



REPORTS

Report on Country Experiences with the 2005 OECD Recommendation on Merger Review 2013

Introduction

In 2005 the OECD Competition Committee adopted a Recommendation on Merger Review, which aims to contribute to greater convergence of merger review procedures. This report, approved in 2013, reviews the experiences of the Member and non-Member countries with the Recommendation.

Overview

The 2005 Recommendation on Merger Review seeks to make merger review procedures more effective with a focus on four areas: the notification and review procedures, the co-ordination and co-operation with respect to transnational mergers, the resources and powers of competition authorities, and the periodic review of merger laws and practices.

This report discusses the experiences of the Members and non-Members of the OECD with the Recommendation by reviewing the key developments in the main areas covered by the Recommendation as well as the areas which fall outside its scope. The Report shows that the Recommendation is still important and relevant and complements the work on merger policy done at international level by other organisations and networks.

Related Topics

- Remedies in Merger Cases (2011)
- Impact Evaluation of Merger Decisions (2011)
- Vertical Mergers (2007)
- Recommendation of the Council on Merger Review (2005)
- Merger Remedies (2003)

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FOREWORD

On 23 March 2005, the OECD Council adopted the Recommendation on Merger Review that aims to contribute to greater convergence of merger review procedures, including cooperation among competition authorities, towards internationally recognised best practices. Four main areas are covered in the Recommendation: the notification and review procedures, the co-ordination and co-operation with respect to transnational mergers, the resources and powers of competition authorities, and the periodic review of merger laws and practices. It reflects and consolidates wide-ranging work on merger control in the Committee, and also takes into account important work by other international bodies in this area, including the International Competition Network and inputs from the business community. In particular, the Recommendation encapsulates the key principles in the ICN Recommended Practices on Merger Review, which built on best practices from OECD and non-OECD economies.

The Competition Committee reviews periodically the experiences of OECD Members as well as non-Members and reports to the OECD Council as appropriate on any further action needed to improve merger laws, to achieve greater convergence towards recognised best practices, and to strengthen co-operation and co-ordination in the review of transnational mergers. In view of this, the Secretariat launched a survey covering the main provisions of the Recommendation. Based on the findings of this survey, this report was prepared to review the recent experiences with the Recommendation on merger review. The Council Recommendation is appended to this report.

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REPORT ON COUNTRY EXPERIENCES WITH THE 2005 OECD RECOMMENDATION ON MERGER REVIEW

1. Introduction

In 2005, the OECD Council adopted the Recommendation on Merger Review (the “Recommendation”) [[C\(2005\)34](#)]. The Recommendation covers four main areas: i) the notification and review procedures; ii) the co-ordination and co-operation with respect to transnational mergers; iii) the resources and powers of competition authorities; and iv) the periodic review of merger laws and practices. The Recommendation instructs the Competition Committee to review periodically the experiences of OECD Member countries and of non-OECD economies that have associated themselves with the Recommendation and to report to the OECD Council as appropriate on any further action needed to improve merger laws, to achieve greater convergence towards recognised best practices, and to strengthen co-operation and co-ordination in the review of transnational mergers.

At its June 2011 meeting, Working Party No. 3 on Co-operation and Enforcement (the “WP3”) of the Competition Committee agreed to work on a Report to the Council on the implementation of the Recommendation. To gather the relevant information and material needed, the Secretariat sent to all delegations a questionnaire covering the main provisions of the Recommendation. Twenty-eight OECD Member countries¹, the European Commission and three non-Members² replied to the questionnaire. The findings of the survey were then discussed by WP3 at its meeting on 14 February 2012.

¹ Australia, Belgium, Canada, Chile, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Italy, Japan, Korea, Mexico, Netherland, New Zealand, Poland, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

² Brazil, Bulgaria and Chinese Taipei.

A draft of the report was then submitted for discussion at the WP3 meeting on 12 June 2012.

The Report is structured as follows: the first part summarises the main provisions in the Recommendations (Section 2); the second part offers an overview of the key developments in the main areas covered by the Recommendation (Sections 3, 4, 5 and 6); the third part of the Report discusses key developments in areas of merger control which fall outside the scope of the Recommendation (Section 7); finally the last section of the Report discusses policy issues that the Competition Committee and/or its Working Parties might decide to address in their future work plan (Section 8).

The main findings of this Report may be summarised as follows:

- There has been a significant convergence in all the areas covered by the Recommendation and most OECD merger control regimes appear to be in line with the Recommendation;
- In some areas, most notably the co-ordination and co-operation with respect to transnational mergers, the survey indicated that competition authorities are occasionally experiencing some practical difficulties, due to the existing legal obstacles to the exchange of confidential information on parallel merger cases;
- There has been a significant convergence in areas that are not covered by the Recommendation, most notably with respect to the legal test that competition authorities apply to the review of mergers;
- The Recommendation is still important and relevant, and it complements the work on merger policy done at international level by other organisations and networks, such as the International Competition Network (ICN).

The discussion in the Competition Committee indicated that it will continue to consider merger control as one of its top priorities, and two areas were identified as possible topics for future work:

- addressing the question of which transactions constitute a “merger” for the purpose of merger control review;
- international co-operation and co-ordination in the definition and implementation of remedies in cross-border cases.

2. The 2005 Recommendation on Merger Review

Effective merger review is an important component of a competition regime as it can help to prevent consumer harm from anti-competitive transactions which would likely reduce competition among rival firms and/or foreclose competitors. The OECD Competition Committee has long focused on a broad range of issues related to the review of mergers under national competition laws. Building on this extensive work of the Competition Committee, on 23 March 2005, the OECD Council adopted a Recommendation on Merger Review.³ The Recommendation aims to contribute to greater convergence of merger review procedures, including cooperation among competition authorities, towards internationally recognised best practices. Its purpose is to make merger review procedures more effective, while at the same time helping competition authorities and merging parties to avoid unnecessary costs in multinational transactions.

The Recommendation which came out of a desire to consolidate and reflect the wide-ranging work on merger control of the Competition Committee, also takes into account important work by other international bodies in this area, in particular the International Competition Network (the “ICN”). The goal was to create a single document that would set forth internationally recognised best practices for the merger review process, including co-operation among competition authorities in merger review.

2.1 *A brief overview of the main provisions in the Recommendation*

The Recommendation addresses all steps of the merger review process, including the definition of thresholds to establish jurisdiction over international mergers, notification requirements, transparency of the merger review process, procedural fairness, the protection of confidential business information, and co-ordination and co-operation among competition authorities. It encourages Member countries to ensure that competition authorities have sufficient powers to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers. Recommendations were made in particular in four areas: a) the notification and review procedures; b) the co-ordination and co-operation with respect to transnational mergers; c) the resources and powers of competition authorities; and d) the periodic review of merger laws and practices.

³ The text of the Recommendation [[C\(2005\)34](#)] is reproduced in Annex I to the present document.

In the area of *notification and review procedures*, it is recommended that the review procedure is effective, efficient and timely, that procedural fairness is guaranteed, that third parties with a legitimate interest in the merger under review may have an opportunity to express their views, that business secrets and other confidential information are protected, and that foreign firms are treated no less favourably than domestic ones. The decisions on the review of mergers should be made within a reasonable and determinable time frame.

Competition authorities should be provided with sufficient information to assess the competitive effects of a merger; at the same time, unnecessary costs and burdens on merging parties and third parties ought to be avoided. Merging parties should be provided with a reasonable degree of flexibility in determining when they can notify a proposed merger; they should also be given an opportunity to consult with competition authorities any significant legal or practical issues that may arise during the course of the investigation. The merging parties should also be able to obtain timely and sufficient information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review of final adverse enforcement decisions on the legality of a merger by a separate adjudicative body, within reasonable time periods.

Only those mergers that have an appropriate nexus with the country in question should be subject to notification (or qualify for review in countries without mandatory notification requirements); the notification criteria (or the criteria for review) should be objective and clear. Mergers that do not raise material competitive concerns are to be subject to expedited review and clearance.

The rules, policies, practices and procedures involved in the merger review process should be transparent and publicly available; reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger should be published as well.

OECD Members and non-Members are encouraged to co-operate and co-ordinate their reviews of transnational mergers and to consider actions to eliminate or reduce impediments to co-operation and co-ordination. Merging parties should be encouraged to facilitate this co-operation and co-ordination, in particular with respect to the timing of notifications and provision of voluntary waivers to confidentiality rights. Safeguards concerning treatment of confidential information obtained from another competition authority should be established. While reviewing a transnational merger, every economy should aim at the resolution of domestic competitive problems arising from such a merger

and should avoid inconsistencies with remedies sought in other reviewing jurisdictions.

OECD Members and non-members are also encouraged to ensure that competition authorities have *sufficient powers* to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers.

Finally, it was recommended that OECD Members and non-members *review their merger laws* and practices on a regular basis in order to seek improvement and convergence towards recognised best practices.

2.2 The role of the Recommendation in the development of merger control internationally

The 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 and specific country reforms, there is little doubt that depending on the circumstances, the Recommendation has initiated, informed or shaped these merger reform efforts. In rare cases, the Recommendation is explicitly mentioned as the source of inspiration for change in the merger review process. This was the case, for example, of the commentary to the proposed German merger review reform of 2009, which makes express reference to the Recommendation. Often, however, the role of the Recommendation is indirect or implicit; its ability to influence ideas, practices and reform depends on the agency and its role in the reform process, the level of support for merger reform, and the legal context.

