviewed, only the People's Republic of China and Latvia did not update their competition rules since 2005. Of those that did, reforms in Brazil, Bulgaria, Colombia, Costa Rica, India, Indonesia, Romania, the Russian Federation and Ukraine brought their merger control systems closer to the framework outlined in International Best Practice Recommendations.

77. These reforms are briefly summarised in Box 5 below.

Box 5. Country Reforms of Notification Thresholds

A number of countries reviewed amended their rules on merger notifications, and thereby became more aligned with the 2005 Recommendation. In the OECD, these include, for example:

Greece – In 2011, a post-closing notification duty for non-reviewable mergers that led to a concentration of more than 10 percent in a given product market in Greece, or where the aggregate domestic turnover of the parties involved was more than EUR 15 million, was removed.

Ireland – Previously, a merger would be notifiable if at least two of the undertakings involved in a transaction had a worldwide turnover of at least EUR 40 million. The merger control thresholds were amended in 2014, introducing a requirement that the local turnover of at least two the parties must be at least EUR 3 million.

Italy – In 2012, it turned its two merger control thresholds – one based on combined aggregate local turnover of the parties, the other on the target's local turnover – into a single cumulative threshold.

Mexico – A reform in 2014 left the merger control thresholds unchanged, but they now take into account annual sales originating in Mexico or assets in the Mexican territory (instead of worldwide sales or assets) and are not applicable to pure foreign-to-foreign transactions.

Poland – In 2015, merger control thresholds were amended so that a notification will only be required when, in addition to the notification thresholds already in place, the turnover of the target, of a party to the merger or of a founder of a joint-venture equals or exceeds EUR 10 million.

Slovakia – In 2012, merger control thresholds were amended so that a notification will only be required when, in addition to the notification thresholds already in place, the turnover of the target, of a party to the merger or of a founder of a joint-venture equals or exceeds EUR 14 million.

Slovenia – In 2008, merger control thresholds based on market shares were replaced with thresholds based on local turnover.

Turkey – In 2013, a Communiqué was implemented, as a result of which, for acquisitions, only the individual turnover of the target is considered (as opposed to that of any of the parties). Furthermore, the existence of an "affected market" is no longer required for a merger notification duty to arise.

In the 16 non-OECD jurisdictions reviewed, amendments include, for example:

Brazil – In 2012, Brazil reformed its merger control regime. It concentrated merger review responsibilities into a single authority, replaced a post-merger with a pre-merger control system, eliminated notification thresholds based on market shares, and introduced a second local turnover threshold.

Bulgaria – In 2008, Bulgaria amended its merger control system so that, in addition to a threshold based on the combined aggregate local turnover of the parties, a local turnover threshold will also have to be met either by at least two individual parties or by the target.

Colombia – In 2009, Colombia adopted a law creating a pre-merger control regime. In 2015, a Resolution introduced a territorial limitation to the calculation of assets and income as notification thresholds, limiting it to those located in Colombia. Under prior regulations worldwide assets and income were taken into account to perform such calculation.

Costa Rica – In 2013, it moved from a post-merger to a pre-merger mandatory review system.

India – In 2007 and 2011, India amended its merger control thresholds by introducing local assets or turnover thresholds.

Indonesia – In 2010, Indonesia implemented by means of Government regulation its merger control regime. This included setting merger control thresholds based on local assets or turnover.

Romania – In 2015, the law was amended to allow the modification of the thresholds triggering the obligation to notify by means of a decision of the plenary assembly of the Competition Council rather than by law, as previously required.

Russian Federation – In 2012 and 2014, post-merger control was removed, and a requirement that the target must meet a local turnover threshold to trigger a notification duty was introduced.

Ukraine – In 2015, Ukraine eliminated its market shares thresholds and updated its local turnover thresholds.

78. Nonetheless, some countries which have amended their competition rules in the interim have adopted or maintained criteria that differ from International Best Practice Recommendations. In the OECD, this is the case of Israel, Portugal and Spain, which maintained or introduced merger control thresholds based on market shares; and New Zealand, which applies local nexus criteria that relate to the effects of the transaction.

79. Outside the OECD, a number of jurisdictions brought their notification threshold closer in line with International Best Practice Recommendations without fully complying with them. For example, the Russian Federation and Chinese Taipei maintained market share notification thresholds.⁵⁶

80. A matter of particular interest is whether the International Best Practice Recommendations are appropriate to voluntary notification systems. On the one hand, countries that adopt such a system can comply with the Recommendations, at least as regards local nexus – this is the case of the UK. On the other, and even if they do not strictly comply with International Best Practice Recommendations, merger control system in Australia and New Zealand are perceived as working rather well, without giving rise to the type of challenges for companies or competition authorities that the International Best Practice Recommendations sought to address.

