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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by BIAC --

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

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BIAC

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 3 for its session on local nexus and jurisdictional thresholds in merger control.

1. Introduction

2. More than ten years ago, the ICN began the process of creating Recommended Practices in Merger Control¹ (“ICN Recommended Practices”). Shortly after, the OECD published a comprehensive Recommendation on Merger Review² (“OECD Recommendation”). Collectively, these recommended practices have been profoundly influential in many jurisdictions and with stakeholders seeking more uniform and efficient merger notification practices. Numerous jurisdictions have aligned with the recommended practices, while other jurisdictions progress more slowly towards alignment. Moreover, the recommendations have significantly benefitted new regimes looking to establish useful and efficient procedures for merger notification and review.

3. The lessons to be learned from this initiative are clear. Conformity to best practices in establishing merger thresholds and jurisdictional nexus benefit both the reviewing authority and the parties that are subject to the notification requirements. Well-designed thresholds help to significantly reduce the number of non-problematic transactions with insignificant impact that must be reviewed by an agency. They streamline the process and allow agencies to direct their limited enforcement resources more precisely on transactions that are both significant to consumers within an economy and potentially create a real and substantial lessening of competition. At the same time, they eliminate from reporting many transactions that do not threaten competition, easing the burden and reducing cost for merging companies trying to gain efficiencies and become more competitive.

4. While the recommended practices have pushed countries towards convergence, there remain significant deviations which have material impacts on merging businesses. These deviations increase the uncertainty and costs associated with global mergers, increase costs on agency administration of pre-merger notification programs, and potentially chill pro-competitive business combinations both in the non-conforming jurisdictions and elsewhere.

5. Further alignment with the non-conforming jurisdictions would help address these problems in the jurisdictions, but several jurisdictions are slow to update their merger notification regimes, perhaps due to a fear of losing the ability to review potentially problematic mergers, which will then escape notification. To address these concerns, BIAC recommends a transitional “safety net” approach, whereby an agency that changes its notification thresholds maintains, for a transitional period, both jurisdictions over and the right to review and demand notification of transactions that would have been notifiable under the previous threshold. This safety net transition period would allow agencies to test the benefits of higher thresholds without sacrificing jurisdiction over sub-threshold transactions. At the same time, it would reap the benefits associated with more refined and targeted notification thresholds. This concept could be applied not only to higher monetary thresholds, but also to higher degrees of jurisdictional nexus.

¹ INT’L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, available at www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf [hereinafter ICN RECOMMENDED PRACTICES].

² OECD, RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW (2005), available at www.oecd.org/competition/mergers/40537528.pdf [hereinafter OECD RECOMMENDATION].

6. This paper first discusses the positive convergence to the recommended practices regarding notification thresholds and local nexus criteria. We then identify examples of existing divergence and the problems that this continued divergence creates. It concludes with a recommendation for increasing notification thresholds while providing a short-term transition period to allow jurisdictions greater comfort while acclimating to the higher threshold.

2. The Recommended Practices Have Been and Continue to be Important Guidance for Developing Merger Notification Requirements

7. Notification thresholds have long been a focus of BIAC, OECD and the ICN, as well as numerous other stakeholder groups, particularly as merger notification regimes and mergers with international scope and effects surge. “Today more than 90 jurisdictions actively engage in merger review, an increase from approximately 60 jurisdictions in 2000, and fewer than a dozen jurisdictions in 1990. As the volume of cross-border transactions increases and with merger filings again on the rise, reducing the unnecessary costs and burdens of merger review is as important today, if not more so, than it was when the International Competition Network was formed in 2001.”³ A more recent statistic by the International Chamber of Commerce suggests that “[m]ore than 146 jurisdictions around the world currently have some form of merger control regime under their antitrust laws.”⁴