It is certain that the work of the Competition Committee, including its peer reviews and Recommendations, plays a key role in initiating and shaping legislative reforms in the competition areas and in particular merger reform efforts. While the Secretariat does not monitor systematically the implementation of OECD Recommendations by Member countries, every year it surveys the use by Member countries and Participants in the Competition Committee of the Committee's products. This survey offers indications also as to how the Recommendation has been used as inspiration for legislative reforms and as material for training, capacity-building events and more generally for advocacy purposes. In addition, many economies have reported that the Recommendation was used to improve effectiveness of the agency's enforcement action in specific cases. The table below summarises the main responses to the Secretariat survey over the last five years.

PURPOSE	REPORTED USE OF THE RECOMMENDATION
<p>LEGISLATIVE REFORMS</p>	<p><u>Brazil</u> used it to promote the reform of its competition law system and in particular to reform its notification thresholds and to introduce a statutory period for the substantive review of notified mergers.</p> <p><u>Bulgaria</u> used it to prepare and support the new Law on Protection of Competition which entered into force on 2 December 2008.</p> <p><u>Chile</u> used it as background for preparing a draft bill submitted by the Fiscalía Nacional Económica (FNE) to the Ministry for the Economy.</p> <p><u>Germany</u> used it as a reference document when deciding to implement a second domestic turnover threshold into merger control law.</p> <p><u>Hungary</u> used it in the preparation of the new Merger Notification.</p> <p><u>Indonesia</u> used it as reference in drafting its merger regulation.</p> <p><u>Japan</u> used it as reference material in reviewing the business combination regulations (investigation procedure and criteria). On 14 June 2011, the Japan Fair Trade Commission (JFTC) published the partial amendment of the Fair Trade Commission Rules. The amendment was put into effect on 1 July 2011.</p> <p><u>Slovak Republic</u> used it as a source of information in the preparation of the legislative proposal for amendment to the Act on Protection of Competition.</p> <p><u>Ukraine</u> used it to prepare the amendments to the Law on protection of economic competition, modifying the merger notification thresholds (to increase them 4 times) to focus effectively on transactions likely to pose competitive concerns.</p>

<p>TRAINING, CAPACITY BUILDING AND ADVOCACY</p>	<p><u>Korea</u> used it as introductory material about the OECD and its instruments for public officials of developing countries during technical assistance.</p> <p><u>Pakistan</u> used it for the preparation of guidelines and briefing note used to educate businesses, chambers of commerce, and industry, and to improve awareness about pre-merger notification requirements of the Competition Law.</p> <p><u>South Africa</u> reported using the Recommendation as background reading and training material for its staff.</p> <p><u>United States</u> used it in conjunction with the work of the ICN Merger Working Group with regard to notifications and procedures.</p>
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The Recommendation reflects and consolidates wide-ranging work on merger control in the Committee, and also takes into account important work by other international bodies in this area, in particular the ICN, and inputs from the business community.⁴ In particular, the Recommendation encapsulates the key principles in the ICN Recommended Practices on Merger Review,⁵ capitalising on best practices from OECD and non-OECD Member countries. Thus, the ICN's and OECD's work have been mutually reinforcing in establishing benchmarks for international merger review and served as a fundamental reference and support for reforms and to shape the direction and content of such reforms. Many of these reforms will be described in the sections below, with reference to the parts in the Recommendations which they help to implement.

3. Notification and review procedures

In the section concerning notification and review procedures, the Recommendation covers five areas: (i) jurisdiction of the competition authorities to review a merger; (ii) information necessary to carry out such a review; (iii) timing of the notification and review periods; (iv) review procedures and procedural fairness, including rights of interested third parties; and (v) transparency of the procedures and applicable rules.

⁴ See for example, BIAC & ICC, Recommended Framework for Best Practice in International Merger Control Procedures (4 October 2001), available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>.

⁵ See Box in Section 3.1.

3.1 *Notification criteria and jurisdiction*

According to the Recommendation, the criteria to determine whether a merger must be notified (or in countries without mandatory notification requirements, whether a merger will qualify for review) should be clear and objective; at the same time, OECD Member countries should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction and review only those mergers that could raise competition concerns in their territory. The Recommendation does not define what would constitute an “appropriate nexus” with the jurisdiction, leaving Member countries room for adopting different jurisdictional criteria.⁶

⁶ The ICN Recommended Practices include criteria on what constitutes an appropriate nexus, i.e. that thresholds should apply to local sales or assets of at least two parties to the transaction or the target. Jurisdictions that have introduced a test that requires at least two parties to the transaction to have local sales/assets include Belgium, Estonia, Hungary, and Korea, among others.

ICN Recommended Practices

The ICN has developed a set of Recommended Practices for Merger Notification Procedures,⁷ which address the specific issue of the nexus to the reviewing jurisdiction. This Recommended Practice seeks to screen out notification of transactions that are unlikely to result in appreciable competitive effects within the jurisdiction concerned. Requiring notification of transactions that lack a sufficient nexus with the reviewing jurisdiction imposes unnecessary costs and commitment of competition agency resources without corresponding enforcement benefit. It is based on three key principles:

- A. Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned;
- B. Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification;
- C. Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.

The ICN Recommended Practices also provide guidance on how to determine the notification thresholds. This Recommended Practice requires clear, understandable, easily administrable, bright-line tests for notification thresholds that permit parties to readily determine whether a transaction is subject to notification. In particular, they recommend the following:

- A. Notification thresholds should be clear and understandable;
- B. Notification thresholds should be based on objectively quantifiable criteria;⁸
- C. Notification thresholds should be based on information that is readily accessible to the merging parties.

⁷ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

⁸ The ICN Best Practices consider objectively quantifiable criteria which refer to assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are more subjective may be appropriate for later stages of the merger control process (such as determinations relating to the amount of information required in the parties' notification and to the ultimate legality of the transaction), but such tests are

In line with the Recommendation, 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.⁹ 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.¹⁰

not appropriate for use in making the initial determination as to whether a transaction is subject to notification.

⁹ Similar reforms have taken place in Slovakia and Spain.

¹⁰ The Russian Federation is currently reviewing its merger regulation and it is considering to increase the notification thresholds and create a stronger local nexus in line with the Recommendation.

Reforms of notification thresholds in line with the Recommendation – Country examples

In Italy, a recent reform – effective from January 2013 – modified the notification threshold to reduce the number of mergers notified to the competition authority. Under the current notification regime a large amount of non-problematic mergers is notified to the competition authority, which causes unnecessary workload and costs for the companies, as well as for the competition authority. The notification criteria have been amended so that both turnover thresholds provided by the law (i.e. the combined aggregate domestic turnover of all companies concerned and the target's aggregate domestic turnover) must be met before the mandatory notification requirement is triggered. It is expected that the introduction of the cumulative threshold requirement will substantially improve the local nexus of the Italian merger notification system in line with the Recommendation. It is also expected to lead to a substantial reduction in notification of non-harmful mergers and a more efficient use of the Authority's resources and time.

Brazil has also recently reformed its merger notification system¹¹ to reduce the number of unproblematic mergers filed with the competition authority. The new law provides for two significant changes regarding the notification thresholds: (i) the elimination of the market share threshold; and (ii) the introduction of a secondary national revenue threshold.¹² The purpose of the reform was to allow for more time and resources for the review of complex mergers. The reform of the thresholds was accompanied by an overhaul of the merger system. In the new system, parties will no longer be able to close the deal simply after notification but will need to wait to receive clearance from the authority before closing. As parties cannot close a deal notified in Brazil before clearance, the timing of the review process became critical; hence, the reform introduced a two-phase merger procedure similar to those used in other jurisdictions.¹³

¹¹ The reform was passed in 2011 and is effective as of 29 May 2012.

¹² Under the old system, mergers have to be notified when (i) the resulting companies or group of companies account for at least 20 percent of the relevant market or (ii) any of the parties to the transaction had annual gross revenues of at least R\$ 400 million in the fiscal year prior to the transaction. Under the new law, the application of the revenue threshold will require that at least one of the merging parties has achieved group-wide revenues of at least R\$ 400 million in Brazil in the fiscal year prior to the transaction, and another party to the transaction has achieved group-wide revenues in Brazil of R\$ 30 million.

¹³ On the suspensory effect of the filing and on the timing of the review process, see further below under Section 3.3.

In 2009, Germany reformed its merger control regime and, among other changes, it amended the turnover thresholds for notification to strengthen the local nexus in line with the Recommendation.¹⁴ Under the applicable rules, a transaction is subject to merger control if the combined and individual turnovers of the participating undertakings exceed the following thresholds: the worldwide consolidated turnover of all participating undertakings has to exceed €500 million; additionally, at least one participating undertaking must have a domestic turnover in Germany of more than €25 million and at least one other participating undertaking must have a domestic turnover in Germany of more than €5 million. The second domestic turnover threshold was introduced in 2009. As a consequence, now transactions in which only one of the merging parties generates substantial turnover in Germany no longer trigger reporting requirements. The number of transactions that are subject to merger control in Germany has been significantly reduced.

In line with the Recommendation, many countries have changed their notification criteria in the last years from subjective (especially market share) to objective (especially turnover) notification criteria. This was, for example, the case of Brazil, the Czech Republic, Poland and Turkey. The new Brazilian legislation which came into force in May 2012 has opted for a turnover based criteria, moving away from the previous systems based on market shares. Similarly, in 2011 Turkey reformed its merger notification system and one of the most important changes was the abolition of the market share in the relevant product market and total annual turnover criteria; instead, a dual-turnover threshold was introduced for triggering the obligation for notification of a merger. A number of jurisdictions, however, continue to apply notification thresholds which include both market shares and turnover based criteria. This is the case, for example, of Israel, Portugal, Spain and the United Kingdom, and of Chinese Taipei among the Participants.

