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MERGER CONTROL LAWS AND PROCEDURES IN LATIN AMERICA AND THE CARIBBEAN

1. Latin American and Caribbean countries are at different places in their implementation of competition policy. In some a competition law has existed for several years; in others, for only a few years or less. Some countries do not have a competition law, but most of those are at some stage in drafting one. In any case, there is steady evolution in the development of competition laws throughout the region. Even countries that have long had such laws have recently made significant changes – Chile is one such country – or are actively considering them – Brazil is an example.

2. On no subject in this field is the situation more dynamic than in merger control. There is active debate, first on the threshold question of whether formal merger control is necessary or desirable for all countries, and second on the optimal structure of such a law, if it is decided to adopt one. This paper will discuss some issues that are relevant to this debate and offer questions for discussion. It will also address the related topic of ensuring efficiency in merger control procedures, focusing on the recently adopted Recommendation of the OECD Council Concerning Merger Review[1] and on work in the International Competition Network.

I. The need for merger control, and forms that it can take

A. Is merger control necessary?

3. There is a consensus that having a competition law is a necessity for any country intent on developing a market-based economy. There are now about 80 countries, large and small, that have some form of competition law, and the number continues to grow steadily. Estimates are that 15-20 countries without competition laws are actively considering adopting one.[2] That trend holds in the Latin America/Caribbean region. Research shows that 13 countries in the region have competition laws[3] and another eight are at some stage in drafting one.[4]

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[1] 23 March 2005 - C(2005)34

[2] See, UNCTAD 2004, Framework of Modern Competition Law and Policy, available at http://www.fias.net/Conferences/CompetitionPolicyTanzDocs/Hassan%20Qaqaya%202.prn.pdf.

[3] Argentina, Barbados, Brazil, Chile, Colombia, Costa Rica, El Salvador, Jamaica, Mexico, Panama, Peru, Uruguay and Venezuela.

[4] Bolivia, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay and Trinidad and Tobago.

4. Competition laws typically address two types of conduct: restrictive agreements – express or implied agreements between two or more economic entities that adversely affect competition – and abuse of dominance or monopolisation – conduct by a single firm that harms competition. Merger control in most competition laws deals with these same two types of conduct. It is intended to prevent or otherwise remedy mergers that are likely to result in one of these anticompetitive outcomes – that is, mergers that make it easier for the firms remaining in a market to collude or to act co-operatively, or that create single firm market power or dominance.[5]

5. Merger control is fundamentally different from conduct provisions in competition laws, however, in that it operates prospectively, while the others operate retrospectively. Merger control attempts to predict the outcome of an event, and as such it is inevitably inexact. It is also resource intensive; merger analysis requires, at least in some cases, that one acquire a great deal of information in order to make an informed judgment about a merger. The process can be disruptive to businesses, which must provide the information demanded by the competition agency and may have to suffer some delay in consummating their mergers. These factors, coupled with the fact that the great majority of mergers are not competitively harmful, cause some experts to argue that merger control is not necessary, at least for some countries, and especially small ones.

6. Some useful background on this issue resulted from a discussion on "Competition Policy in Small Economies" in an OECD Global Forum on Competition held in Paris, France in February 2003.[6] It was implicitly accepted by the participants in the Forum that small economies need competition laws; no one expressed the contrary view. The debate centered on what special characteristics a competition law or its implementation should have in a small economy. One of those special characteristics, of course, could be the absence of merger control, although that position was not specifically articulated either. The discussions were relevant to this question, however, and will be referenced below where appropriate.[7]

7. The table at the end of this paper contains brief descriptions of the merger control regimes, if any, of those Latin American and Caribbean countries that have competition laws. It will be seen that of the thirteen countries that have competition laws, four do not have formal merger control. It is known that some of the other countries in the region that are drafting a competition law are considering not including merger control.

8. The following are some of the arguments against merger control in a competition law enforcement regime:

Ours is a small economy; our markets are small, characterised by few firms and high concentration. Minimum efficient scale (MES) is large relative to the size of our markets. The traditional tests employed in merger analysis in large economies are irrelevant in small countries like ours.

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[5] The merger control standard may be broader than those that apply to the conduct provisions of a competition law, but in general it addresses the same types of anticompetitive conduct. That issue is discussed further below.

[6] The documentation from that Forum is available on the OECD website at http://www.oecd.org/competition/globalforum.