8. Recognizing the proliferation of competition agencies interested in merger review, ICN developed a set of recommended practices in 2002 which could be adopted by nascent or established competition agencies alike.⁵ In 2005, the OECD developed merger review guidance for jurisdictions, including principles related to the premerger notification process that reflected many of the same principles as embodied in the ICN recommendations.⁶ Three years later, the ICN surveyed its members who had examined and adjusted their thresholds based on the ICN Recommended Practices and prepared a report “with a view to assisting agencies planning to introduce or revise their notification thresholds in mandatory regimes.”⁷ In 2013, the OECD published a comprehensive review of its member countries’ efforts to date in implementing the OECD Recommendation,⁸ and the ICN conducted a similar survey in 2014 which it updated in 2016 for the Annual Conference in Singapore.⁹

³ Maria Coppola, *ICN Best Practice: Soft Law, Concrete Results*, CPI ANTITRUST CHRONICLE (July 2011) at 2, available at www.ftc.gov/system/files/attachments/key-speeches-presentations/1107cpicoppola.pdf [hereinafter Coppola, *Soft Law*].

⁴ INT’L CHAMBER OF COMMERCE, ICC RECOMMENDATIONS ON PRE-MERGER NOTIFICATION REGIMES 1 (Mar. 2015), available at www.iccwbo.org/Data/Policies/2015/ICC-recommendations-on-pre-merger-notification-regimes [hereinafter ICC RECOMMENDATIONS].

⁵ [ICN RECOMMENDED PRACTICES](#).

⁶ OECD RECOMMENDATION.

⁷ INT’L COMPETITION NETWORK, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW (Apr. 2008), available at www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf [hereinafter ICN 2008 REVIEW].

⁸ OECD, REPORT ON COUNTRY WITH THE 2005 OECD RECOMMENDATION ON MERGER REVIEW (2013), available at www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf [hereinafter OECD 2013 REVIEW].

⁹ See INT’L COMPETITION NETWORK, HOW DOES YOUR MERGER REVIEW REGIME CONFORM TO THE ICN’S RECOMMENDED PRACTICES? A DISCUSSION OF SELF-ASSESSMENT TOOLS (Apr. 10, 2014), available at www.internationalcompetitionnetwork.org/uploads/library/doc959.pdf; INT’L COMPETITION NETWORK, ICN: N&P RP SELF-ASSESSMENT TOOL ONLINE SURVEY 2016: AN UPDATE (Apr. 4, 2016) [hereinafter ICN 2016 SURVEY]. Additionally, several other stakeholders have undertaken various reviews of the effectiveness and implementation of the Recommended Practices. See, e.g., Maria Coppola & Cynthia Lagdameo, *Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures*, in

9. The recommended practices were developed to balance several factors at tension in a premerger notification regime. “[T]ransnational mergers can impose substantial cost on competition authorities and merging parties, and it is important to address these costs without limiting the effectiveness of national merger laws.”¹⁰ Specifically, the recommended practices seek to identify anticompetitive mergers which will materially impact a jurisdiction, while minimizing agency resource expenditure on mergers unlikely to cause competitive problems, and minimize the costs imposed on businesses.¹¹

10. To strike the appropriate balance between the costs imposed on businesses and agencies, and providing an effective review regime, the recommended practices focus on two primary principles. First, the recommended practices require that “[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.”¹² Ensuring a local nexus ensures that limited agency resources won’t be wasted on reviewing transactions which are unlikely to produce material changes in the jurisdiction, and respects the sovereignty of other nations which may have a significant interest in a matter.¹³

11. Second, the recommended practices require merger notification thresholds to be tuned such that the focus is on identifying classes of mergers which, if anticompetitive, are most likely to have a material impact on the jurisdiction.¹⁴ Unduly low merger thresholds capture more mergers in a notification scheme, of course, but may not reflect a corresponding increase in the number of questionable mergers pursued or in overall consumer welfare.¹⁵ Moreover, reviewing more mergers increases costs on business, creates market uncertainty, and stretches agency resources.¹⁶ Conversely, well-tuned notification thresholds designed to focus on significant matters, particularly those based on objectively quantifiable criteria related to combined party or target party assets and/or sales, focus agency resources on matters which are likely to materially affect the reviewing jurisdiction’s economy and “ensure that notification will not be required for transactions lacking a potentially material effect on the local economy.”¹⁷