The need to rely on notification thresholds based exclusively on objectively quantifiable criteria (such as assets and sales, or turnover) and not on subjective criteria (such as market share and potential transaction-related effects) for mandatory notifications is widely shared. In a voluntary regime, on the contrary, there are essentially no notification thresholds (although one could have an objective threshold for *de minimis* mergers).¹⁵ A party to a proposed merger must make a judgment call about whether the merger will create

¹⁴ The commentary to the proposed legislation expressly refers to the OECD Recommendation and to the ICN Recommended Practices.

¹⁵ This is not always true. For example in the UK, where there is a voluntary notification regime, one of either a turnover or share of supply jurisdictional test is applied.

competition concerns and whether it should apply for a clearance (or ‘notify’). In this situation, it is guidance from the agency describing when a competition issue might arise that is valuable to the party making that decision. This information will include an indication of market share “safe harbours”. In Australia¹⁶ and in New Zealand, where the notification is voluntary, a set of Guidelines published by the competition authority identify notification guidance based on post-merger market shares.

Although the Recommendation does not take a view as to whether a mandatory notification system should be preferred to a voluntary notification system, the survey of Member countries and Participants indicated that mandatory notification systems are prevalent, as they are enforced in 30 out of the 34 OECD Member countries and in the European Union. Voluntary notification systems are adopted by Australia, Chile (with the notable exception of media mergers, for which notification is mandatory), New Zealand and the United Kingdom.

¹⁶ According to the Australian merger guidelines, a merger should be notified if the post-merger market share is higher than 20% on the relevant market and the products of the merging parties are either substitutes or complements.

After a long debate the UK retains the voluntary notification system

In the context of the recent review of the UK competition law system, the government has considered whether to introduce a mandatory notification regime as opposed to the voluntary system currently in place. This proposal was amongst the most controversial of the government's proposed reforms and triggered a lively debate in UK competition circles.

According to the UK response to the Secretariat survey, there are two main downsides of a voluntary notification regime: (i) the risk that some anti-competitive mergers are not subject to scrutiny by the authorities; and (ii) the risk that some consumer harm is generated during the merger integration process and prior to scrutiny by the competition authorities, including consumer harm arising before remedies are imposed and/or implemented.¹⁷

Introducing a mandatory notification regime was presented as one possible policy option to prevent these risks together with strengthening the ability to impose 'hold separate' arrangements.¹⁸ The UK government, however, decided to retain the voluntary merger notification systems because of the flexibility it grants the authority in allocating its resources and because it avoids an unnecessary regulatory burden. To prevent anti-competitive mergers from going unscrutinised, under the new competition regime which will enter into force in 2014, the competition authority will have enhanced powers to unwind mergers that have already been completed and to suspend mergers while a review is pending.

Similarly, the Recommendation does not mention whether a notifiable transaction should be notified before or after its consummation. The survey indicated that almost every OECD jurisdiction requires a pre-merger filing with the only exception of Korea which has a post-merger notification system.¹⁹ A number of countries have recently amended their competition rules and moved from a post-merger notification system to a pre-merger notification system. For example, Japan adopted a pre-merger notification system for stock acquisition

¹⁷ It can be more difficult to reverse integration or apply preferred remedies where integration has occurred and it takes longer and is therefore more costly to the authorities.

¹⁸ Under these arrangements, the assets subject to the merger are held separate during the approval process, preserving the merging parties as independent competitors in the market.

¹⁹ The Korean post-merger notification system does not apply to mergers with high importance (turnover above KRW 2 trillion) which should be notified prior to their consummation.

following the amendment of its Antimonopoly Act in 2009, while a pre-merger notification system had already been adopted for other types of mergers before the amendment. Among the Participants, Brazil has also introduced the pre-merger notification system since its 2012 reform.

3.2 *Information requirements and other burdens on merging parties*

According to the Recommendation, OECD Members and non-members should ensure that the review process enables competition authorities to obtain sufficient information to assess the competitive effects of the notified merger; at the same time, merger laws should avoid imposing unnecessary costs and burdens on the merging parties and on third parties, setting only reasonable information requirements consistent with an effective merger review.

3.2.1 *Notification forms*

The majority of OECD Member countries have adopted a standard notification form which allows the competition authority to obtain the necessary information for the review of the notified transaction. Although significant differences still exist in national practices, in most countries, the review process is triggered by the filing of a defined set of information on the merging parties, the transaction and the markets affected by it.²⁰ Only 5 out of the 34 Member countries have not issued a mandatory notification form or have published only a form which can be used by the parties on a voluntary basis.²¹ At the time of the survey, only 7 Member countries²² and the EU had a separate notification form for mergers to be reviewed under a simplified procedure

²⁰ In Australia's informal system the Australian Competition and Consumer Commission (ACCC) provides guidance as to what information is likely to be required but does not prescribe what must be provided. The ACCC aims to ensure information provided under its informal mechanism is proportionate to the competition concerns by taking a scaled approach to information requirements seeking only enough information to reach a view on whether the transaction is likely to substantially lessen competition.

²¹ Canada, Chile, Mexico and the Slovak Republic do not require a compulsory format for notification. In Slovakia, however, each notification has to be consistent with the Decree no. 204/2009 Coll. laying down details of a notification of concentration. A notification must be provided in the structure required by the decree. The German and Canadian competition authorities offer on their websites a form for voluntary use.

²² Denmark, Estonia, Greece, Italy, Korea, Norway, Spain and Turkey have a separate and shorter notification form for simplified procedures.

(because unlikely to have any effect on competition)²³. The other 19 Member countries issued only one notification form but at times implemented different mechanisms for reducing the information burden on the merging parties. For example, some allow parts of the form (e.g. detailed market information, the effects of the merger to the relevant market) to be skipped by the merging parties.²⁴ Other countries allow the parties to request the competition authority to waive the obligation to provide certain information if they believe that this information is not necessary for the assessment of the transaction or cannot reasonably be obtained.²⁵

²³ See section 3.2.3.

²⁴ This solution is used for example in Austria, Hungary, Latvia, Poland and Sweden.

²⁵ This solution is used for example in Belgium, Canada, Portugal, Slovak Republic, Sweden and Switzerland.

Information requested in merger notification forms

Following one of the recommendations in the Whish-Wood Report,²⁶ in 1996 WP3 considered the possibility of creating a Model Notification and Report Form, containing provisions that were common to the forms used by Member Countries. It was quickly recognised that such a form could not completely supplant existing forms in most countries, and that even if it were immediately practical to do so, such a step would require amending national laws or regulations in most cases.²⁷ In light of the difficulties associated with drafting a notification form that might be employed in several different countries, each currently having different laws and regulations governing notifications of concentrations, in May 1998 the Committee released a Framework for a Notification Form (rather than a 'model form'), containing accompanying text explaining the rationale for each of the categories of specifications. The categories were: (a) identify the parties to the transaction, (b) describe the transaction that is the subject of the notification, (c) describe the operations of the parties in the notified country, (d) identify and describe markets in which the transaction could have horizontal or vertical effects, (e) submit listed documents and (f) confidentiality waiver.

The countries' responses to the survey indicated the types of information requested in the notification forms do not differ significantly among Member countries. However the depth of the information and the amount of supporting documents varies from country to country. According to an ICN survey,²⁸ the following four types of information are generally requested in initial merger notification: (1) information for administrative and identification purposes,²⁹ (2) information concerning the parties' activities and products,³⁰ (3) a description of the transaction;³¹ as well as (4) information on the impact of the transaction on competition.³²

²⁶ Available at <http://www.oecd.org/dataoecd/4/40/31587583.pdf>. This study for the OECD used an empirical approach to look at what the companies involved in a selected number of cross-border mergers were actually experiencing in the merger process, and to see how effectively the co-operation process between enforcers was working. The purpose was to issue a set of recommendations about the course of future process convergence and co-ordination among competition authorities in merger review.

²⁷ It was acknowledged that such a model could foster convergence of premerger notification procedures among countries over time, and further, in appropriate circumstances national competition agencies could voluntarily permit the use of the form, or parts of it. As noted in the Whish-Wood Report, standardisation of reporting requirements could ease the burdens of parties to mergers that are reportable in more than one country, and could also enhance the ability of competition agencies to co-operate in their investigations of such transactions. Such a common form would have at least two benefits: (1) in the longer run, countries could formally incorporate into

It follows from the Recommendation that unnecessary costs and burdens of merger review should be eliminated. At the same time, competition authorities regularly perform thorough economic analysis when assessing the competitive impact of a notified transaction. Such an analysis requires significant amounts of information to be gathered from merging as well as from third parties. The increasing reliance on economic analysis in recent years³³ had as its main consequence that information requirements of competition authorities have

their forms some or all of the provisions of the model form and (2) in the shorter run, to the extent competition agencies have discretion to modify information requirements in specific cases, they could employ some or all of the specifications on a case-by-case basis as appropriate.

²⁸ For more detailed information, see 2009 ICN Survey, available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>.

²⁹ Almost every country requires the same set of information, such as the full legal name of the parties, addresses, the registered offices, contact information, power of attorney, original or certified copies of documents governing the management and disclosure of turnover or revenue.