[7] For a description of the written submissions to the Forum see Secretariat Note, *Competition Policy and Small Economies, at http://www.oecd.org/dataoecd/57/13/2486724.pdf.*

9. These are good arguments for flexibility in applying competition law standards across countries. Market concentration safe harbours might be higher in small economies than in large ones. Efficiencies might have a more important role in competition analysis in a small economy than in a larger one. Experience in large economies to date has shown that while their laws are structured to give consideration to efficiency gains from mergers, that issue is not usually determinative when a merger receives close scrutiny. It could be different in a small economy, however. Most firms may not be operating at MES, so that mergers involving them may yield relatively greater efficiency gains. This view was expressed during the OECD Global Forum discussion on competition policy in small economies.[8] But it does not seem that this argument by itself can justify fully omitting merger control. Even in small markets mergers could be anticompetitive and not justified by efficiency gains. All else being equal, one would want to prevent them. Of course, all else is almost never equal. Imposing merger control does introduce costs, which are further explored below.

Our country's economy is based on trade. Our markets are open to imports, and our largest companies are significant exporters. In this context, a merger of two domestic firms would seldom matter, given the number of actual and potential competitors from abroad, and in any case we have a strong interest in supporting our own national champions as they strive to compete in the global economy.

10. Like the first situation described above, where efficiency considerations are paramount, this set of conditions describes a context in which many mergers of domestic firms would not be competitively harmful, but it falls short of applying to all of them. Most obviously it does not protect against anticompetitive mergers in nontradable sectors, such as construction services or certain types of telecommunication services. Moreover, even when a particular good or service is tradable there may exist entry barriers in the relevant domestic markets, such as barriers related to distribution, which would cause a merger of domestic firms to be competitively problematic.

11. As for the need to relax merger control standards (and other aspects of competition law enforcement) in order to assist national champions, it is conventional wisdom that exporters are better equipped to compete in world markets if they are forced to compete at home. There is also evidence that monopoly profits at home are not the optimal source of capital for national champions. Apart from the fact that they benefit foreign consumers (through lower export prices) at the expense of domestic consumers, they do not impose the discipline on the national champion that independent sources of capital would. The result would be to make those enterprises less competitive globally.[9] Finally, the application of merger control in domestic sectors that provide inputs to national champions, such as telecommunications, would benefit the exporters by keeping their costs at competitive levels.

The conduct provisions of our competition law – those that apply to restrictive agreements and abuse of dominance – are sufficient. They will catch anticompetitive conduct that results from mergers.

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[8] See, e.g., OECD, Secretariat Report on the OECD Global Forum on Competition: *Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity* (2004).

[9] See, e.g, the contribution by Ireland to the 2003 Global Forum, at http://www.oecd.org/dataoecd/58/8/2485758.pdf.

12. This approach is attractive because it is the most efficient. Formal merger control can be costly, as discussed below, and it also inevitably produces type I errors – the rejection of mergers that are not competitively harmful. Dealing with anticompetitive mergers *ex post* avoids both of these problems, but it creates others. First, in most cases it forfeits the opportunity for a structural remedy – preserving the merging parties as separate, competing entities. Structural remedies are considered to be more effective in the merger context than behavioural remedies, but it will usually not be possible to apply them – to undo or restructure a consummated merger, especially if one waits until there are observable anticompetitive effects.[10]

13. But more important, the *ex post* approach will result in more type II errors – failure to remedy those mergers that are anticompetitive. First, it is axiomatic that not all violations of competition laws are discovered and prosecuted. Thus, a merger may alter the structure of a market in such a way as to permit the formation of a cartel, but conventional wisdom is that only one in three cartels are discovered, perhaps as few as one in six.[11] Second, certain types of anticompetitive conduct are not easily addressed under the conduct provisions of competition laws. The best example is "monopolistic pricing" by a dominant firm or a firm possessing market power. Such a firm created by a merger is most likely to exercise its market power simply by raising its prices above competitive levels. In some countries monopolistic pricing is not prohibited by the abuse of dominance provision of the law. In others it is technically prohibited but almost never prosecuted, because it is so difficult both to identify and to remedy. *Ex ante* control is the best way of remedying this most common type of harmful single firm conduct that results from mergers. Another example could be certain forms of tacit collusion that are made possible by a merger but which would be difficult to prosecute as anticompetitive agreements.[12]

Merger control is expensive. It imposes costs on both the business community, which has to comply with notification requirements, undergo lengthy investigations and suffer delays in consummating mergers, and on the competition agency, which must expend scarce resources in reviewing mergers. It's not clear that it's worth it – that the improved efficiency in our markets resulting from merger control would offset these costs.

14. This argument clearly has some merit. Merger control can be inefficient. An obvious response to this objection, however, is to make the process more efficient. Moreover, there is a growing international consensus on how to do this, which is discussed in part II below. Still, the problem can be a significant one, especially for countries just drafting or implementing a new competition law. The business community in a country may be strongly opposed to any form of merger control for efficiency reasons. This, in turn, could jeopardize a country's ability to enact any type of competition law. There are two approaches to this problem: first, to give the business community confidence that the proposed procedures will operate efficiently by conforming them to internationally recognised standards, and second, to implement formal

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[10] The ICN is preparing a comprehensive report on merger remedies, which it expects to approve at its annual meeting in Bonn, Germany in June, 2005. The document will be available on the ICN's web site.