3. The Recommended Practices Have Spurred Change and Improved the Efficacy of Merger Review

12. In 2013, the OECD conducted a review of changes to merger regimes since the 2005 OECD Merger Recommendation was published.¹⁸ The results of the review were encouraging. Generally, “[t]he Recommendation has been very successful in shaping merger review practices at country level. It has served as a catalyst for reform in merger review in many OECD Member countries and non-members. While it is hard to draw a direct, causal link between the provisions in the Recommendation

THE INTERNATIONAL COMPETITION NETWORK AT TEN (Paul Lugard ed., 2011), *available at* www.ftc.gov/system/files/attachments/key-speeches-presentations/coppolalagdameoicn.pdf.

¹⁰ OECD RECOMMENDATION at 1.

¹¹ ICN RECOMMENDED PRACTICES at 1 (“Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of ‘local nexus’ required, such as material sales or assets levels within the territory of the jurisdiction concerned.”).

¹² *Id.* at 1.

¹³ *Id.*; OECD RECOMMENDATION at 1.

¹⁴ OECD 2013 REVIEW at 14; ICN RECOMMENDED PRACTICES at 3-4 and associated footnotes.

¹⁵ ICN 2008 REVIEW at 4.

¹⁶ ICC RECOMMENDATIONS at 1-2.

¹⁷ ICN RECOMMENDED PRACTICES at 2.

¹⁸ OECD 2013 REVIEW.

and specific country reforms, there is little doubt that depending on the circumstances, the Recommendation has initiated, informed or shaped these merger reform efforts.”¹⁹

13. With specific regard to merger notification thresholds and local nexus requirements, the 2013 OECD report found “a number of economies have changed the notification thresholds in order to strengthen the local nexus and to assess only those mergers that are actually capable of distorting competition within their territory. For example, in recent years the notification criteria have been amended in Italy, Brazil and Germany to emphasize the need for ‘notifiable transactions’ to have potential effects in their respective countries. A significant share of OECD Member countries (31 countries) has adopted as notification thresholds the domestic turnover or the value of assets in the domestic market of one or more companies involved in the transaction, creating a stronger local nexus.”²⁰

14. Similarly, a recent ICN survey highlights the progress identified in OECD review.²¹ Eighty nations responded to an ICN survey regarding premerger notification process in results published in April 2016. This survey identified that 65 percent of responding countries have utilized the ICN Recommended Practices in their review of the jurisdiction’s premerger notification requirements.²² Many have taken positive actions incorporating those recommendations. Over ninety percent of the responding countries now include a local nexus requirement to merger notification requirements,²³ a laudable statistic and significant improvement from years past. However, other gaps in the adoption of the recommended practices have in some cases undermined the potential benefits of local nexus changes.

4. Significant Non-Conformity Remains, Imposing Significant Costs and Burdens on Parties and Agencies

15. While many jurisdictions have taken considerable steps towards implementing the recommended practices, significant problems still exist in most jurisdictions.²⁴ The Secretariat’s Report identifies that 26 OECD countries are fully aligned with the Recommended Practices.²⁵ While this is a considerable improvement from 2002, and a significant benefit to merging businesses, many OECD countries continue as outliers, in addition to numerous non-member countries which are noncompliant. Continued outliers impose significant costs on merging parties, and the inefficient allocation of resources in those agencies.²⁶

¹⁹ *Id.* at 11.

²⁰ *Id.* at 16 (citations omitted).

²¹ ICN 2016 SURVEY.

²² *Id.* at 11.

²³ *Id.* at 3.

²⁴ “[M]uch work remains to be done. Some established agencies (including some that were founding members of the ICN) still fail to follow some aspects of the Recommended Practices. While the Recommended Practices have been quite valuable in helping to improve a number of the newer merger regimes prior to their taking effect, many of the newer regimes would benefit from changes that would bring their procedures more in line with the ICN Recommended Practices.” Hugh Hollman, *Ron Stern, An In-House Perspective on Global Competition Law Developments*, in *CONCURRENCES* (2012), available generally at www.concurrences.com.