³⁰ The merging parties are required to provide a general view of their business, their structure and their ownership. According to the survey, significant differences can be found between the countries' practice concerning which type of documents the parties are required to submit. Usually, documents include recent annual reports and financial statements, a detailed description of the parties' activities and of their products and/or services, a list of affiliated companies and their activities. Some countries require such information also from all of the affiliates, while others limit this information to the affiliates active in markets where the parties have overlapping activities.

³¹ All countries require a description of the transaction which is subject to the notification. Typically this includes a description of the nature of the merger, the ownership structure before and after the transaction, and how the transaction affects control over the companies. Most countries also require a discussion of the strategic and economic reasons for the merger. In almost every country, the merger agreement must be attached to the notification form.

³² The parties are required to offer an analysis of the impact of the proposed transaction on competition. Countries usually require the parties to provide a definition of the relevant geographic and product market(s), as well as market share estimates and a list of their customers and suppliers on these markets. Supporting materials, such as market analyses, reports and surveys are also to be included.

³³ See below in Section 7.2.

become more burdensome.³⁴ To ensure compliance with the Recommendation, however, a number of agencies have reviewed their notification forms to simplify them and to streamline their information requirements.

Streamlining notification forms – Country examples

In order to strike the right balance between information requirements and unnecessary burdens on merging parties, as is required under the Recommendation, many competition authorities are continuously modifying their notification forms. In Hungary, for example, the notification form and merger review procedure was reviewed in 2012. The new notification form is expected to significantly reduce the administrative burdens of notification – the form is divided into two parts, with the second one to be filled only in case of mergers more likely to cause competition problems; also, the merging parties are no longer obliged to provide registry court documents as an annex to the notification and certified translation from English is required only with respect to certain crucial documents.

Similarly, in 2011 the U.S. agencies went through the largest revision of the Hart-Scott-Rodino (HSR) form since 1976 to streamline the form and reduce unnecessary burdens for the filing parties. The revised HSR form deletes several categories of information that over time have proven unnecessary in a preliminary merger review.³⁵ The new form also requires filers to provide the Federal Trade Commission and Department of Justice with narrowly focused additional documents that will help expedite the merger review process. The revised form changes certain kinds of required reporting³⁶ and new concepts are introduced that are designed to expedite the antitrust review, including reporting information about “associates” of the acquiring person. The changes made the HSR form easier to complete, reducing the burden for most filers, and made the premerger notification review programme more effective for both U.S. agencies.

³⁴ In some OECD Member countries (e.g. the United States), the initial notification form which is to be filed by merging parties is relatively brief and the competition authorities require more detailed information only if they engage in an in-depth review of the merger. In others (e.g. Switzerland), even though the initial notification form is detailed, it is possible to discuss with the competition authority the extent to which it needs to be filled – the merging parties may be allowed to skip certain parts.

³⁵ For example, HSR filers will no longer be required to provide copies of documents – whether in hard copy or via electronic link – filed with the Securities and Exchange Commission, report economic code “base year” data, or give a detailed breakdown of all the voting securities to be acquired.

³⁶ Required reporting includes revenue information by industry NAICS code, and the identity of holders and holdings of the entities making a filing.

3.2.2 *Pre-notification meetings*

In view to comply with provisions in the Recommendation according to which merger laws should avoid unnecessary costs and burdens on the parties and set only reasonable information requirements, many OECD Member countries have also introduced the possibility of pre-notification meetings between the reviewing authority and the merging parties. Pre-notification meetings, for example, have been introduced in a number of countries, either by way of legislation (for example, by Spain in 2007) or by soft law (for example, in the Czech Republic in 2008 and Portugal since 2006 and more recently, in 2012, with the adoption of new guidelines).

Pre-notification meetings are usually not regulated by the law but the merging parties are encouraged to engage in a constructive discussion with the reviewing authority before proceeding to a formal notification. Both the authority and the parties can gain valuable information during the meetings, and have an informal opportunity to discuss questions and issues that can be relevant once a formal notification is filed. During such meetings, the extent of information requirements may also be discussed with the aim of targeting the requests to the need of the investigation and avoiding unnecessary burdens on the parties.³⁷

3.2.3 *Expedited or simplified procedures*

To ensure that merger review does not impose unnecessary costs and burdens on merging parties and third parties, as recommended by the Recommendation, most of the OECD Member countries have also introduced different forms of expedited or simplified procedures for the review of mergers which are unlikely to raise competition concerns. These procedures enable not only the shortening of the timing of the review but also allow the merging parties to provide only a limited amount of information in the notification form.³⁸

To reduce the procedural burden on non-problematic mergers in line with the Recommendation, 26 OECD Member countries³⁹ and the EU divide the

³⁷ See also discussion below in Section 3.4.

³⁸ See below in Section 3.3.

³⁹ Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Italy, Japan, Korea, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the UK and the US.

investigation into two parts (so-called Phase I and Phase II). In the first phase, the competition authority reviews the merger to assess whether a thorough review is necessary; non-problematic mergers are cleared at the end of this first phase. In a second phase, the authority reviews the more complex cases which require a more in-depth analysis. All notified mergers are therefore reviewed in Phase I, but only a limited number is subject to an in-depth investigation in Phase II. The survey indicated that there is a clear trend towards institutionalising these two-stage procedures.⁴⁰

3.2.4 *Translation costs and filing fees*

Additional costs are also associated with the requirement to translate certain documents from English into the official language of the jurisdiction concerned; some translations often need to be certified. It may be observed that the readiness of non-English-language jurisdictions to accept original documents in English has increased, thus lowering the costs of merger review. As of today, 18 out of 28 non-English-speaking countries (64%) accept some documents (not the notification itself) in English.

Costs and burdens of merger review are associated not only with the information requirements but also with filing fees. In 19 OECD Member countries,⁴¹ a fee is to be paid with the notification. From the survey it appears that there has not been any discernible trend in this area; the proportion of countries requiring a notification fee remains basically the same.⁴²

3.3 *Timing and review periods*

According to the Recommendation, merging parties should be provided with a reasonable degree of flexibility in determining when they can notify a proposed merger. This rather general recommendation builds on the ICN Recommended Practices for Merger Notification Procedures,⁴³ according to

⁴⁰ For example, Slovakia has introduced a phase I/II review procedure in 2012.

⁴¹ A filing fee is due in Australia (for the formal clearance or authorisation), Canada, Czech Republic, Estonia, Germany, Greece, Hungary, Ireland, Italy, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, Spain, Switzerland, the UK and the US.

⁴² Although this does not mean that there has been no change. For example, Italy introduced notification fees in 2006 and Mexico abolished them in 2011.

⁴³ See ICN Recommended Practices available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

which the parties should be permitted to notify proposed mergers upon certification of a good faith intention to consummate the proposed transaction. ICN Recommended Practices also suggest that jurisdictions that prohibit the implementation of the merger while the competition authority is reviewing the transaction (this is the so-called suspensory effect of the notification) should not impose deadlines for pre-merger notification, while non-suspensive jurisdictions should at least allow the merging parties a reasonable time in which to file notification, following a clearly defined triggering event.

Currently, 23 OECD Member countries⁴⁴ and the EU do not require a binding agreement as triggering event for the notification but allow the parties to notify once there is a good faith intention to execute the transaction. This is a very significant development compared to the 2005 ICN Survey,⁴⁵ when only 12 out of 53 (23%) of the jurisdictions which responded to the survey allowed notification upon a good faith intention to consummate the merger.⁴⁶

Many OECD Member countries also used to have relatively short deadlines for filing a merger notification form; to bring their system in line with

⁴⁴ A binding agreement is not required in the following countries: Australia, Austria, Canada, Chile, Czech Republic, Estonia (but the decision can be made only after the contract is signed), Finland, France, Germany, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK and the US. In Italy, a letter of intent is not considered enough to trigger a filing obligation, but the parties can notify a merger as soon as the essential terms of the transaction have been agreed, even before the conclusion of the final agreement. In Ireland, the Competition Authority has proposed changes to the existing notification system whereby merging parties would be able to notify on the basis of a letter of intent.

⁴⁵ See 2005 ICN Survey, available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf>.

⁴⁶ The comparison of the results of the ICN 2005 Survey and of the resent OECD survey, however, is imperfect. Firstly, the ICN sample of 53 jurisdictions includes both OECD and non-OECD countries; not all the OECD Member countries are however included. And secondly, data were not available with respect to all of these countries; it is therefore possible that the actual number of jurisdictions reported to comply with the ICN Recommended Practices might have been in fact higher. The statistics therefore cannot be directly compared and quantifiable results cannot be concluded; they might however be useful in outlining trends in which the merger review is evolving. Since July 2012, under the new Competition Act, Portugal has also abolished the fixed deadline for notification.

the Recommendation, a number of them have abolished such limitations.⁴⁷ As a general rule, in all of the Member countries where a notification is mandatory⁴⁸ the notification should be made before the implementation of the merger. Few countries have deadlines for filing the notification linked to the signing of the merger agreement. In three countries,⁴⁹ a filing is due within 30 days from the signing of the agreement; otherwise sanctions and penalties can be imposed. In ten Member countries,⁵⁰ there is no specific deadline for filing, but mergers must be notified after signing the agreement but before the transaction is consummated.

Before these reforms concerning the timing were implemented, there was a discussion in many jurisdictions with suspensive effect of notifications about whether the abolition of strict notification deadlines could result in failure to notify. No such developments have been reported, and the new system seems to be working smoothly.