[11] See, OECD 2003, *Hard Core Cartels – Recent Progress and Challenges Ahead,* available at http://www.oecd.org/document/36/0,2340,en_2649_37463_2516132_1_1_1_37463,00.html.

[12] In this sense, the substantive standard applying to merger control, for example, "substantial lessening of competition," could be said to be broader that those that apply to the conduct provisions of a competition law.

merger control at some point in time after the effective date of the conduct provisions of the competition law. The two can be complementary, of course.

15. There is precedent for the second approach – delaying the implementation of formal merger control. Interestingly, two of the largest jurisdictions currently engaging in merger control, the United States and the European Union, did just that. The U.S.'s merger control statute, the Clayton Act, was enacted in 1914, long after the enactment of the Sherman Act in 1890. The EC Treaty, containing what are now Articles 81 and 82, became effective in 1957; the EU's Merger Regulation was promulgated in 1990. It must be noted, however, that in both jurisdictions the conduct provisions in the first laws had some application to mergers, though it was considered incomplete. In Latin America, Argentina added formal merger control in 1999 to an older competition law.

16. One benefit to this approach, as noted above, is to make it easier for a country to enact its first competition law; another is that having experience in enforcing the conduct provisions of a competition law could assist in getting a new merger control regime "right," both in substance and procedure. An obvious drawback is that the economic benefits from merger control are forgone during the interim period. A second is that unforeseen political and economic developments may make it more difficult, not less, to enact a merger control law at a later time.

17. In sum, the arguments against implementing a formal merger control regime have some validity, especially in small economies, but it does not seem that any argument can carry the day by itself. In combination they may be more persuasive, but the benefits of an effective merger control regime are also undeniable. A key element in successful merger control is efficiency. Fortunately, the accumulating experience across countries in merger control seems to be generating a consensus on that topic, which is discussed in Part II below.

Suggested questions for discussion

- *Some countries in the region have competition laws without formal merger control. What were the reasons for the omission of merger control? Describe your experience with this system. Has it been positive or negative?*

- *A majority of countries in the region, including some small economies, do have merger control as part of their competition law. How has it worked for you? Have you been able to avoid problems of inefficiency – of high costs and long delays – in your review process? If so, how?*

- *Does any country have experience with delaying the onset of merger control until sometime after the conduct provisions of the competition law become effective? What are the advantages and disadvantages of this approach?*

B. Forms of merger control laws

18. Merger control laws can take different forms, particularly as to whether, and at what time, formal notification is required. These different forms can have important implications for efficiency, though it is not clear that any one method is most efficient for all countries. Some of these methods are discussed below.

Mandatory pre-merger notification

19. Most OECD countries employ this method.[13] These laws require the merging parties to report their agreement to the competition agency before they consummate the transaction and to refrain from consummation until after the expiration of a specified period of time. Most laws provide the competition agency with the power to extend the waiting period for a specified period in order to investigate further. The agency also has powers to require the parties to provide information and documents. Not all mergers must be notified. Small mergers are excluded from the requirement, based on size thresholds stated in the act or in regulations.[14] Nevertheless, the rules that define the class of notifiable transactions can be complex, given the many different forms that merger transactions can take.

20. Notification has the obvious and important effect of giving the competition agency notice of a potentially anticompetitive event. Requiring that notification be made pre-merger has the additional benefit of permitting the competition agency to examine the transaction and to decide whether to block it or to require modifications before it is consummated. As noted above, structural remedies are preferred in the merger context, but it is difficult if not impossible to impose them if the transaction has been consummated. Pre-merger notification optimizes the agency's ability to apply structural remedies.

21. This process could negatively affect efficiency, however. The class of notifiable mergers may be too large, requiring businesses to notify mergers that almost certainly are not anticompetitive and the competition agency to spend resources reviewing those notifications. The rules applying to the notification process may be too complex or not sufficiently transparent, introducing uncertainty – even litigation – into the process. The waiting periods may be too long, or the competition agency may have too much authority to extend them, thus prolonging the delay in consummation of non-harmful transactions, which comprise the great majority of all mergers.

22. While pre-merger notification is the preferred model among OECD countries,[15] of the eight Latin American and Caribbean countries that currently have merger control, only three – Barbados, Colombia and Mexico – employ mandatory pre-merger notification.[16] It may be that this system is less appropriate for smaller economies. Other methods, explored below, might be indicated for these countries.

Mandatory notification, but consummation could occur prior to notification

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[13] An excellent source containing information on the merger control laws and procedures of 50 countries is *Getting the Deal Through – Merger Control*, at http://www.gettingthedealthrough.com/main_fs.cfm?book=MergerControl.