²⁵ These countries account for over 75 percent of the OECD members, and include: 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, United Kingdom, and United States. Luxembourg does not have a premerger notification regime in place.

²⁶ See, e.g., Coppola, *Soft Law*; ICC RECOMMENDATIONS.

16. One area where further convergence is required is the use of local sales and/or assets to determine if a merger reaches notification thresholds. Of countries responding to the ICN Survey, approximately 25 percent of the jurisdictions consider assets beyond the local nexus to determine notification requirements.²⁷ Global market tests which can override local nexus thresholds fail to maintain the necessary local connection. In these scenarios, there is no basis to justify the resource allocation, expense and time of the reviewing agency or the notifying parties.

17. Additionally, in nearly 40 percent of the jurisdictions, the buyer's activity in the jurisdiction alone (i.e., assets, revenues or, compounding the non-compliance problem, market share) can trigger notification in a matter.²⁸ Buyer only tests are inappropriate measures for merger notifications if the intent is to identify likely anticompetitive effects that impact consumer welfare within a jurisdiction. Generally, when only the buyer has sufficient sales or assets to trigger notification, the combined entity is highly unlikely to result in a reduction of competition.²⁹ Even if the seller has some level of activity in the jurisdiction below the requisite threshold, the disparate party sizes suggest that a competitive restraint on the larger company is unlikely or, at best, theoretical. This is perhaps best evidenced by the dearth of challenges globally based exclusively on potential competition.

18. Of additional concern, nearly 30 percent of jurisdictions continue to use non-objectively quantifiable criteria in setting notification thresholds.³⁰ Non-objectively quantifiable criteria include market share estimates, market power determinations or other transaction related effects. While these criteria can be beneficial, it is well established that market share and concentrations are “not determinative of possible competition concerns.”³¹ Moreover, they fail to provide any level of certainty for businesses who are left to interpret imprecise subjective criteria,³² and they thereby create the risk of both Type I and Type II error.³³

19. Assessing non-objectively quantifiable criteria is difficult, time intensive and costly. Businesses often do not have sufficient information to assess these questions, particularly early in a merger review. As an example, it is frequently the case that a company will have a significant production center in one country, from which it distributes into several or many other countries. In this scenario, the company will likely know its sales into another jurisdiction based on “ship to” data. But it is often not possible, or even attempted, to assess its market share in every jurisdiction into which it ships product. This is becoming more so the case as the internet opens avenues to product

²⁷ ICN 2016 SURVEY at 4.

²⁸ *Id.*

²⁹ *See, e.g.*, Letter from McMillan LLP (representing the Merger Streamlining Group) to Jorge Grunberg, et al, Ministerio de Economía, Fomento y Turismo, Chile (July 20, 2015), *available at* http://mcmillan.ca/Files/183262_MSG%20-%20Submission%20to%20Chile%20-%20July%202015.PDF (citing ICN RECOMMENDED PRACTICES).

³⁰ ICN 2016 SURVEY at 5.

³¹ INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER ANALYSIS 13 (2008), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

³² *See, e.g.*, Letter from McMillan LLP (representing the Merger Streamlining Group) to Aivaras Abromanvicius, Minister of Economic Development and Trade, Ukraine (June 4, 2015), *available at* http://mcmillan.ca/Files/183264_MSG%20Submission%20to%20Ukraine%20-%20June%202015.PDF (“Market share thresholds generate considerable uncertainty because the process of defining relevant markets and estimating shares is necessarily time-consuming, subjective, and fact- and economics-intensive. Accurate market share estimates are often difficult—if not impossible—for merging parties to obtain. This also presents challenges for the AMC: making a proper determination of whether market share thresholds have been exceeded may be difficult and resource-intensive.”).

³³ ICN 2008 REVIEW at 4 (discussing a “Swedish study of notification thresholds” that found that “thresholds should be set at a level that minimizes the sum of error costs . . .”).

distribution across borders without a significant sales and marketing presence in those other jurisdictions.