The Recommendation further suggests that after the notification, the substantive review should be concluded, and a final decision should be taken within a reasonable timeframe. To provide enough time for review of complex and potentially problematic mergers, and to conclude the review of relatively easier cases in a short time, most OECD Member countries - as already mentioned in the previous section - organise their review procedure in stages or phases. Even countries which do not have a clear separation of the review process in distinct phases, usually allow the review process to be shortened in case of transactions deemed to lack significant anti-competitive impact. In the US, for example, the closing of notified transactions is subject to a waiting period of 30 days in which the reviewing authority can decide whether to investigate the transaction further by requesting additional information (commonly known as “second request”). Under the Hart-Scott-Rodino Act, the filing parties may request that this waiting period be terminated early (“early

⁴⁷ For example, Slovakia has brought more flexibility into the notification process as of 2009 – the fixed deadline for notification running from the conclusion of a merger agreement was abolished and it is now possible to notify the merger even before the agreement is concluded.

⁴⁸ Except in Korea where for some cases a post-merger notification is possible.

⁴⁹ Greece, Hungary and Slovenia.

⁵⁰ Countries without a specific deadline for filing are: Belgium, Denmark, Iceland, Ireland, Israel, Japan, Korea, Mexico, Portugal and Slovenia.

termination”) for a particular transaction.⁵¹ In 2009, the Canadian merger system moved closer to the US system described above. Canada’s former competition regime required companies to wait 42 days, followed by a three-year post-merger period during which the Commissioner of Competition could challenge the merger. The amended regime, implemented in 2009, includes a 30-day waiting period during which the Commissioner of Competition can temporarily stop the deal to ask for more information on the transaction, followed by another 30-day waiting period that commences when the additional information requested has been provided.

The Recommendation does not define what a reasonable timeframe is. The ICN Recommended Practices suggest that Phase I should be completed, at the latest, within 6 weeks, and Phase II should take at the most 6 months. If the ICN deadlines are considered to meet the “reasonable timeframe” requirement in the Recommendation, then 31 OECD Member countries are in line with it. Most OECD countries have 1 calendar month or 25 working days to authorise the notified transaction in Phase I.⁵² Exceptionally, countries have longer or shorter review periods: Hungary applies a 45 day review period⁵³. In Brazil, the recent reform of the merger regime has for the first time introduced more straightforward statutory time periods for the review of transactions bringing Brazil more in line with the Recommendation. The new law establishes, however, a maximum term of 240 days from the date of notification for the

⁵¹ The majority of early terminations occur within two weeks from the date of filing. In Canada, merging parties may elect to submit a request for an advance ruling certificate and a waiver of the statutory information requirements for pre-merger notification. This simplified procedure is typically used for non-complex transactions.

⁵² In Mexico this period is a bit longer but is still within the ICN recommended 6 weeks period. Recently, the Slovak Republic has reviewed its legislation and got rid of the 60 working days review period applicable before for the entire review process; currently, Phase I has to be completed within 25 working days and Phase II must be completed within 90 working days from the notification. In Korea, until June 2012 when the law was amended, there was no specific review period for M&A deals subject to ex post notification. After the recent amendment which took effect in June 2012, a 30-day review period applies to any merger examination. This initial review period can be extended up to 120 days. New Zealand has an administrative target of 40 working days for all merger clearance investigations. However, as New Zealand’s merger regime is voluntarily all applications are subject to full (Phase 2) investigation.

⁵³ Poland also has a two-month\ review period but the investigation is not divided into two parts.

issuance of a final administrative decision. In case of complex transactions (“Phase II”), the 240 day-period can be extended by either 60 or 90 days upon request of the parties or the Administrative Tribunal, respectively. Therefore, the new law sets the maximum period for the Conselho Administrativo de Defesa Econômica (CADE) to render final administrative decisions in merger reviews at 330 days from the date of notification, a time period which is still in excess of that in force in many OECD Member countries and Partners.

Finally, the Recommendation requires that mergers which do not raise material competitive concerns should be subject to expedited review and clearance. In many jurisdictions, the notification form for such transactions is substantially simplified. Usually countries consider the Phase I review and approval as the expedited way to deal with non-problematic mergers. Half of the respondents to the survey have emphasized that in practice the review of these transactions is generally concluded faster than that normally required for a Phase I review. Only two countries (the US and Japan) have introduced the formal possibility for the parties to seek early termination of the review process.

3.4 *Review procedure and procedural fairness*

The merger review process has to guarantee procedural fairness to both the merging and third parties. According to the Recommendation, merging parties should (i) obtain sufficient and timely information about material competitive concerns raised by a merger and (ii) a meaningful opportunity to respond to such concerns; (iii) they should also 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. As far as the third parties with a legitimate interest in the merger under review are concerned, they should have an opportunity to express their views during the merger review process.

In case of an adverse decision on legality of the merger, the merging parties should have a right to seek review by a separate adjudicative body; the review of adverse enforcement decisions should be completed within reasonable time periods. The Recommendation further suggests that competition authorities should protect from disclosure business secrets and other information treated as confidential, obtained from any source at any stage of the review process.

Procedural fairness is of significant importance for OECD Member countries. It has been the subject of WP3 roundtable discussions in February and June 2010 and in October 2011. The fundamental fair trial requirements, included in the Recommendation, are respected in all the OECD Member countries. For example, there is not a single OECD Member country that denies

the merging parties the right to judicial review against an adverse decision of the competition authority.

Comparing national procedural regimes is inherently difficult. The trend over the last years, however, has been clearly towards an expansion of the procedural rights and guarantees enjoyed by the merging parties. This has often been done not through changes in the legislation, but by changing the enforcement practice of competition authorities. These changes were often codified in guidelines or other soft law instruments, or in the authority's decisional practice.⁵⁴ Attempts have also been made by some competition authorities to streamline the merger review procedure. Most notably in France, as part of the simplified file procedure, provisions have been made for firms that carry out a significant number of concentrations in one year (for example investment funds or major actors in the retail trade). These companies can, after closing their annual financial statements, provide the mergers unit with a core summary (preferably in electronic format) containing the general information that is likely to be repeated in all the notifications throughout the year to come. This limits the content of their notification to the information specific to each operation.

Many authorities have improved their degree of openness before and after the procedure, to increase the opportunities to discuss the transaction with the merging parties, bringing their merger review systems closer to the Recommendation. As discussed above, for example, even though not explicitly mentioned in the Recommendation, some countries have introduced pre-notification meeting; and countries that do not have formalised pre-notification procedures are considering introducing them.⁵⁵ Most of the competition authorities have also started to organise "state of play" meetings with the merging parties at crucial procedural stages of the proceedings, even though their legislation does not specifically require them to do so. In the Czech Republic, for example, the competition authority is committed to organising a "state of play" meeting before Phase II review is commenced, even though the general procedural rules require meetings to be held only when "necessary". In Sweden, "state of play" meetings are normally offered to the parties at three separate occasions during the merger process.⁵⁶

⁵⁴ See Guidelines issued by Italy and Spain.

⁵⁵ The Hungarian competition authority, for example, is currently finalising its new procedural "best practices", discussing also pre-notification procedure.

⁵⁶ First, within 15-20 working days after notification if the competition authority decides a special investigation is required; second, within 10

Despite this trend, there are still areas that are so tightly connected with national general procedure rules that any changes are highly improbable. For example, some competition authorities allow the merging parties to inspect the file throughout all of the proceedings e.g. Slovakia and Portugal, whereas others open the file only after the statement of objections in Phase II, e.g. the Netherlands. In Brazil, the case files are public and available for consultation by any interested party throughout the process. Access to confidential information included in the case file of the authority is still a sensitive area, and new methods have been used by authorities to ensure an effective balance between the need to protect confidential business secrets and the right of defence of the parties subject to the investigation.

Innovative procedural safeguards to protect confidential information

Competition agencies adopt a variety of methods to protect confidential information contained in documents that are provided to parties as evidence. The widely used conventional methods involve removing or redacting the confidential information and/or figures, providing non-confidential summaries or using ‘in camera’ sessions in court proceedings.

‘Innovative’ methods include the use of a confidentiality ring, which involves full disclosure of all information but limiting the persons to whom it is made available, for example legal and economic advisors. A second innovative method involves the use of data rooms, in which again full disclosure of all information is made, but access is only given to external advisors under limited circumstances, and under the supervision of the agency officials. Both these methods may be employed for the protection of extremely sensitive confidential information, where limiting disclosure to the defendant may be necessary.

The Recommendation also refers to the procedural rights of third parties that have to be guaranteed during merger review process. The status of interested third parties however differs widely among the OECD Member countries. All respondents reported the ability of third parties to submit their observations concerning the merger under review. However, the extent of involvement varied considerably, as is illustrated by the examples below. In Greece, third parties may intervene in Oral Hearings where, contrary to other systems, cross examination may be used. In Germany and the Netherlands as well as in Portugal, third parties can challenge the decision of the competition

working days after the competition authority’s decision on a special investigation; and finally, within 5 working days after the parties’ comments on the competition authority’s draft summons application.

authority and in Germany, Portugal and Slovenia they can become a party to the proceedings. In the Netherlands, Poland and Hungary, third parties cannot access the case file, whereas in Portugal and the Slovak Republic the competition authority is obliged by law to provide any third parties with a legitimate interest access to the information gathered.

3.5 *Transparency*

According to the Recommendation, the OECD Members and non-members 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.

To comply with the Recommendation, many competition authorities of OECD Member countries have recently created dedicated web pages where legislation, soft law, as well as merger decisions are published. In Mexico, the Comisión Federal de Competencia's web page includes a search engine which allows access to the texts of more than 2500 decisions taken by the authority during the period 1993-2011. In a few countries, competition authorities do not publish decisions, but will issue press releases or information notices. In some jurisdictions, only Phase II decisions are published.