[14] A potentially important issue in countries employing pre-merger notification is whether mergers that fall below the size thresholds for notification are nevertheless subject to the merger control law. That is, the competition agency could still block or apply a remedy post-consummation to an anticompetitive, non-notifiable transaction. Most experts think that an agency should have such powers, for two reasons: first, it is obvious that in the right circumstances small mergers can be anticompetitive, and the competition agency should not be powerless to remedy them; and second, the lack of such powers would tend to cause the agency to define the class of notifiable mergers too broadly, in order to catch all possible harmful mergers. This would have negative effects on efficiency.

[15] But not all OECD countries employ it. Notably, in Australia, New Zealand and the United Kingdom notification is voluntary.

[16] As noted in the table below, El Salvador's new law, which will become effective in 2006, also provides for mandatory pre-merger notification.

23. This type of system is much less common than mandatory pre-merger notification. On its face it has some disadvantages compared to pre-merger notification. It does not ensure that the competition agency will have the opportunity to review the transaction before it is consummated, and yet because notification is mandatory it entails many of the efficiency risks described above relating to pre-merger notification, and some that a pre-merger notification system does not have. If notifications are made post-consummation, for example, the merging parties may have incentives not to speed up the review by the agency, but to slow it down. It is possible, of course, that these infirmities could be overcome, at least to some extent. Businesses could be encouraged in various ways to provide notification in advance of consummation and/or to suspend consummation during the review even though they are not legally required to do so. The competition authority might have powers to order that the consummation process be stayed for a period of time when it learns of a potentially anticompetitive transaction.

24. In Latin America, Argentina and Brazil employ variants of this system. In Argentina it appears that in some cases there could be acquisition of control of the acquired entity before notification, but the law requires that upon notification there must be suspension of consummation. The suspension would help to preserve the ability of Argentina's competition agency to apply an appropriate remedy to an anticompetitive transaction and would provide a continuing incentive on the part of the parties to facilitate the agency's review. Brazil's difficulties with its system, on the other hand, are well known, and are outlined in the peer review report before this Forum. In recent years it has managed significant improvements in its review procedures, but the system imposes limits on what can be accomplished. There are proposals, as has been reported, for a change to pre-merger notification in that country.

Notification not required, but voluntary notification permitted

25. This is an interesting alternative to mandatory notification. Its obvious advantage is that it imposes fewer burdens on business and the competition agency than a mandatory notification regime does: it would almost certainly result in a lesser number of notifications being made. The offsetting disadvantage, of course, is the impaired ability of the competition agency to learn of anticompetitive mergers prior to consummation and to apply structural remedies to them. Still, there are aspects of a voluntary notification regime that could recommend it to a small economy.

26. The utility of formal notification may be less significant in a small economy; the competition agency might be more likely to learn of important mergers by public means. Of course, without a mandatory waiting period the agency could be hard pressed to deal effectively with the mergers it does learn about in that way. It seems that the answer to this problem is to implement procedures that provide incentives for businesses to notify the agency voluntarily of a proposed merger that could be objectionable and to refrain from consummation while the agency conducts its review. Such measures could include:

- Establishing a credible threat that the agency will oppose consummated mergers that it considers to be unlawful and that it will seek structural remedies in these cases to the extent possible. Businesses desire certainty when it comes to mergers; a significant possibility that the transaction could be undone or structurally altered at a future date could affect the parties' willingness to proceed, or at a minimum negatively affect the terms of their agreement.

- Creating the power in the competition agency to impose, or to apply to a court or tribunal for, an order temporarily suspending consummation of a troublesome transaction during a

review by the agency. The suspension period should be limited and finite, and the agency should bear a burden of having to show that the merger could pose a substantial risk to competition.

- Creating a formal clearance procedure, whereby businesses can apply for and receive a formal decision declaring their merger lawful. The procedure would require that the parties refrain from consummating their transaction during the review.

27. As noted above, among OECD countries, Australia, New Zealand and the United Kingdom have voluntary notification regimes. Their processes are very different, but they each have elements of the above three procedures.17

28. Another way to encourage voluntary premerger notification would be to create a threat of punitive fines for consummating an unlawful merger. The procedure would provide for immunity from fines, however, if the merger had been notified and approved by the competition agency. Such a policy could be controversial, however. It is well known that the great majority of mergers are not competitively harmful, and some benefit competition. Moreover, merger analysis is highly technical and in some ways subjective; it could be unfair to subject the business community to the possibility of punitive sanctions for engaging in conduct that in most cases is ambiguous. Of course, a response to these objections is that any such risk could be eliminated by notifying the transaction in advance. In any case, to create such an incentive the agency must establish a credible threat of imposing such fines, and like anti-cartel enforcement, the fines would have to be large. The competition laws of several countries provide for the possibility of fines against unlawful mergers, but there is little evidence that this sanction has actually been imposed.