5. Conclusions

81. The Secretariat's review found some patterns in merger control practice across OECD and several non-OECD jurisdictions.

82. It is not uncommon for a jurisdiction to use various notification criteria simultaneously – either as alternative merger control thresholds, or in order to create composite merger control thresholds.

83. Most merger control thresholds applied in the jurisdictions reviewed require some form of local nexus. When this is not the case – i.e. when the merger control threshold focuses on the size or value of the transaction, on global assets, or on global turnover –, additional local nexus criteria always apply. Most often the additional criterion is local turnover, but it can also be the nationality of the merging parties or their local market shares. In some cases, local nexus is established by rules requiring the transaction to have local effects.

84. Merger control thresholds based solely on local turnover or assets are among the easiest to apply and the best suited to establish local nexus. Tests based on local turnover or assets are often coupled with other notification criteria. The most common additional criteria are worldwide turnover or asset value, but it is not uncommon for other notification criteria to be used as well.

85. A number of jurisdictions apply merger control thresholds based solely on market shares. However, all these jurisdictions also apply alternative merger control thresholds – usually based on local turnover or assets. Furthermore, some of these jurisdictions combine market shares with local turnover or asset value to create composite merger control thresholds.

86. The notification criteria recommended by the OECD and the ICN tend to be good proxies for the potential impact of a transaction on the economy, but not for a transaction's potential for anticompetitive harm. As a result, merger control thresholds may lead to the notification of too many unproblematic transactions while not catching some anticompetitive transactions. To address this, some countries have adopted ad hoc notification criteria based on indicators of potential local anticompetitive effects, while others grant their competition authorities the power to review transactions even if they do not meet national merger control thresholds. Simultaneously, a number of countries have exempted parties from the duty to notify for merger control, even when a transaction meets the merger control thresholds, in situations where it is unlikely that the transaction will have a sufficient local nexus or will give rise to competitive issues.

87. In short, the Secretariat's review indicates that international practice is broadly in line with the ICN and OECD recommendations. Since 2005 – when the Recommendation was adopted – the trend has been towards increased alignment with it.

88. In some cases, failure to follow international best practice raises questions regarding the adequacy of the International Best Practice Recommendations for some countries. This is, for example, the case of some countries that adopt voluntary notification systems. Most voluntary systems do not comply with the cumulative requirements regarding local nexus and the use of objective and quantifiable notification criteria, but there is no indication that this is problematic for either companies or regulators.

89. In other cases, the Secretariat's review indicates that there is still scope for increased compliance with the International Best Practice Recommendations. Merger control thresholds that rely on notification criteria without an intrinsic local nexus element – in particular, those based on the size or value of the transaction, and worldwide assets or turnover – must rely on additional local nexus criteria. In such circumstances, some countries rely on local effects tests which are subjective, hard to quantify and not easily ascertainable by the parties. This goes against the International Best Practice Recommendations, and could be avoided by recourse to notification criteria such as local turnover or assets – if necessary coupled with the competition authority's power to review transactions falling below the relevant merger control thresholds.

90. Some jurisdictions, including OECD members, have decided to keep notification thresholds based on market shares following legal reform. While there may be particular reasons justifying this option, it does not follow International Best Practice Recommendations, or the practice of most countries which, having considered adopting notification thresholds based on market shares, decided that they were not appropriate for the reasons identified in the International Best Practice Recommendations.

91. The present paper brings to the forefront a number of additional questions that the Working Party 3 on Co-operation and Enforcement may want to discuss. These include questions regarding why countries adopt certain merger control thresholds, or change the law in a certain direction. In particular, any improvement of the existing International Best Practice Recommendations would benefit from a greater understanding of the (local) factors that influence the evolution of merger review systems.

92. Local nexus is increasingly important in light of the evolution of the international merger control system. During the last 10 years, more and more countries have adopted competition law regimes, including, in many cases, merger control systems. This means that the costs of compliance for multinational companies involved in mergers keep growing, and that the risk of conflicting decisions and remedies by competition authorities is increasing. More and more authorities have a say on the outcome of mergers and this increases coordination efforts. A proper application of local nexus can eliminate unnecessary costs for companies and competition authorities, and reduce the risk of divergence in decisions regarding the same merger and the need for cross-border cooperation, while increasing the efficiency, effectiveness and coherence of global merger control.