20. In those cases, companies are left with three options. The first is to expend the resources to study relative market shares in the country in the hopes of reaching a sound conclusion on market shares. The second is to conclude that such a reasonable determination is not possible, but to notify in any case out of an abundance of caution. Considering that the vast majority of mergers are pro-competitive or competitive-neutral, both of these routes impose high transaction costs on mergers, with minimal agency benefit. The final alternative, undoubtedly utilized at times, is to conclude that since no reasonable determination can be made based on information available to the parties, then no notification will be filed.

21. It is BIAC's experience that merging parties observe and respect notification requirements in those regimes that are based on objectively quantifiable criteria almost without exception. The same cannot be said for jurisdictions that rely on non-objectively quantifiable criteria.

22. Eleven jurisdictions responding to the 2008 ICN survey do not provide for pre-notification consultation.³⁴ Merging parties may desire pre-notification consultations to discuss the scope and level of data required with jurisdictions that require significant market data or other non-objectively quantifiable data (even if their notification threshold is not defined on this basis). Merging parties may require guidance to better understand the obligations the jurisdiction places on them, and whether they are able to meet those requirements. Without pre-notification consultation, merging companies risk unnecessary transaction costs through unnecessary filings or exposing themselves to liability by not appropriately filing despite their best efforts to comply with the law. Moreover, incomplete or misdirected notifications can waste the time of the agency and unnecessarily slow down the review process.

23. The recommended practices do not specify an absolute notification threshold, recognizing that identifying an appropriate notification level varies by jurisdiction and over time. However, BIAC believes that notification thresholds globally are generally too low. This causes unnecessary reporting, increased transaction costs on parties, and inefficient agency resource allocation. Steps should be taken to further align non-compliant countries with the recommended practices, and suggest increasing the local notification thresholds.

24. Fewer filings would produce substantial benefits for most agencies. This would reduce total reviews and total costs, particularly given most mergers do not pose competitive problems.³⁵ Fewer filings also could reduce agency workloads, and allow higher staffing levels for quicker review of non-problematic mergers and more thorough review of potentially problematic mergers.³⁶

25. Some stakeholders have suggested that increased notification thresholds could allow smaller anticompetitive mergers to escape review. Critics cite Israel's extensive review of the ICN Recommended Practices of the impact of merger review in its jurisdiction.³⁷ After conducting a review of merger notifications and in Israel's merger notification system, stakeholders were

³⁴ ICN 2008 REVIEW at 7.

³⁵ "For many agencies, a significant portion of their budget is dedicated to merger review, and only a tiny percentage of the reviewed transactions are potentially problematic." Coppola, *Soft Law* at 2.

³⁶ E.g., OECD 2013 REVIEW at 171-18; G.R. Bhatia, Merger Regulations Needs Fine Tuning By the Competition Commission of India (Mar. 21, 2016), *available at* www.mondaq.com/india/x/475792/Antitrust+Competition/Merger+Regulations+Needs+Fine+Tuning+By+The+Competition+Commission+Of+India ("It is believed that businesses will need to file significantly less transactions and this will enable CCI to render swift approvals thereby contributing to the 'ease of doing business'.").

³⁷ Coppola & Lagdameo, *supra* note 9, at 314.

uncomfortable adopting several of the ICN's Recommended Practices in part because they feared too many potentially problematic mergers would escape review and Israel's competition agency does not have the authority to review non-notifiable transactions.³⁸

26. While stakeholders in Israeli's review process ultimately decided not to comport with the recommended practices, several other jurisdictions have identified various ways to comply with recommended practices. As illustrated in section 4.2 of the Secretariat's Background Paper, many jurisdictions have changed notification thresholds despite potential concerns that small, non-notified mergers could be problematic in rare instances.³⁹ Specifically, the Secretariat's paper sites several OECD countries (Greece, Ireland, Italy, Mexico, Poland, Slovakia, Slovenia and Turkey) and non-OECD countries (Brazil, Bulgaria, Colombia, Costa Rica, India, Indonesia, Romania, the Russian Federation, and Ukraine) that have more closely aligned with the OECD Recommendation.