Suggested questions for discussion

- *How has mandatory pre-merger notification worked in those few countries in the region that use it? Have you managed to avoid creating unnecessary burdens for business and for your agency? What measures have you taken to accomplish this?*

- *How has voluntary notification worked for those countries that use it? Have you encountered difficulties because businesses do not regularly notify voluntarily? What incentives for voluntary notification do you provide?*

II. Making merger control efficient – a growing international consensus

33. Merger control procedures have received a significant amount of attention in international circles in recent years, and work in these forums is continuing. This work was prompted by the growing internationalization of markets; more and more enterprises are operating in more than one country – sometimes in dozens – and when these companies engage in mergers their transactions may be reviewed by many competition authorities. No two countries conduct merger control alike, nor could they be expected to do so, but there is the general feeling that some convergence around a set of best practices would be beneficial to all concerned. The benefits, it would seem, would accrue not only in situations involving mergers of multi-national enterprises, but to businesses and reviewing agencies in general, in any country that conducts merger review on a regular basis.

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[17] Good descriptions of the procedures of these two countries, and of many others, can be found at the *Getting the Deal Through* web site, cited in footnote 9 above.

34. The OECD, through its Competition Committee, has been studying merger control procedures for several years. It has tended to concentrate in the area of international co-operation,[18] but it has worked in other areas as well.[19] The International Competition Network (ICN) chose to focus in more detail on review procedures by national competition agencies. In 2002 it published a set of "Guiding Principles for Merger Notification and Review." They are set out below.

1. Sovereignty. Jurisdictions are sovereign with respect to the application of their own laws to mergers.

2. Transparency. In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.

3. Non-discrimination on the basis of nationality. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.

4. Procedural fairness. Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.

5. Efficient, timely, and effective review. The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.

6. Coordination. Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

7. Convergence. Jurisdictions should seek convergence of merger review processes toward agreed best practices.

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[18] See, e.g., the 1995 *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, available on the OECD web site at http://webdomino1.oecd.org/horizontal%5Coecdacts.nsf/Display/08D2C09E78365013C1256FD4007DD230?OpenDocument*.

[19] For example, it published a report on merger notification forms, which is available at http://www.oecd.org/dataoecd/40/2/2752153.pdf.

8. Protection of confidential information. The merger review process should provide for the protection of confidential information.

35. In 2003, 2004 and 2005 the ICN approved a series of "Recommended Practices for Merger Notification Procedures." These recommendations address the topics found in the Guiding Principles in much greater detail. Each of the several Recommended Practices is accompanied by comments that provide additional interpretation and guidance. The Recommended Practices are too long to be reproduced here, but they can be found on the ICN's web site. 20 Recently, in March 2005, the OECD produced its own "Recommendation of the Council Concerning Merger Review." That document is attached to this paper. It is consistent with the ICN Guiding Principles and Recommended Practices, but it does not have the detail that the Recommended Practices do.

36. The documents are broad in scope, covering virtually all aspects of the merger review process, including efficiency, procedural fairness, transparency, co-ordination, remedies, agency powers and protection of confidentiality. Because this paper focuses on efficiency in merger review, the discussion below will be limited to aspects of the merger review process that relate directly to that topic. Three subjects will be addressed: notification rules, information requirements and time periods. References to the ICN and OECD documents will be made where appropriate.

Notification rules

37. As noted above, in most OECD countries notification is mandatory. It is not surprising, therefore, that the ICN and OECD documents focus on notification requirements as an important aspect of efficiency in merger review. In the Latin America/Caribbean region the proportion of countries with merger control that require notification is somewhat lower, but still significant – 2/3 according to the table below.

38. The purpose of notification is to alert the competition agency to mergers that could violate the competition law, that is, likely cause significant harm to competition. The goal in framing notification rules is to obtain notification of as many potentially anticompetitive mergers as possible, but without requiring notification of an undue number of transactions that are certain not to be harmful. A second goal relating to efficiency is to write notification rules that are as easy possible to understand and to administer.

39. In all notification regimes the class of notifiable mergers is defined principally by means of size thresholds, defined according to size of the merging parties or of the transaction, or both. Only mergers whose size exceeds the thresholds must be notified. Thus, setting these thresholds – establishing minimum sizes – is a critical factor in minimizing burdens associated with notification. The OECD and ICN documents have little to say on this subject, however. It is obvious that "one size does not fit all" when it comes to defining significant mergers across countries. Each country will make this decision based upon its own experience, the size of its economy, and so forth. Setting size thresholds is inevitably somewhat arbitrary, however, especially at the beginning of the process. The OECD (Recommendation ("Rec.") I.D.) and ICN (Recommended Practices ("RP") XI) recommend that countries periodically review their notification rules for this purpose, as well as others.