ENDNOTES

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- ¹ Dane Holbrook ‘International Merger Control Convergence Resolving Multijurisdictional Review Problems’ (2002) 7 *UCLA Journal of International Law and Foreign Policy* 345; W. Adam Hunt, ‘Business Implications of Divergences in Multi-Jurisdictional Merger Review by International Competition Enforcement Agencies’, (2007-2008) 28 *Nw. J. Int'l L. & Bus.* 147; Jonathan Galloway, ‘Convergence in International Merger Control’ (2009) 5 *Competition Law Review* 179. These costs include not only pecuniary costs incurred in the pursuit of merger control notifications, but also working time devoted to merger control, diversion of other company resources, and uncertainty during the merger control process. For more details, see: “A tax on mergers? Surveying the costs to business of multi-jurisdictional merger review,” commissioned by the International Bar Association and the American Bar Association, produced by PricewaterhouseCoopers (June 2003), available at http://www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf; and the ICN (2004) Report on the Costs and Burdens of Multijurisdictional Merger Review, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf>.
- ² ICN (2004) Report on the Costs and Burdens of Multijurisdictional Merger Review, at 10-18.
- ³ OECD (2013) Report on Country Experiences with the 2005 OECD Recommendation on Merger Review, particularly at 16.
- ⁴ OECD (2013) Definition of Transaction for the Purpose of Merger Control Review, available at <http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>.
- ⁵ Another way to formulate this is by saying that jurisdictional thresholds should minimise the sum of costs resulting from type I errors (notified transactions that raise no competition problems), type II errors (problematic transactions that escape merger review) and compliance and enforcement efforts (that may increase when uncertain or subjective criteria are used) – see ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review, note 3 at 4 ; OECD Definition of Transaction for the Purpose of Merger Control Review, 13.
- ⁶ ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review; Paolo Buccirossi, Roberto Cervone and Chiara Riviera, ‘Optimal Pre-Merger Notification Thresholds: A Contribution to the Italian Debate’ (2014) *Italian Antitrust Review* 3:166.
- ⁷ ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review, 5; OECD (2013) Definition of Transaction for the Purpose of Merger Control Review, 5-6 and 12-14.
- ⁸ Gavin Roberts ‘Merger Control Procedure and Enforcement: An International Comparison’ (2014) 10 *European Competition Journal* 523, 524.
- ⁹ ICN (2002) Recommended Practices for Merger Notification and Review Procedures. See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.
- ¹⁰ Gavin Roberts ‘Merger Control Procedure and Enforcement: An International Comparison’ (2014) 10 *European Competition Journal* 523, 525; ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review, at 4-5.

