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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by the United States --

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

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UNITED STATES

1. To achieve an appropriate balance between identifying potentially anticompetitive transactions and avoiding unnecessary filing burdens, the United States federal antitrust agencies (the Federal Trade Commission (FTC) and Department of Justice (DOJ)) have broad notification thresholds with exemptions for transactions that are unlikely to raise competition concerns. The thresholds are complemented by a simple notification form, a short initial review period, expedited review of transactions that can quickly be identified as not raising competition concerns, and the ability to review transactions that do not meet the notification thresholds. The U.S. agencies' premerger notification program (administered by the FTC) allows for efficient and expedient review of more than one thousand proposed transactions annually.[1]

2. From the enactment of the Clayton Act in 1914 until 1976, there was no mandatory pre-merger notification in the United States. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-935, 90 Stat. 1390 (the "HSR Act") and implementing regulations established a pre-merger notification system with specified thresholds that govern which transactions parties must notify to the U.S. agencies.[2] The notification thresholds are based on the sales and/or assets of both parties for transactions of a particular size (described below in paragraphs 6 and 7) to determine which transactions parties must report to the U.S. agencies. Failure to report a required transaction can result in a civil penalty of $16,000 per day of violation.[3] The sales and assets of potential filing parties are calculated based on worldwide sales and assets, but there are exemptions for acquisitions of foreign assets and of voting securities of foreign issuers that do not have a significant nexus with the United States.[4]

1 For annual information on the number of notified transactions, as well as the number challenged or abandoned, see the FTC's Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

2 The notification requirements are set forth in Section 7A of the Clayton Act, 15 U.S.C. §18a, as amended by the Hart-Scott-Rodino Improvements Act of 1976 and The Premerger Notification Rules, 16 C.F.R. Parts 801-803 (2008) (the "HSR Rules"). Other materials related to HSR Premerger Notification include The Statement of Basis and Purpose for the original HSR Rules ("SBP"), 43 Fed. Reg. 33450 (July 31, 1978). Federal Register notices related to the Statement of Basis and Purpose are available at www.ftc.gov/bc/hsr/sbp.shtm. The formal interpretations issued pursuant to the HSR Rules are compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475. *See* www.ftc.gov/bc/hsr/hsrbook.shtm. For more information, see the ICN merger template for the United States, available at http://www.internationalcompetitionnetwork.org/uploads/templates/merger/united%20states%20-%20march%202011.pdf.

3 For example, in 2015, investor Len Blavatnik agreed to pay $656,000 in civil penalties to resolve allegations that he violated federal premerger reporting laws by failing to report the 2014 acquisition of voting shares in a technology start up, TangoMe. See https://www.ftc.gov/news-events/press-releases/2015/10/investor-len-blavatnik-pay-656000-settle-ftc-charges-he-violated.

4 See 16 CFR §802.50, http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=16:1.0.1.8.87#se16.1.802_150, and 16 CFR §802.51, http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=16:1.0.1.8.87#se16.1.802_151.

3. As the Secretariat paper notes, the U.S. thresholds are not jurisdictional – i.e., the thresholds determine which transactions parties must notify to the U.S. agencies but the FTC and the DOJ retain the authority to review and challenge non-notifiable transactions, as described below in paragraphs 9-11.

4. Compliance with notification requirements has been strong, and has minimized the number of post-consummation challenges the enforcement agencies have had to pursue, which is helpful as consummated anticompetitive mergers generally are more difficult to remedy.

5. The notification thresholds are part of a pre-merger review system that includes the possibility of pre-notification consultations between parties and the agency, a notification form that seeks only minimal information from the parties, and an initial review in 30 days or less.

1. Thresholds

6. The 2005 OECD Council Recommendation on Merger Review ("OECD Recommendation") and the International Competition Network's Recommended Practices for Merger Notification and Review Procedures ("ICN Recommended Practices")[5] call for notification thresholds to be based on objectively quantifiable criteria and information that is readily accessible to the merging parties, and to be designed to screen out transactions without a material nexus to the reviewing jurisdiction. The HSR Act generally requires transactions to be notified when: (1) the acquiring or acquired person is engaged in U.S. commerce or in any activity affecting U.S. commerce; (2) the amount of voting securities, or the non-corporate interests that yield control, or assets held as a result of the acquisition is over $78.2 million[6] (the size of transaction test); and (3) if a transaction is valued at $312.6 million or less, one person has sales or assets of $156.3 million or more and the other has sales or assets of $15.6 million or more (the size of person test). If the size of the transaction is greater than $312.6 million, the size of person test does not apply and, absent an exemption, the transaction is reportable.

7. In some instances, a transaction may not be reportable to the U.S. agencies even if the size of person and the size of transaction tests have been satisfied. The HSR Act and implementing regulations set forth exemptions,[7] including for the acquisition of foreign assets if the sales in or into the United States attributable to those assets are $78.2 million or less.