40. Another important factor in controlling unnecessary notifications is accurately defining the types of transactions subject to the requirement. These rules can be quite complex, given

[20] At http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

the many forms that mergers can take, and they too may be idiosyncratic across countries, as national laws governing business transactions can differ significantly. The OECD and ICN documents do address one aspect of this issue, however – local nexus. Most countries consider that they have jurisdiction under their competition laws over conduct occurring abroad, including mergers, that has a substantial effect within their country. But mergers involving enterprises that have minimal contacts within a particular country – that have no physical presence within a country or conduct minimal transactions there – are unlikely to have any significant effect on competition in that country.

41. The ICN and OECD documents urge that these mergers, while technically within a country's jurisdiction, should be screened out from its notification and review procedures. The OECD recommends that countries "assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction" (Rec. I.A.1.b.i). The ICN provides more detail (RP I); it urges that notification be required only if at least two parties to the transaction have significant local activities, measured by local assets or sales into the jurisdiction. Alternatively, notification could be required if only the entity to be acquired has significant local contacts, but not if the acquiring entity alone has such contacts.

42. The OECD and ICN address the second aspect of efficiency in notification – making the notification rules easy to understand and to administer (Rec. I.A.1.b.ii; RP II). In particular, they stress that notification thresholds should be defined "objectively." [21] Objective criteria in this context are those that are readily ascertainable by reference to financial statements or other information regularly kept in the ordinary course of business. They include asset values or turnover (sales). The ICN specifically recommends against using market share tests – requiring, for example, notification of mergers resulting in a market share above a given threshold. Market shares, of course, are highly relevant to the competitive analysis of a merger, but they are thought to be unsatisfactory as notification thresholds, because, as the ICN puts it, defining markets is "judgmental." Parties can differ, and often do, on the definition of a relevant market. Employing them at the notification stage can introduce considerable uncertainty into the process.

43. Finally, the ICN recommends that competition agencies stand ready to provide pre-notification guidance to merging parties on interpreting the notification requirements and the parties' obligation to notify (RP V.C).

Information requirements

44. It is obvious that burdens associated with merger review can be significantly affected by requirements for information that the merging parties must submit to the competition agency. These burdens affect both the merging parties, who must assemble the information, and the agency, which must review it. The OECD's Recommendation urges that countries "set reasonable information requirements consistent with effective merger review" (Rec. I.A.1.b.iii). The ICN focuses both on information required to be submitted with the initial notification and on that which the parties are asked to supply during an investigation. Regarding the former, it urges that the parties be required to submit with their notification only information sufficient to determine that the notification thresholds are met and to permit a decision as to whether the transaction merits further investigation (RP V). As noted above,

[21] The OECD also recommends that countries employing a voluntary notification scheme "use clear and objective criteria to determine . . . whether and when a merger will qualify for review." Rec. I.A.1.b.ii.

the OECD has studied notification forms, and one of its reports contains sample specifications that countries could use for this purpose.[22]

45. The OECD report on notification forms notes that practices of OECD countries vary significantly in this area, however, and the same is true of non-member countries. Some require much more information than others. These requirements may be affected by other aspects of the review process. A country may have set its notification thresholds low, resulting in many notifications, the bulk of which will not raise competition problems. It would be wise to limit the information requirements in this situation. If thresholds are high, on the other hand, a higher proportion of notified transactions could be competitively harmful, suggesting that the initial notifications provide relatively more information. A country's law may limit the competition agency's ability to obtain additional information from the parties at a later stage in an investigation, which would cause it to require more initially. (It would seem that the better practice, however, would be to give the agency the powers it needs to obtain information after the initial notification.)

46. The ICN recognises that countries will differ in their information requirements, and it urges that at a minimum competition agencies have – and exercise – flexibility in applying their rules in this area, for example by providing alternative notification formats or granting discretionary waivers in appropriate cases (RP V.B).

47. The ICN also addresses information requirements in the investigation stage (RP VI.E). Again, the goal is to acquire as much information as is relevant and necessary, but not more than that. The ICN urges that the agency be flexible in its demands, as with notification; that it permit the submission of information in forms most easily accessible; and that it minimise burdens associated with the production of documents, such as requirements for translations.

Time periods

48. Time is often of the essence in mergers; a merger delayed may be a merger denied. Timing also has obvious implications for efficiency; the longer an inquiry takes the more resources it is likely to use. Both the OECD and the ICN emphasise this issue in their documents. The OECD recommends that "[t]he review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame" (Rec. I.A.1.c). The ICN urges likewise (RP IV.A). Both documents urge that there be procedures in place permitting expedited clearance of mergers that clearly present no significant competitive problems – by far the most numerous of all proposed mergers in most countries (Rec. I.A.1.b.iv; RP IV.B).

49. The ICN recommends that the periods within which investigations are to be conducted be finite and determinable (RP IV.C and D). In situations where an investigative period is not subject to a definite deadline, the ICN recommends that the agency and the parties complete a "timing agreement" that would provide a schedule for completion of the investigation (RP VI.D).