27. Additionally, many jurisdictions permit the review of non-reportable mergers, providing remedies such as divesting the offending business if mergers are anticompetitive. These jurisdictions, in particular, should be willing to scrutinize existing merger thresholds and raise them if few smaller transactions are challenged. Post-closing review, while disfavored for lack of certainty, ensures the jurisdiction or private litigants the opportunity to address combinations that harm consumer welfare within a jurisdiction. The trade-off should be to establish a high initial notification standard to avoid unnecessary notifications on deals unlikely to raise concern.

28. A recent example of post-merger enforcement is Canada's prosecution of Tervita Corp.⁴⁰ Tervita acquired Babkirk, an owner of a competing waste remediation permit. The merger did not trigger notification thresholds, and the Canadian Competition Bureau was unable to prevent the merger prior to closing. However, the Bureau challenged the merger on the grounds that it was likely to demonstrate anticompetitive effects after closing. The Commission won on appeal to the Canadian Supreme Court, dissolving the transaction that had been consummated four years prior to the final decision. Post-closing review also occurs with relative frequency in other jurisdictions such as the United States.

5. BIAC Suggestions to Address Concerns Relating to Notification Thresholds and Local Nexus

29. BIAC recognizes that some jurisdictions may be reluctant to increase their merger notification thresholds for fear of losing the ability to challenge smaller mergers, even though the odds of a significant problem arising from a smaller merger are very low. A solution may be found, however, that would accomplish both the objective of reducing unnecessary costs and preserving the ability to challenge smaller deals. BIAC also recommends that, to facilitate the adoption of recommended practices and higher notification thresholds in noncompliant jurisdictions, substantially raised thresholds be accompanied by a "safety net" review period which, at least temporarily, would allow merger regimes to review and intervene on non-reportable mergers.

³⁸ *Id.*

³⁹ For example, retail store mergers in France must notify the merger when turnover exceeds half of the notification threshold for non-retail mergers. Similarly, Italy has identified movie cinemas and theaters as deserving of unique notification thresholds.

⁴⁰ *Tervita Corp. v. Canada*, [2015] 1 S.C.R. 161 (Can.), available at www.canlii.org/en/ca/scc/doc/2015/2015scc3/2015scc3.html?searchUrlHash=AAAAAQAHdGVydm10YQAAAAAB&resultIndex=3; see also Calvin Goldman, Richard Annan & Nicholas Cartel, *Impact of the Supreme Court of Canada Decision in Tervita*, COMPETITION LAW (Corp. Lawyer Series, Toronto, Ont.), Vol. XIV, No. 3, at 910, available at www.goodmans.ca/files/file/docs/Federated%20Press%20Competition%20Law%20-%20SCC%20Tervita%20cb.pdf.

30. This could be accomplished if the increase in the merger notification threshold was accompanied by a provision preserving the ability to require notification or challenge transactions down to the prior threshold for a specified period of time.⁴¹ For example, a jurisdiction might elect to raise its threshold from 50 million to 100 million, but reserve the right to demand notification of the deal (and suspensive effect) and the jurisdiction to challenge mergers that would have met the previous 50 million threshold for up to six months after closing.

31. Although this would create uncertainty for businesses as to those deals valued between 50 and 100 million, in our experience that is preferable to requiring notification for a large number of mergers unlikely to raise concerns. In this way, problematic mergers at lower thresholds less likely to materially affect the jurisdictional economy can still be addressed in advance or remedied *ex post*. If the increased thresholds were found to eliminate notification for a number of problematic transactions, the jurisdiction could return to the prior notification thresholds.