8. Thus, the U.S. notification thresholds include both sales and assets tests, the buyer alone cannot trigger the notification requirement, and there is a significant exemption for foreign transactions so that only transactions with a material nexus to the U.S. are notifiable.

2. Thresholds do not limit jurisdiction

9. An important element of the U.S. merger review regime is the FTC's and DOJ's ability to review, and if necessary, challenge non-notifiable transactions. Decoupling thresholds from jurisdiction enables the U.S. agencies to set thresholds sufficiently high to avoid the need for parties

5 OECD Recommendation on Merger Review (2005), available at: http://www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm; and ICN Recommended Practices for Merger Notification and Review Procedures, available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

6 Since 2005, the notification thresholds have been adjusted annually based on changes to the gross national product. The references to the specific dollar amounts here are for 2016. See https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds. The original thresholds in the HSR Act are $50 million for the size of transaction test, and for the size of person test, for a transaction valued at $200 million or less, one person has sales or assets of $100 million or more and the other has sales or assets of $10 million or more.

7 For example, Section 7A(c) of the HSR Act and Part 802 of the HSR Rules exempts acquisitions of up to ten percent of voting securities if they are made solely for investment purposes, and acquisitions of certain types of assets including real property assets and carbon-based mineral reserves.

to report small transactions that are unlikely to raise competitive concerns while retaining the ability to review the few problematic below-the-threshold transactions. For example, over the past five years, the FTC has conducted an in-depth review of 28 transactions that were not notifiable under the HSR rules, in addition to the 117 notified transactions where the Commission conducted an in-depth review. Similarly, DOJ conducted in-depth reviews of 28 transactions that were not notified under the HSR rules during this period, in addition to 130 in-depth investigations of notified transactions.

10. Staff rely on several sources to learn of such transactions. Often, staff will learn about potentially problematic non-notifiable transactions from reading the trade press or other media. For example, the FTC's retail and hospital mergers section subscribes to publications of the National Federation of Retailers and the American Hospital Association, which often report on transactions that do not meet the notification thresholds. DOJ similarly monitors trade press covering the industries subject to its oversight, and recently, for instance, brought a successful challenge to the nonreportable acquisition of the *Orange County Register* by Tribune Publishing, owner of the *Los Angeles Times*, based on information DOJ acquired through its media review.

11. Complaints are another source of information about potentially anticompetitive transactions. Complainants can range from industry participants, such as customers concerned that their suppliers are going to merge, to individual citizens or labor unions. Complaints may come to the agencies directly, may be reported in the press, or may be communicated to the federal agencies by state-level government agencies.

12. The U.S. agencies also can and do review consummated transactions and take enforcement action when the agencies have concerns about anticompetitive effects. For example, during the past five years the FTC has challenged ten consummated transactions, resulting in a consent decree or an injunction. These challenges account for about 10 percent of transactions that resulted in such relief. During this period, DOJ challenged four consummated transactions, resulting in a consent decree or injunction, and accounting for 4.4 percent of all transactions it reviewed that resulted in such relief.

3. Balancing the Burden of Mandatory Notification Requirements

13. While a premerger notification and review system has many benefits, the U.S. agencies are mindful of the additional costs it can impose. These include the direct and indirect costs imposed on firms as well as the costs to the agency to review notified transactions. The U.S. notification system focuses agency resources on transactions that present the greatest risk to consumer welfare while allowing the vast majority of transactions, which do not present any meaningful risk to competition, to proceed quickly through the review process. While many factors contribute to the efficacy of the U.S. premerger notification program, three elements help to reduce the costs and burdens of merger notification, in particular.

14. First, the agencies make available considerable information and guidance on their websites about the notification and reporting obligations.[8] In addition, the agencies are available to answer questions, including advice on individual transactions. Consultation, however, is not obligatory and is used in connection with a small minority of notifications.

15. Second, the short initial notification form is based predominantly on basic information about the participating parties and the transaction that is readily available to the parties. Parties are not required to define markets, or report their market shares or their customers, suppliers, and competitors. The most substantial requirement is the production of all studies, surveys, and analyses

[8] For example, the FTC provides detailed guidance for first time filers, available at https://www.ftc.gov/enforcement/premerger-notification-program/first-time-filer. The FTC also has sample style sheets, an informal advice database that addresses common and detailed questions about the filing process, and other tools, available at https://www.ftc.gov/enforcement/premerger-notification-program.

that were prepared by or for any officer or director, or by individuals exercising similar functions, for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.