Responses were mixed with regard to the public announcement of the opening of a merger investigation. In Canada, the Bureau normally, will only confirm that it is reviewing a merger once the transaction has been publicly announced by one or both of the parties to a merger. In France the entire pre-notification phase remains strictly confidential and does not result in any publication on the website or any contact with third parties. In contrast, in Italy, since 2005, the competition authority has introduced pre-merger publicity of most significant mergers through a notice on its website (with the authorisation of the interested parties). In Germany and Portugal, a list of notified transactions is published on the website. In Germany, since 2012, a separate list of pending Phase II cases is published and updated once a week. Similarly, in Turkey the Turkish Competition Authority announces notified mergers and acquisitions on its website, together with the names of undertakings concerned and their fields of operation. The Italian Competition Authority has published important notified mergers on its website since 2005. Any interested party, including customers and competitors, may then submit observations on the notified concentration within five business days of the publication. This significantly increased third-party interventions during the phase I process. The assessment of the ICA is that such publication has helped to speed up the decision making process and its effectiveness.

Few authorities reported that reasons would be given publically for closing an investigation. However, the US stated that in ‘appropriate occasions’ the competition authorities may issue a public statement describing the reasons behind closing an antitrust investigation, and have published notices describing the issuance of these public statements.⁵⁷ In 2010, Canada’s Competition Bureau undertook a self-assessment on transparency, which led the Bureau to commit to (1) creating a public Merger Registry,⁵⁸ to be updated monthly, with information on completed merger reviews, (2) increasing the publication of position statements⁵⁹ to describe the reasoning behind the Bureau’s conclusions in certain complex merger cases, and (3) increasing the frequency of public announcements where no enforcement action was taken.

⁵⁷ See <http://www.justice.gov/atr/public/guidelines/201888.htm> and <http://www.ftc.gov/os/closings/commclosing.shtm>.

⁵⁸ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02435.html>.

⁵⁹ See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03352.html.

Transparency and merger review in Australia⁶⁰

In Australia, merger parties choose from three potential avenues of merger review or clearance: the informal review regime, a voluntary system developed over many years which in practice has become the sole method by which merger parties seek clearance from the Australian Competition and Consumer Commission (“ACCC”); a ‘formal’ voluntary clearance regime, which to date has not resulted in any applications to the ACCC;⁶¹ and authorisation on public benefit (primarily efficiency) grounds by application to the Australian Competition Tribunal, with no applications made directly to the Tribunal to date.⁶²

The ACCC’s informal merger clearance process involves extensive consultation with the parties to the merger where the merger undergoes a substantive merger review.

As part of the ACCC process, an online public register is maintained for mergers which are currently under review. The public register contains a range of information relating to the merger, including details about: the parties to the transaction; the relevant markets; issues under consideration; status of the review; and an indicative timeframe for completion of the matter.

Before the introduction of the current informal merger clearance process⁶³ there were concerns from the Australian business community about the timeliness of the ACCC’s decision making, the consistency of decisions and the transparency of the ACCC’s deliberations.

In order to provide greater transparency and accountability in its informal review of mergers, the ACCC adopted a new set of merger review process guidelines.⁶⁴ The guidelines provide a reliable, comprehensive and detailed guide to merger applicants and third parties to predict the processes that will be applied by the ACCC to merger reviews. The guidelines established more definitive, indicative timelines for the clearance process, created a new public register, and allowed for the publication, where applicable, of a *Statement of Issues* (when competition issues require further information and consideration)⁶⁵ and *Public Competition Assessments* (providing comprehensive reasons for decisions in significant or contentious matters).⁶⁶

The Statement of Issues and Public Competition Assessment provide substantial transparency and accountability around the ACCC’s merger analysis and decisions in complex matters. Increased communication with the market has often led to the ACCC having more information about market behaviour before it, thereby enabling the ACCC to make more informed decisions.

⁶⁰ See Australian contribution to the Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings, [DAF/COMP\(2010\)11](#).

The most interesting development as far as transparency is concerned was not related to the publication of decisions, but rather to the increasing number of jurisdictions which have adopted (and made available to the public) guidelines and other soft law materials. In line with the Recommendation, a number of countries have recently made publicly available the rules, policies, practices and procedures involved in the merger review process. In the Czech Republic, for example, there were no guidelines in 2005, but as of today, the competition authority has issued notices on pre-notification contacts, on calculation of turnover for the purposes of assessing the notification thresholds, on the concept of concentration, on the concept of undertakings concerned, on implementation of the concentration prior to its approval, on failing firm defence and on expedited review procedure.

It appears from the survey that almost all competition authorities of the OECD Member countries have published some guidelines, concerning both the

⁶¹ The ACCC's formal merger clearance regime commenced on 1 January 2007.

⁶² Prior to 2007, applications for authorisation came to the ACCC in the first instance. The ACCC received a small number of applications for authorisation under this regime.

⁶³ The ACCC introduced new merger review processes in 2004 (revised in 2006) following the Report of the Trade Practices Act Review Committee (the Dawson Committee). This Report is available at: <http://tpareview.treasury.gov.au/content/home.asp>.

⁶⁴ See *Merger review process guidelines July 2006* available at: <http://www.accc.gov.au/content/index.phtml/itemId/740765>.

⁶⁵ The use of a Statement of Issues is an important tool used by the ACCC to publicly communicate its preliminary views. A Statement of Issues gives the merger parties and the market an opportunity to provide the ACCC with more information about the transaction, including its likely effect on competition in the relevant markets.

⁶⁶ Public Competition Assessments are designed to provide increased transparency of the ACCC's decisions under the informal review process. If parties choose to proceed with a merger when the ACCC has indicated it will oppose the merger, the ACCC must seek orders from the Federal Court of Australia to prevent the merger. In those cases, the Court's reasoning will be set out in a substantial public judgment. However, such decisions are rare as most complex mergers are either cleared (outright or subject to undertakings) or withdrawn when the ACCC indicates it will oppose a merger. In these circumstances, Public Competition Assessments provide an indication of the Commissions' current view of competition issues in specific markets.

procedural and substantive aspects of merger review, during the time period covered by this Report. These guidelines are also frequently updated, thus reflecting the current practices of competition authorities. Italy, for example, published in 2005 its Notice on Procedural Aspects Regarding Mergers, which was then revised in 2006 and 2010. In the US, the Department of Justice and the Federal Trade Commission collaborated to issue revised Horizontal Merger Guidelines in 2010⁶⁷ and in 2011 the Department of Justice issued an updated Antitrust Division Policy Guide to Merger Remedies.⁶⁸ In 2011, Spain issued Guidelines on short-form notification, in order to clarify the principles that guide its action.⁶⁹ In 2012, Germany's Federal Cartel Office published a new guidance document (replacing an earlier one published in 2000) describing the concept it applies in examining corporate mergers.⁷⁰ Turkey also recently introduced two sets of merger guidelines to increase the certainty and predictability of the merger procedure.⁷¹ In 2011, Canada's Competition Bureau published revised guidelines on its analytical approach to merger review (replacing an earlier version published in 2004)⁷² and updated its Merger Review Process Guidelines⁷³ (replacing an earlier version published in 2009).

3.6 *Special rules on foreign firms*

According to the Recommendation, merger laws should not treat foreign firms less favourably than domestic ones in like circumstances.

No OECD Member country reported any special rules concerning foreign firms. Foreign firms are subject to the same procedural rights as domestic firms, and mergers in which foreign firms participate are subject to the same standard of review as purely domestic mergers.

⁶⁷ See www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

⁶⁸ See www.justice.gov/atr/public/guidelines/272350.pdf.

⁶⁹ The use of the short form might be extended to cases not expressly mentioned in the law dealing with mergers, and the competition authority will therefore assess each merger on a case-by-case basis.

⁷⁰ See http://www.bundeskartellamt.de/wEnglisch/News/press/2012_03_29.php.

⁷¹ These are the "Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions" and the "Guidelines on Remedies that are Acceptable by the TCA in Merger/Acquisition Transactions".

⁷² See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

⁷³ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html>.

4. International Co-ordination and Co-operation

According to the Recommendation, OECD Members and non-members should co-operate and co-ordinate their reviews of transnational mergers; they should aim at the resolution of domestic competitive concerns and avoid inconsistencies with remedies sought in other jurisdictions. In order to facilitate effective co-operation and co-ordination of merger reviews and to eliminate or reduce impediments to it, OECD Member countries should consider adopting or amending national legislation and concluding bilateral as well as multilateral agreements. OECD Member countries should also encourage merging parties to facilitate co-operation between competition authorities, in particular with respect to timing of notifications and provision of confidentiality waivers. Finally, OECD Member countries should establish safeguards concerning the treatment of confidential information obtained from other competition authorities.

4.1 *Legal instruments facilitating co-operation*

Bilateral agreements constitute the most frequently used instrument for international co-operation in the field of competition. They range from intergovernmental agreements to memoranda of understanding (MoUs) between competition authorities and from specific agreements concerning exclusively competition law (or merger review in particular) to chapters dedicated to these questions in more general international treaties. It should be noted, however, that cooperation agreements or MoUs are by no means a prerequisite to productive cooperation between agencies.

Many Member countries reported the existence of specific antitrust co-operation agreements, and the ‘routine’ co-operation that takes place on mergers with multijurisdictional aspects. A number of these agreements have been signed after the adoption of the 2005 Merger Recommendation. For example, since 2005, Japan has entered into ten ‘Agreements concerning Co-operation on Anti-competitive Activities and Economic Partnership’ (EPA) with Malaysia, the Philippines, Chile, Thailand, Indonesia, ASEAN, Vietnam, Switzerland, India and Peru.