32. BIAC also recommends that regional competition regimes, with the encouragement of the OECD, review and adopt the recommended practices, with greater transparency with regards to the notification requirements. Like individual countries, regional competition regimes, such as COMESA, should implement local nexus and notification thresholds sufficient to limit review to only those mergers appropriate for regional review. This would include a local nexus with a substantial number of jurisdictions within the region, and a sufficiently high notification threshold based on the economic characteristics of the region such that a truly regional dimension exists. Additionally, regional competition regimes should not be permitted to review transactions contemporaneously with the organization's member states, which can lead to complexity and confusion regarding notification requirements as well as investigative process. Greater effort should be taken to encourage clear delineation of when a regional regime, or local jurisdictions within that region, have jurisdiction. Otherwise, a "least common denominator" approach is inevitable.

6. Recommendation Related to Size-of-Transaction without Local Nexus

33. In paragraph 53 of the Secretariat's Background Paper, the so called "size-of-transaction" test is mentioned and described as a criterion which is objective, easily quantifiable and available to the parties. The United States and Mexico implemented this test several years ago, and several countries in Europe are currently considering whether to following suit. For example, in Germany a revision of the national competition law may introduce a test that will grant the national competition authority the power to review transactions with a deal volume above € 500 million.

34. The ostensible rationale for introducing such a test is that the acquisition of a company with a low turnover cannot be reviewed under the current turnover thresholds, even in cases where the target holds commercially valuable data, or has a considerable market potential for other reasons. Purportedly, with the advent of new business models on multi-sided markets as well as the increasing digitization of many industries, transactions which may have a significant impact on competition on a forward looking basis fail to meet the turnover thresholds because products or services are currently not monetized.

35. Against this background, and in order to ensure the local nexus, however, BIAC submits that the introduction of such a "size of transaction" test should always be accompanied by rules requiring the transaction to have jurisdictional nexus by taking into account local turnover or assets. Otherwise, the "size of transaction" effectively would singularly supersede the requirement for a local nexus and undermine all of the efficiency benefits of that test to agencies and parties. In this context, both the OECD and the ICN are encouraged to work towards further convergence and best practices regarding the definition and establishment of a local nexus in acquisitions which are subject to merger control based on the "size-of-transaction."

⁴¹ For example, India's small target exception was initially implemented in 2011 for a period of 5 years. BIAC believes 5 years was too long, given that the exception was recently extended.

7. Recommendation Related to Acquisition of Non-Controlling Interests

36. It is BIAC's experience that the vast majority of minority share acquisitions are not likely to cause competitive issues, particularly when such acquisitions are made purely for the purposes of investment. BIAC continues to recognize that, in some limited circumstances, the acquisition of minority shares of stock may provide the acquirer with the ability to influence the policy of the target company, and that, in some cases such influences can have anti-competitive effects. However, these instances are largely limited to acquisitions which an effective change of corporate control occurs.

37. BIAC submits that notification of minority interests generally should not be necessary unless the minority interest results in change of actual ability to control, or a company acquires a significant minority interests in a competitor such that the acquisition is likely to affect competitive incentives or impose barriers to competition. Additionally, a safe harbor excepting minority share acquisitions for insignificant shares or passive investment purposes only, akin but not identical to the exception in place in the U.S., should be recommended for all jurisdictions. BIAC endorses such exceptions but notes, however, that the threshold for the exception in the U.S. under the HSR Act is extraordinarily conservative and, in light of current economic thinking, is extremely low. The difficulty of such a low threshold becomes amplified significantly where the scope and burden of notification is high, as is the case under the EC system and jurisdictions with similar notification requirements.

8. Conclusion

38. The recommended practices have had a positive impact on global merger notification regimes. Increasingly, jurisdictions are moving towards compliance with the recommended practices. However, several significant outliers remain and many jurisdictions still have some non-compliant practices. As previously detailed, each outlier causes increased costs on merging parties, chilling pro-competitive mergers and wasting business and agency resources alike.

39. BIAC believes that the OECD, having issued its recommendation on merger review, should continue to promote these practices and focus on their implementation.⁴² Continued convergence will serve the mutual interests of competition enforcement and business interest by promoting efficient merger review.

⁴² OECD RECOMMENDATION.