- 11 Paolo Buccirossi, Roberto Cervone and Chiara Riviera, ‘Optimal Pre-Merger Notification Thresholds: A Contribution to the Italian Debate’ (2014) Italian Antitrust Review 3:166.
- 12 ICN (2008) Setting Notification Thresholds for Merger Review.
- 13 By means of Competition Act 2002 (Section 18(5) and (6)) Order 2007, which replaced Competition Act 2002 (Section 18(5) and (6)) Order 2007 (S.I. No. 622 of 2002).
- 14 ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review, 6.
- 15 Yavuz Karagok and Samuel Rutz ‘Towards Optimal Merger Notification Regimes: Evidence from Switzerland’ (2014) Journal of Antitrust Enforcement 2 (2): 451-483.
- 16 For example P.A. Pautler ‘Evidence on Mergers and Acquisitions’ (2003) 48 The Antitrust Bulletin 119; Bas Postema, Marie Goppelsroeder and Peter AG van Bergeijk ‘Cost and Benefits of Merger Control: An Applied Game Theoretic Perspective’ (2006) KYKLOS 59: 1, 85–98; Mats Bergman, Malcolm Coate, Maria Jakobsson and Shawn Ulrick ‘Comparing Merger Policies in the European Union and the United States’ (2010) Review of Industrial Organization 36:4, 305–331.
- 17 Lars Sorgad ‘Optimal Merger Policy: Enforcement v Deterrence’ (2009) Journal of Industrial Economics 57 (3), 438; Paolo Buccirossi, Roberto Cervone and Chiara Riviera, ‘Optimal Pre-Merger Notification Thresholds: A Contribution to the Italian Debate’ (2014) Italian Antitrust Review 3:166; Lear Competition Note ‘Optimal Pre-Merger Notification Thresholds: An Economic Approach’ January 2015; Paul Gorecki ‘Too Many Unnecessary Merger Notifications in Ireland?’ (2011) Journal of Competition Law & Economics (2011) 7 (3): 651-670.
- 18 Luxembourg has no merger control.
- 19 Participants are Brazil, Bulgaria, Colombia, Costa Rica, Egypt, India, Indonesia, Latvia, Lithuania, Malta, Peru, the Russian Federation, South Africa, Chinese Taipei, and Ukraine.
- 20 OECD (2013) Report on Country Experiences with the 2005 OECD Recommendation on Merger Review, 16.
- 21 This is, for example, the case of Canada.
- 22 Outside the OECD, Brazil, Bulgaria, Costa Rica, Egypt, Indonesia and South Africa have adopted notification thresholds which rely exclusively on local turnover and/or local assets. Brazil is uncommon in taking into account the seller’s turnover and the specific situation of the target (but not its assets or turnover) to determine whether there is a sufficient link to Brazil. Indonesia and South Africa’s thresholds look at alternative turnover and asset-based thresholds.
- 23 ‘Operating business’ is defined as a business undertaking in Canada to which employees employed in the undertaking ordinarily report to – this will usually require either assets in, or revenues being generated in Canada.
- 24 In Italy, the relevant thresholds focus on the aggregate local turnover of all the parties and the individual local turnover of the target. However, as regards situations where a foreign entity purchases a target which, by itself, meets the aggregate local turnover threshold (and, thus, also the lower individual local turnover), the notification guidelines published by the authority set forth that: “*The Authority does not require the notification of acquisitions and mergers through incorporation involving foreign-registered undertakings which do not have at the time of the operation, and did not have during the previous three years, directly or indirectly, a turnover in Italy. These operations are, however, subject to notification whenever, following the concentration, the undertaking begins doing business on the Italian market.*” In parallel, the guidelines also clarify that joint ventures and mergers in which at least one of the parties to the operation is foreign-registered do not need to be notified if the foreign party does not have any turnover in Italy at the time of the operation, and did not have any turnover in Italy during the previous three years.

- 25 Outside the OECD the main countries with this type of tests were Colombia - where foreign mergers are subject to control by Colombian authorities only if the entities involved have any direct or indirect presence in the local relevant market (e.g. subsidiaries, local branches, distributors or resellers) –, and Russia – where transactions between foreign companies will only trigger a filing, even when the global assets threshold is met, if the target’s Russian turnover in the preceding year exceeded 1 billion roubles.
- 26 And, outside the OECD, Lithuania, where a merger notification is required if the combined aggregate turnover of the undertakings participating in the concentration exceeds 50 million litas in the preceding business year, and the aggregate turnover of each of at least two undertakings concerned exceeds million litas in the preceding business year. While for domestic companies worldwide turnover is relevant, for foreign undertakings the aggregate turnover is calculated as the sum of income arising from sales in Lithuania.
- 27 Outside the OECD, in Malta the merger control threshold couples a minimum local turnover with a requirement that a minimum of 10% of the companies’ turnover must result from activities within the jurisdiction.
- 28 ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation I (B).
- 29 An example of this is in Indonesia, where the notification thresholds for banking companies look exclusively at local assets.
- 30 Or to a set of *de minimis* thresholds. For example, in Spain a transaction that meets the notification thresholds is exempted from notification when the total Spanish turnover or assets of the acquired company did not exceed EUR10 million in the last accounting year and the undertakings involved do not have an individual or joint market share higher than 50% on any of the affected markets.
- 31 ICN (2002) Recommended Practices for Merger Notification and Review Procedures, Recommendation II; ICN (2008) Setting Notification Thresholds for Merger Review, at 4-5. As a consequence, while market share thresholds are not recommended for mandatory notifications, they may play a useful guiding role in voluntary notification systems where the onus is on the parties to self-assess and to report transactions that may give rise to competition issues.
- 32 Outside the OECD, this includes Russia – where a merger is notifiable when one of the companies involved in the transaction is listed in the official Register of Companies with a market share exceeding 35% on the relevant product market –, Chinese Taipei – where a notification is required if any of the merger parties’ market share exceeds a quarter of the market, or if as a result of the merger one of the companies’ market share exceeds a third of the market –, and Latvia – where a notification is required if the combined market share of merger participants exceeds 40% in any relevant market. Up until January 2016, merger clearance was required in Ukraine if either the individual or combined market share of the parties in the market concerned or an adjacent market exceeds 35%.
- 33 Colombia uses market shares in a different fashion – while a merger notification will be required whenever the relevant revenue or asset-based thresholds are met, the transaction will be automatically authorised when the combined share in any relevant market does not exceed 20%
- 34 In Spain, this local turnover or asset threshold is framed as an exception. Outside the OECD, a notification will only be required in Latvia if the parties’ combined market share is 40% or more and if at least each of two merger participants’ turnovers exceeded EUR 2.134 million in Latvia.
- 35 Outside the OECD the main countries with this type of tests were Colombia - where foreign mergers are subject to control by Colombian authorities only if the entities involved have any direct or indirect presence in the local relevant market (e.g. subsidiaries, local branches, distributors or resellers) –,Costa Rica – where the merging companies must all have operations with effects in Costa Rica – and Russia – where transactions between foreign companies will only trigger a filing, even when the global assets threshold is met, if the target’s Russian turnover in the preceding year exceeded 1 billion roubles.