The more frequent the contacts between the respective authorities, the more detailed are the co-operation agreements. Australia and New Zealand co-operate very closely in merger reviews. In 2006 the two competition authorities signed a Co-operation Protocol for Merger Review, which provides a formal framework under which the two regulators can share information, evidence and documentation in respect of their investigations, prosecutions and enforcement decisions when both or either of them is reviewing mergers with a trans-Tasman

dimension. This trans-Tasman dimension is interpreted broadly and does not require all parties to be active in the supply of goods in Australia and New Zealand. The degree of co-operation between Australia and New Zealand has been enhanced during 2010 with the formal cross appointment of commissioners between the two regulators; the Chair of the ACCC's Merger Review Committee has been appointed as an Associate Commissioner to New Zealand's Commission and the New Zealand Commission Chairman has been appointed to the ACCC as an Associate Commissioner.

Because of the close proximity and degree to which their economies are integrated, the Canadian and US competition authorities often work closely with one another in cross-border merger reviews. In addition to the bilateral cooperation agreement, concluded in 1995, between these countries, coordination between their competition authorities has been enhanced by amendments to Canadian competition law in 2009, which more closely aligned the merger review process of the Competition Bureau with that of its US counterparts. In addition to conducting senior-level bilateral meetings and regular officer-level discussions with regards to specific merger reviews, in 2010, the Canadian and US competition authorities established a merger officer-level working group. The aim of this group is to improve the understanding of the merger review processes in both countries and, ultimately, facilitate more efficient and stronger multi-jurisdictional reviews. The team leader working group meets, on average, twice a year, where the focus is not to discuss ongoing merger reviews, but to discuss respective processes, lessons learned and strategies to address common challenges encountered during merger reviews.

Jurisdictions which are not involved in international co-operation on such a regular basis are only infrequently parties to such bilateral agreements. However, this fact itself does not prevent co-operation on an *ad hoc* basis. Other countries may not have any automatic co-ordination or co-operation agreements in place, and may therefore have to rely on other methods. Switzerland is one such example and therefore relies on merging parties providing waivers allowing the Swiss competition authority to discuss case related matters and exchange information about a pending merger with other reviewing authorities. Similarly the UK has no bilateral agreements in place to facilitate co-operation or co-ordination, but in January 2011 entered into a non-binding MoU on Co-operation with the National Development and Reform Commission of the People's Republic of China, which aims to establish and develop co-operation in the enforcement of competition policy and related matters between the participants.⁷⁴ A MoU was signed by the US Federal Trade Commission and

⁷⁴ See www.ofc.gov.uk/shared_ofc/MoUs/China_NDRC.pdf.

Department of Justice with the three Chinese competition authorities,⁷⁵ which includes provisions on increased co-operation and co-ordination.⁷⁶

Various provisions on competition law and policy are often contained in Free Trade Agreements (FTAs); although they are hardly ever referred to by competition authorities as being a legal basis for their co-operation in the merger area. Competition-specific agreements may thus be considered to be the most relevant. The first such agreement was concluded in 1976 between the United States and Germany. Since 2005, there has been a significant increase in the number of similar arrangements. For example, Chile has signed many FTAs and association agreements, most of them having a chapter covering competition policy and co-operation in the enforcement of corresponding laws.⁷⁷

The European Union remains the only regional organisation with jurisdictional rules in place that allow most mergers with significant cross-border effects to be reviewed by a single competition authority, i.e. the European Commission. The rules concerning the co-ordination and co-operation of competition authorities in a European context are found in the EU Merger Regulation, which also makes provisions for a network of public authorities. The EU Merger Working Group also serves as an important platform for co-ordination between European competition authorities. Its Best Practices (2011) ensure that they are informed when a merger is required to be notified in more than one state and provide for co-operation in the investigation.

⁷⁵ China's antimonopoly law enforcement responsibility is divided among three authorities: MOFCOM, which handles review of mergers and acquisitions; NDRC, which enforces the law against price-related anti-competitive conduct; and SAIC, which is responsible for non-price-related anti-competitive conduct.

⁷⁶ The MOU provides for periodic high-level consultations among all five authorities as well as separate communications between individual authorities. It also lists several specific avenues for co-operation, including: (i) exchanges of information and advice about competition law enforcement and policy developments; (ii) training programs, workshops and other means to enhance agency effectiveness; (iii) Providing comments on proposed laws, regulations and guidelines; and (iv) co-operation on specific cases or investigations, when in the investigating authorities' common interest.

⁷⁷ E.g. with Peru in 2006; with Japan in 2007; with New Zealand, Brunei Darussalam and Singapore in 2005; and with Australia in 2008. See <http://www.fne.gob.cl/english/internacional/ftas-chapters-on-competition/>.

There are other regional arrangements in place which facilitate improved co-ordination for the review of mergers. In 2006, Member States of MERCOSUR,⁷⁸ the South American regional organisation promoting free trade and free movement of goods, people and currency, entered into an Agreement for Co-operation between Competition Agencies for Regional Merger Review, providing for mutual notification and co-ordination of merger review. In 2008 the Marchfeld Competition Forum was established. This initiative aimed to strengthen regional co-operation and co-ordination between Central and Eastern European countries,⁷⁹ and has resulted in the creation of a database for cross-border merger cases focusing on mergers notifiable within these countries.

Numerous competition authorities reported that in the absence of a specific legal instrument, they referred to the 1995 OECD Council Recommendation Concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade [C(1995)130/FINAL] (the “1995 Co-operation Recommendation”). Chile, Finland, France, Israel, Italy, Japan, Korea, the Slovak Republic and the United States all specifically refer to use of the 1995 Co-operation Recommendation which has proved to be particularly useful in the absence of a signed agreement between some Member countries. During the review of the BHP Billiton-Rio Tinto joint venture, Korea and Japan felt an increased need to work together and therefore voluntarily increased their communication and co-operation, based on the framework set out in the 1995 Co-operation Recommendation.

⁷⁸ Including Argentina, Brazil, Paraguay and Uruguay.

⁷⁹ Including Austria, Bulgaria, the Czech Republic, Croatia, Hungary, Lithuania, Latvia, Poland, Romania, Slovakia, Slovenia and Switzerland.

The Rio Tinto/BHP Billiton joint venture case

At the beginning of 2008, the acquisition of Rio Tinto by BHP Billiton was announced. Both merging parties were British-Australian dual-listed companies that mine and market a range of commodities such as iron ore, coal, uranium, aluminium, mineral sands, copper and diamonds, as well as various other base metals and industrial minerals. The proposed merger was notified to a number of jurisdictions, including Australia, EU, Japan South Africa and the US. It was subjected to an in-depth analysis, in particular with respect to potential competition problems in the markets for iron ore.

Rio Tinto and BHP Billiton were the number two and three producers of iron ore. Following the merger, they would have had a combined market share of 55-60%, controlling with the previous top producer (Companhia Vale do Rio Doce of Brazil) most of the world market. All other producers would have been significantly smaller. Though the acquisition was cleared without conditions in Australia and the US, remedies including divestiture were expected in the EU. The European Commission's preliminary investigation found that by increasing the new entity's market power in iron ore and metallurgical coal, there was a serious risk that the planned takeover could have a negative impact on the outcome of price negotiations with steel customers. There was also considerable risk that the merged entity might have the incentive to reduce the scale of its investment projects or slow down such investment, and so reduce supplies available on the market and increase prices.⁸⁰ However, before the European Commission's decision was adopted, the merger was abandoned.

In mid 2009, the joint venture of Rio Tinto and BHP Billiton concerning production of iron ore in West Australia was announced. It was, again, reviewed by a number of jurisdictions worldwide, including Australia, Germany, EU, Korea and Japan, all of which co-operated and expressed preliminary competition concerns. In Germany, the Bundeskartellamt's investigation had indicated collective dominance of BHP, Rio Tinto and Vale on the market for fine ore, even before the merger. The Bundeskartellamt was concerned, inter alia, about the strong incentive within the oligopoly to co-ordinate volume increases in such a way as to maintain supply shortages.⁸¹

⁸⁰ See http://ec.europa.eu/competition/mergers/cases/index/m99.html#m_4985.

⁸¹ In particular, the German authority found that the dominant position would have been strengthened by the concentration, in particular for the following reasons: the number of independently active Members in the oligopoly would have been reduced from three to two, the already high transparency would have further increased and the coordination costs would have fallen. As a consequence, incentives to deviate from the co-ordinated equilibria would have further decreased. See <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B01-010-10-english.pdf?navid=44>.

In Japan, the issues focused on the advantageous positioning of the parties for marine transportation costs, the ability of both companies to produce iron ore at low costs, and the high barriers to entry. The JFTC therefore found that there would be no supplier who could be an ‘effective deterrence’ against the merged entity in the long term.⁸² In Korea, the KFTC gave notice to competition authorities of Australia and EU immediately after delivering the merging firms an Examination Report, which concluded that the proposed deal would cause anti-competitive effect.⁸³ Although the project was abandoned by the end of 2010, it was, however, expected that far reaching remedies would have been required.