50. The OECD has studied the topic of timing in merger investigations. The Competition Committee conducted a survey of member and observer countries on this and other aspects of merger review procedures. As noted above, the majority of OECD countries employ mandatory pre-merger notification and most of these employ a two-phase review process, that is, in the first phase it is decided whether to clear a merger as non-problematic or to conduct a

[22] See note 15 above.

more intensive investigation in a second phase. In the majority of these countries the length of the first phase is one month or 30 days (in two cases, four weeks). In a few countries the first phase lasts for 45 days. In several countries, but not all, it is possible to shorten the mandatory waiting period for mergers that clearly present no problems, as recommended by the OECD and the ICN.

51. There is greater variation across countries in the length of the second phase. Second phase periods range from one month (or 30 days) to four months. Three months was the most common. In most countries there are procedures for extension of the second phase period. In some, the competition agency can unilaterally extend the period as provided by law; in others it can be done by agreement with the parties. There were other variations in investigation periods across countries, but as a rule, non-problematic mergers were cleared in 30 days or less, and problematic ones tended to be resolved in three to five months, though a few took much longer.

52. The ICN addresses one rather technical issue relating to timing – the imposition of notification deadlines. Such rules require that notifications be made within a certain period after the occurrence of a specified event: for example, "notification must be made within fourteen days after the conclusion of a definitive agreement by the merging parties." Not all countries have such deadlines, especially those that employ mandatory pre-merger notification. Since the parties in these countries cannot consummate their merger until after the expiration of the mandatory waiting period following notification, the competition agency is mostly indifferent as to when they notify. In the relatively few countries that require notification but not pre-merger, a notification deadline could be more important to the agency, which would want to learn of possible anticompetitive mergers in time to take action before consummation, if possible.

53. The business community finds such deadlines to be problematic. They may be unreasonably short, or the date that causes the beginning of the period leading up to the deadline, often called the "trigger date," may be difficult to determine accurately, leading to litigation over failure to notify. This problem has been especially acute in Brazil, for example, where there have been many such cases. Conversely, a trigger date may be defined in such a way as to prevent the parties from notifying as early as they otherwise would want to.

54. The ICN recommends that "[p]arties should be permitted to notify transactions without undue delay" (RP III.A. Comment 1), and the OECD recommends that countries provide parties with "a reasonable degree of flexibility in determining when they can notify a proposed merger" (Rec. I.A.1.b.5). The ICN considers notification deadlines to be unnecessary in countries with mandatory pre-merger notification (RP III.B), and it urges the countries that require notification but not pre-merger to "allow parties a reasonable time in which to file notification following a clearly defined triggering event" (RP III.C).

<u>Suggested questions for discussion</u>

- *In what respects do your country's procedures relating to notification rules, information requirements or timing <u>not</u> conform to the OECD and ICN recommendations? What difficulties, if any, have you experienced as to those procedures?*

- *How much time, on average, does it take for your agency: a) to review and clear non-problematic mergers; b) to review and decide on mergers that do present significant competitive issues?*

- *Do you think that work like that being conducted in the OECD and ICN on merger review procedures is useful to you? Should there be any special focus on small economies? What would you suggest in that regard?*

MERGER CONTROL REGIMES IN LATIN AMERICAN AND CARIBBEAN COUNTRIES WITH COMPETITION LAWS[23]

Country	Merger Control?	Notification Requirements
Argentina	Yes – added to competition law in 1999	Mandatory, but not pre-merger: notification required ". . . before or within a week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest."
Barbados	Yes	Mandatory pre-merger. Voluntary notification permitted.
Brazil	Yes	Mandatory, but not pre-merger: ". . . must be notified previously or no longer than fifteen business days after its occurrence." Voluntary notification permitted.
Chile	No specific merger control except for a few sectors. Mergers generally subject to conduct provisions of law.	Notification not mandatory. Voluntary notification permitted.
Colombia	Yes	Mandatory pre-merger. Voluntary notification permitted.
Costa Rica	Yes	Notification not mandatory. Voluntary notification permitted.
El Salvador	Yes; new law to become effective in January 2006.	Mandatory pre-merger.
Jamaica	No.	
Mexico	Yes.	Mandatory pre-merger. Voluntary notification permitted.
Panama	Yes.	Notification not mandatory. Voluntary notification permitted.
Peru	No, except for electricity sector	Mandatory pre-merger for electricity sector.
Uruguay	No.	
Venezuela	Yes.	Notification not mandatory. Voluntary notification permitted.

[23] The principal sources for this table were the templates prepared by members of the International Competition Network, which can be accessed from http://www.internationalcompetitionnetwork.org/mergercontrollaws.html, and the *Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere*, which can be found on the ALCA-FTAA web site at http://www.ftaa-alca.org/ngroups/ngcomp_e.asp.