36 ICN (2008) Setting Notification Thresholds for Merger Review, 8.

37 For example, Canada currently exempts asset securitization transactions from notification requirements; the US exempts transactions solely for the purpose of investment if, as a result of such acquisition, the securities held do not exceed 10 percent of the outstanding voting securities of the issuer.

38 A different type of exemption, also not discussed here, is an exemption from review even when the transaction must still be notified. For example, in Germany transactions affecting *de minimis* markets (that is, concentrations exclusively affecting a market in which goods or commercial services have been offered for at least five years and which had a market volume of less than EUR15 million in the last calendar year), are exempt from substantive review but must be notified; in Colombia, when the combined share in any relevant market does not exceed 20%, the transaction will be authorised, but a notification will still be required.

39 Outside the OECD, India – which requires at least some of the merging parties to meet local turnover thresholds – has administratively exempted acquisitions of shares, voting rights, assets or control from notification requirements when the target has: (i) assets in India of no more than INR 2.5 billion (c. USD41 million) or (ii) turnover in India of no more than INR 7.5 billion (c. USD125 million). This exemption is only available until 3 March 2016. In Latvia, while notification is required when the combined market share of merger participants exceeds 40 per cent in any relevant market, there is an exemption for those transactions where there are not at least two merger participants which turnover in Latvia exceeded €2.134 million during the previous financial year. One could also include Russia – which adopts thresholds based on global turnover or assets – in this group. From one perspective, the system exempts foreign-to-foreign transactions unless the target’s Russian turnover in the preceding year exceeded 1 billion roubles. Another way to look at this, however, is to consider that this amounts to a notification system which requires global and local turnover thresholds to be met cumulatively.

40 The HSR Rules provide that acquisitions of foreign assets by US and non-US companies shall be exempt from the HSR Act unless the foreign assets that would be held as a result of the acquisition generated sales in or into the US exceeding US\$78.2 million during the acquired person’s most recent fiscal year. Even if the acquisition exceeds this threshold (as adjusted annually), the acquisition will nonetheless be exempt if: (i) both the acquiring and acquired persons are foreign; (ii) the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US\$171.9 million; and (iii) the assets that will be held as a result of the transaction are valued at US\$312.6 million or less.

41 Such an acquisition shall be exempt from the HSR Act unless the foreign issuer (together with any entities it controls) either holds assets in the US valued over US\$78.2 million, or made aggregate sales in or into the US of over US\$78.2 million in the most recent fiscal year. As regards acquisitions of voting securities of a foreign issuer by a foreign person, such an acquisition shall be exempt unless it confers on the acquiring person control of the target issuer (i.e., it is an acquisition that will give the acquiring person 50 % or more of the voting stock of the target) and the target, again, either holds assets in the US valued at more than US\$78.2 million, or made aggregate sales in or into the US of more than US\$78.2 million in the most recent fiscal year. Even if either of the US\$78.2 million thresholds described above (as adjusted annually) is exceeded, the transaction will nonetheless be exempt where the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US\$171.9 million; and the value of the voting securities that will be held as a result of the transaction is US\$312.6 million or less.

42 This reflects the US’ agencies’ views that, while certain foreign acquisitions may affect competition in the US, pre-merger notification should not be required if there is insufficient nexus with US commerce.