16. Third, the U.S. agencies review notified transactions expediently. The initial review period is 30 days (15 days in the case of a cash tender offer or a bankruptcy) from the initial filing.[9] Parties can request "early termination" if they believe the transaction is unlikely to present competition concerns, and the agencies generally make early termination determinations within 10 to 15 days of filing. The agencies grant early termination to more than half of notified transactions.[10]

17. Overall, this combination of guidance, simple notification form, and expedited review procedures creates a system where the vast majority of transactions are notified and reviewed at a limited cost and burden to both the parties and the U.S. agencies.[11]

4. Review of US merger notification system

18. As the OECD and ICN recommendations suggest, an agency enforcing a premerger notification program should engage in continual self-assessment of the program's impact and effectiveness. The U.S. agencies continually assess how the review process can be made more efficientand how the agencies can reduce the costs and burdens on parties while maintaining the agency's ability to investigate and stop or remedy proposed transactions that are likely to significantly lessen competition.

19. Since the premerger notification program became effective in 1978, the majority of the changes have been to agency practice. The program has functioned effectively with only occasional changes to the rules. Among the more prominent are the introduction of the filing fee in 1989, and expanded exemptions for acquisitions of goods and realty transferred in the ordinary course of business and for real estate acquisitions in 1996.[12]

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9 In some cases, parties may decide to provide staff with additional time to conduct an initial review by withdrawing their HSR filing and refiling. Refiling starts a new 30 day review period from the date of the new filing, allowing staff to investigate further in order to determine whether extended review is necessary. For more information, see https://www.ftc.gov/news-events/blogs/competition-matters/2014/06/running-time.

10 For example, in FY 2014, 1,663 transactions were reported to the agencies. Of these, parties requested early termination in 1,274. The agencies granted early termination for 1,020 of those requests (approx. 60 percent of all notifications). See Appendix A of the Hart-Scott-Rodino Annual Report – Fiscal Year 2014, available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr_report.pdf.

11 The FTC and DOJ employ a two phase review system for mergers subject to prior notification, conducting a second-phase review of approximately three percent of reported mergers. For example, of the 1,754 transactions notified to the agencies in FY 2015, the FTC issued a "second request," which triggers an in-depth investigation, in 20 transactions and DOJ issued second requests in 27 transactions. In addition, the FTC conducted in-depth reviews of three non-reportable and/or consummated mergers. While these more intensive reviews comprise fewer than three percent of the transactions reviewed, they can last longer than six months and are often costly to the parties involved.

12 For the 1989 introduction of filing fees, see https://www.ftc.gov/sites/default/files/documents/hsr_statements/54-fr-48726/891124-54fr48726.pdf. For the 1996 rules that exempted certain classes of transactions that are not likely to raise antitrust concerns, see https://www.ftc.gov/news-events/press-releases/1996/03/ftc-enacts-new-exemptions-merger-regulations.

20. It was not until 2001 that the U.S. Congress made the first significant reforms to the HSR Act. In response to complaints that the 25-year old $15 million size-of-transaction threshold had become too low, Congress increased it to $50 million and indexed it to GDP. Congress also removed the size-of-person test for transactions valued at over $200 million (as adjusted) and implemented a graduated filing fee schedule. These reforms set the stage for the numerous rule changes also made that year, including restructuring the foreign exemptions by raising the safe harbor ceiling to $50 million (as adjusted) (from the former $15 million or $25 million, depending on the circumstances).[13]

21. Although these changes pre-date the 2005 Council Recommendation and the ICN Recommended Practices, they are in keeping with the guidance of the recommendations, by revising the thresholds upwards to reduce the number of notifiable transactions that are unlikely to raise competitive concerns.

5. The role of the OECD and ICN Recommendations in Promoting Reform

22. An important role the OECD Council Recommendation and the ICN Recommended Practices play for the U.S. agencies is their primacy as a source of guidance that the FTC and DOJ provide to other agencies on proposed laws and regulations, as well as in their technical assistance programs.[14] When invited to comment on proposed legislative reforms, staff can provide advice based not only on the U.S. experience, but also based on international norms as reflected in the OECD and ICN recommendations. Similarly, through its technical assistance programs, the U.S. agencies often provide advice on the development or reform of a merger notification system based on the OECD and ICN recommendations.[15]

13 The reforms also narrowed the foreign exemptions in some respects, for example, by eliminating the prior blanket exemption for all acquisitions of foreign assets by foreign persons. Formerly exempt across the board, these acquisitions are now subject to the same $50 million (as adjusted) nexus with the United States test as acquisitions of foreign voting securities, and the exemption for acquisitions by foreign persons who do not meet the $100 million (as adjusted) aggregate sales and assets test was altered to apply only where such acquisition is not valued over $200 million (as adjusted) (to correspond with the elimination in the HSR Act of a size-of-person test for acquisitions valued at over $200 million (as adjusted). See Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program, available at https://www.ftc.gov/sites/default/files/documents/reports/annual-report-congress-regarding-operation-hart-scott-rodino-premerger-notification-program/hsrarfy2001.pdf.

14 The technical assistance programs are extensive. For example, in FY 2015 the FTC conducted 30 competition technical assistance missions, involving 21 jurisdictions, mainly in developing countries in Asia, Africa, and Latin America.

15 The U.S. agencies use the ICN's assessment tool in making that evaluation, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc916.pdf.