Recommendation of the Council on Merger Review

23 March 2005 - C(2005)34

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the Council's Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL], which recommended that, when permitted by their laws and interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other's requests to share information;

Having regard to the suggestions in the study of transnational mergers and merger procedures prepared for the Committee on Competition Law and Policy [Merger Cases in the Real World, A Study of Merger Control Cases (OECD 1994)] and to the Committee's work related to merger review procedures, including the Report on Notification of Transnational Mergers [DAFFE/CLP(99)2/FINAL];

Recognising that the continued growth in internationalisation of business activities, and the increasing number of jurisdictions which have adopted merger laws, correspondingly increase the number of mergers that are subject to review under merger laws in more than one jurisdiction;
Recognising that reviews of transnational mergers can impose substantial cost on competition authorities and merging parties, and that it is important to address these costs without limiting the effectiveness of national merger laws;

Recognising that cooperation and coordination among competition authorities with respect to mergers of common concern can enhance the efficiency and effectiveness of the review process, help achieve consistent, or at least non-conflicting, outcomes, and reduce transaction costs;

Recognising the benefits that can result from the ability of competition authorities to share confidential information with foreign competition authorities with respect to mergers of common concern, and considering that most competition authorities may not be authorised by law or international agreement to share confidential information with foreign competition authorities in merger review proceedings, and therefore may do so only if the parties voluntarily waive their confidentiality rights;

Recognising that confidential information must be protected against improper disclosure or use if competition authorities share such information;

Recognising the important work by other entities in the area of merger notification and procedures, in particular that of the International Competition Network;

Recognising that Member countries are sovereign with respect to the application of their own laws to mergers;

I. RECOMMENDS as follows to Governments of Member countries:

A. Notification and Review Procedures

1. Merger review should be effective, efficient, and timely.

1. Member countries should ensure that the review process enables competition authorities to obtain sufficient information to assess the competitive effects of a merger.

2. Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties. In this respect, Member countries should in particular:

1) assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;

2) use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review;

3) set reasonable information requirements consistent with effective merger review;

4) provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance; and

5) provide, without compromising effective and timely review, merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger.

3. The review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame.

2. Member countries should ensure that the rules, policies, practices and procedures involved in the merger review process are transparent and publicly available, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger.

3. Merger laws should ensure procedural fairness for merging parties, including the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such review of adverse enforcement decisions should be completed within reasonable time periods.

4. Merging parties should be given the opportunity to consult with competition authorities at key stages of the investigation with respect to any significant legal or practical issues that may arise during the course of the investigation.

5. Third parties with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to express their views during the merger review process.

6. Merger laws should treat foreign firms no less favourably than domestic firms in like circumstances.

7. The merger review process should provide for the protection of business secrets and other information treated as confidential under the laws of the reviewing jurisdiction that competition authorities obtain from any source and at any stage of the review process.

B. Coordination and Cooperation

1. Member countries should, without compromising effective enforcement of domestic laws, seek to cooperate and to coordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.

2. Member countries are encouraged to facilitate effective cooperation and coordination of merger reviews, and to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to cooperation and coordination.

3. Member countries should encourage merging parties to facilitate coordination among competition authorities, in particular with respect to the timing of notifications and provision of voluntary waivers of confidentiality rights, without drawing any negative inferences from a party's decision not to do so.

4. Member countries should establish safeguards concerning the treatment of confidential information obtained from another competition authority.

C. Resources and Powers of Competition Authorities

Member countries should ensure that competition authorities have sufficient powers to conduct efficient and effective merger review, and to effectively cooperate and coordinate with other competition authorities in the review of transnational mergers. They should be cognisant that competition authorities need sufficient resources to fulfil these tasks.

D. Periodic Review

Member countries should review their merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.

E. Definitions

For purposes of this Recommendation:

Competition authority means a government authority or agency charged in general with the review of mergers under the merger laws of a Member country. Competition authority does not include a government authority that is responsible for the review of mergers only in a specific industry sector.

Merger means a merger, acquisition, joint venture, or any other form of business amalgamation, combination or transaction that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

*Merge*r laws means the competition laws of a Member country applied by competition authorities in the review of mergers, and the procedural rules governing such reviews.

Transnational merger means a merger that is subject to review under the merger laws of more than one jurisdiction.

II. INSTRUCTS the Competition Committee:

1. to explore further means to enhance the effectiveness of merger review, reduce the costs of reviewing transnational mergers, and strengthen coordination and cooperation among agencies, including by coordinating with other international organisations addressing these issues;

2. to periodically review the experiences under this Recommendation of Member countries and of non-member economies that have associated themselves with this Recommendation; and

3. to report to the Council as appropriate on any further action needed to improve merger laws, to achieve greater convergence towards recognised best practices, and to strengthen cooperation and coordination in the review of transnational mergers.

III. INVITES non-member economies to associate themselves with this Recommendation and to implement it.