43 Outside the OECD, India – which requires at least some of the merging parties to meet local turnover thresholds – has administratively exempted acquisitions of shares, voting rights, assets or control from notification requirements when the target has: (i) assets in India of no more than INR 2.5 billion (c. USD41 million) or (ii) turnover in India of no more than INR 7.5 billion (c. USD125 million)

- 44 According to statistics, more than 95% of notified mergers in Europe and the US are approved at first phase. See Cloe and Shekar (2009) ‘Compulsory or Voluntary Pre-Merger Notification? Theory and Some Evidence’ MPRA Paper No. 13450; Paul Gorecki ‘Too Many Unnecessary Merger Notifications in Ireland?’(2011) *Journal of Competition Law & Economics* (2011) 7 (3): 651-670.
- 45 OECD (2014) ‘Investigations of Consummated and Non-Notifiable Mergers’. Outside the OECD, jurisdictions with the power to review mergers below the thresholds include Brazil, China, Indonesia, Lithuania and South Africa
- 46 Outside the OECD, in South Africa companies being investigated by competition authorities must always file for merger control.
- 47 See Competition Appeals Tribunal, case *Akzo Nobel v Competition Commission* [2014] EWCA Civ 482, and joined cases *Groupe Eurotunnel S.A. v Competition Commission* and *The Société Coopérative de Production Sea France S.A. v Competition Commission*, [2013] CAT 30. For more detail on the *Ryan Air / Aer Lingus* case mentioned below, see Pedro Caro de Sousa ‘Minority Shareholdings and the Competing Merger Control Jurisdictions of the EU and National Competition Authorities: The *Ryan Air / Aer Lingus* Case’ (2013) *Competition Policy International*, available at: <https://www.competitionpolicyinternational.com/minority-shareholdings-and-the-competing-merger-control-jurisdictions-of-the-eu-and-national-competition-authorities-the-ryan-air-aer-lingus-case>.
- 48 The following OECD countries adopt notification thresholds based exclusively on assets or turnover: Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Netherlands, Norway, Poland, Slovakia, Slovenia, Sweden and Turkey. Switzerland’s turnover are also based on turnover, except for the requirement for companies which have been previously found dominant to notify mergers they are part to even if they do not meet the notification thresholds.
- 49 The following OECD countries adopt notification thresholds that are based on the size or value of the transaction: Mexico, USA. This can be coupled with a turnover or asset value threshold.
- 50 Brazil, Bulgaria, China, Costa Rica, India, Indonesia, Lithuania, Malta, and Romania. South Africa also falls in this group, but like Switzerland it has an additional threshold that companies under investigation from the competition authorities should notify mergers even if they do not meet the notification thresholds.
- 51 In the OECD, this includes Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Netherlands, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, Turkey, UK and US. Outside the OECD, this includes Bulgaria, China, India, Indonesia, Lithuania, Malta, and Romania.
- 52 In the OECD, this is the case of Israel, Portugal and Spain. Outside the OECD, this is the case of Latvia, Russia, Chinese Taipei and Ukraine.
- 53 Examples of this are Brazil – which may require merger notifications solely on the basis of the acquiring firm's local activities, which goes against the recommendation that local nexus should not be established without reference to the acquired firm’s local activities, even if Brazil then applies a local nexus criterion based on whether the targets has assets, sales or a subsidiary in Brazil, or whether the target is prospecting the Brazilian market and has effective plans to enter it –, Colombia – which subjects purely foreign merges to merger control if the entities involved have any direct or indirect (e.g. subsidiaries, local branches, distributors or resellers) presence in the local relevant market or in the same supply chain –, and Costa Rica – which notification thresholds are based solely on aggregate turnover and assets, but then requires that both companies, including the target, be active in Costa Rica.

⁵⁴ In countries that adopt voluntary notification system, only the UK seems to avoid this by adopting thresholds based on local turnover and share of supply to define the limits of the authorities' merger review jurisdiction. Regarding mandatory notification systems, the US has developed a system of administrative exemptions based on local turnover and assets that, in practice, is the equivalent of systems based on local turnover and asset thresholds coupled with the power to review mergers below these thresholds *ex officio*.

⁵⁵ OECD (2014) Assessment of Merger Control in Chile.

⁵⁶ Brazil can also potentially be included in this group. The new thresholds do not conform to the International Best Practice Recommendations because they include the turnover of all of the members of the corporate group of the seller, when those Recommendations are that thresholds should focus on the sales of the target(s) being acquired, not the sales of entities not being transferred to the buyer.

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