4.2 *Sharing of confidential information*

Exchange of information constitutes a crucial prerequisite for efficient international co-operation. Generally speaking, it is possible to distinguish exchange of:

- *non-confidential, publicly available information*: such information sharing is generally available without any limitations; usually, such information is used for inter-agency notifications, even in case there are no specific legal instruments in place;
- *non-confidential, non-public information*: sharing of such information is generally not regulated by national law, and only rarely by international legal instruments. Such information is, however, very important for inter-agency consultations, especially when confidential information cannot be shared; it may include questions of methodology, relevant market definition, theory of harm, possible forms of remedies; and
- *confidential information*, which may generally be shared with other competition authorities only subject to the consent (by way of a waiver) of the disclosing party.

Over the last years, the amount of information, including confidential information, shared among competition authorities in merger investigations has

⁸² See Japan’s contribution to 2012 GFC Roundtable on Competition and Commodity Price Volatility for a detailed discussion of this case – [DAF/COMP/GF/WD\(2012\)33](#).

⁸³ See Korea’s contribution to the 2011 Roundtable on Cross Border Merger Control: Challenges for Developing and Emerging Economies - [DAF/COMP/GF/WD\(2011\)2](#).

increased significantly, also thanks to the increasingly more common practice of merging parties granting waivers which allow the reviewing authorities to share confidential information. When WP3 was dealing with Information Exchanges in International Co-operation in Merger Investigations in May 2003,⁸⁴ it found that very few jurisdictions had had experience with waivers. Most of the jurisdictions had no experience at all with waivers, some only in one case⁸⁵ and only the United States reported use of waivers to have been “*common practice*”. Similarly, according to the 2005 ICN Survey, only 3 out of 53 competition authorities (6%) had a model confidentiality waiver form.

However, in 2005, the ICN issued a Model Confidentiality Waiver for Mergers and by 2011, most OECD Member countries reported using waivers regularly. Even those having no or limited experience in 2003 currently report to be using waivers as “*a routine practice*”.⁸⁶ In responses to the current questionnaire, numerous countries reported that they would seek voluntary confidentiality waivers when appropriate including Australia, Belgium, Denmark, Finland, Japan, Korea, Netherlands, New Zealand, Slovakia, Spain, the UK and the US. Some countries, such as Chile and Sweden, may seek waivers but do so seldomly. In Germany and Portugal, waivers are requested where close co-operation is needed and the parties have not provided them on their own initiative.

⁸⁴ See Information Exchanges in International Co-operation in Merger Investigations, [DAFFE/COMP/WP3\(2003\)3](#).

⁸⁵ E.g. Australia.

⁸⁶ E.g. Switzerland.

Sharing of confidential information

The ability to share confidential information without waivers remains very rare. Some Member countries, for example New Zealand and Australia, have each enacted national legislation enabling sharing of confidential information without a waiver. In the case of Australia disclosure may be made unilaterally to other government agencies; in the case of New Zealand an agency to agency co-operation arrangement approved by the Minister, or a government to government co-operation is required is required.

On a regional level, beyond the close co-operation among the member States of the European Union, only the Nordic Agreement between Denmark, Iceland, Norway and Sweden enables competition authorities to share confidential information about the merging parties without their consent. However, the confidential information may only be shared if covered by professional secrecy rules at least equivalent to those applicable to the disclosing agency. The information may only be used for the purpose specified in the agreement, and may only be passed on by the receiving authority after the express consent of the National Competition Authority (“NCA”) providing the information, and then only for the purpose for which such consent is given.

Bilateral agreements usually cover only non-confidential information. In contrast to these “first generation” agreements, a few “second generation” agreements provide even for sharing of confidential information, such as the 2013 Co-operation Arrangement between the competition authorities of Australia and New Zealand.

The European Union and Switzerland have recently agreed to enter into a new co-operation agreement on the application of their competition laws addressing the limitation on the exchange of confidential information, allowing the European Commission and the Swiss Competition Commission to exchange such information. Like the “first generation” agreements concluded so far, this agreement will help to structure cooperation and a policy dialogue on competition matters between the two agencies. By including the possibility to exchange, subject to specific conditions,⁸⁷ confidential information between the competition agencies of both Parties, the Agreement will also enable the two agencies to benefit from the results of information gathered by the other one. The European Union is currently negotiating a “second generation” agreement also with Canada.

⁸⁷ The agreement regulates the discussion and transmission of information between the Commission and the Swiss Competition Commission. It authorises the Commission and the Swiss Competition to discuss information obtained by investigative process. Furthermore, both authorities may under certain conditions transmit information already in their possession and obtained by investigative process to the other authority. They can only do so when they investigate the same or related conduct or transaction. The agreement provides that they cannot discuss or transmit information which

4.3 *Co-ordination of merger review*

Consultations concerning the analysis of mergers subject to parallel review by several competition authorities and co-ordination of crucial procedural steps of the review, including the final outcome and possible remedies, do not take place with respect to every transnational merger. Co-operation and co-ordination generally occur in large, cross-border transactions which are likely to have an impact on several jurisdictions. Even though such cross-border mergers are becoming more frequent due to the increasingly globalised economy, they still constitute a minority of cases dealt with even by those jurisdictions that are the most active in this area. For some countries, mergers remain very national in scope, and therefore international co-operation is simply not required, as is the case for example of Iceland (due to the fact it is a small island economy) and Slovenia. Spain also reports that mergers requiring close co-operation with non EU competition authorities are ‘very infrequent’.

International co-operation and merger remedies⁸⁸

Co-ordination is especially important with respect to remedies.

For example, both the US Department of Justice and the Competition Bureau of Canada challenged the acquisition of **Live Nation** by **Ticketmaster Entertainment**. Live Nation entered the US market for primary ticketing services in December 2008 and prior to the proposed merger, it intended to enter the Canadian market as well. The transaction could have substantially lessened competition for primary ticketing services to major concert venues and was thus likely to result in higher prices and less innovation for consumers. The Canadian Competition Bureau was further concerned that the merger would prevent Live Nation from entering the Canadian market as a direct competitor to Ticketmaster and that it would raise barriers deterring other companies from entering the market to compete against the merged entity. Both the authorities co-operated closely throughout the investigation and agreed on the same remedies, according to which the merged firm must license its ticketing system for use

was received under their respective leniency or settlement procedures, without the prior express agreement of the source. Nor can they exchange information if using such information would be prohibited under the procedural rights and privileges guaranteed under their respective laws. The decision to transmit information is always in the discretion of the transmitting authority; there is no obligation to do so.

⁸⁸ Examples are taken from country submission to the Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies [[DAF/COMP/GF\(2011\)13](#)].

by Anschutz Entertainment Group, Live Nation's principal competitor and the second largest promoter of live events in Canada and the United States, and sell its subsidiary ticketing business Paciolan.

As the market structure differs across regions, the competition problems are often not identical and specific remedies are necessary in individual jurisdictions. In some instances, remedies in addition to those generally agreed are employed.

For example in 2009, the acquisition of **Sanyo** by **Panasonic** was cleared with conditions by the European Commission (EC), US Federal Trade Commission (FTC), the Japan Fair Trade Commission (JFTC) and the Chinese Ministry of Foreign Commerce (MOFCOM). The EC, FTC and JFTC were able to co-operate closely on the basis of bilateral agreements and waivers provided by the merging parties; due to lack of such an agreement with China, the co-operation with MOFCOM was more limited. Other competition authorities reviewed this merger as well, without imposing any additional remedies. The competition concerns were associated in particular with batteries markets. Both undertakings were active in the area of nickel metal hydride (NiMH) rechargeable batteries for automotive use; whereas the EC, FTC and JFTC concluded that this market did not raise competition concerns, MOFCOM conditioned its approval of the merger upon Panasonic's divestiture of its automotive NiMH business. All the authorities expressed concerns regarding markets for portable batteries. In the area of rechargeable NiMH batteries (used e.g. in police two-way radios), competition concerns were identified by all the authorities concerned. In the area of coin-shaped batteries (used e.g. in watches), concerns were raised by EC and MOFCOM, and concerning cylindrical lithium batteries (used e.g. in fire alarms and utility meters), by EC and JFTC. To address these concerns, Panasonic and Sanyo committed to divest the entire overlap for these batteries.

Occasionally, remedies adopted in one jurisdiction are sufficient for others as well, so there is no need to impose them again. For example in 2010, the EC approved the acquisition of **Tandberg**, a vendor of videoconferencing products, by **Cisco**, a computer network firm. The approval was conditional upon divestment of a protocol developed by Cisco for its videoconference solutions to ensure the interoperability of the merged entity's products with those of its competitors. The investigation was conducted in close cooperation with the Department of Justice, which cleared the transaction on the same day as the EC; due to the evolving nature of the videoconferencing market and the commitments that Cisco made to the EC to facilitate interoperability, the Department of Justice concluded that the proposed deal was not likely to be anti-competitive and decided not to challenge it.

Respondents to the Secretariat survey did not report any divergent outcome on the assessment by several authorities of the same transaction, or conflicts in the remedies imposed by different authorities. While it cannot be excluded that there may still be instances of conflicts, this seems to indicate that co-operation between reviewing authorities is effective.

Competition authorities involved in transnational mergers strive to synchronize their investigations and inform each other about their respective major procedural steps. Co-ordination of the timing of the procedures is, however, to a significant extent dependent on the merging parties, for national procedures are usually bound by time limits that cannot take into account foreign procedures. The issue of timing has been addressed to a certain extent through the publication of Best Practices in Merger Review (see box below).

EU Best Practices for National Competition Authorities (“NCAs”) in Merger Review (November 2011)

The EU Best Practices, adopted November 2011, are a tool to improve the co-operation between NCAs where a merger affects several Member states but where the one-stop-shop option provided by the European Commission is not an option. The EU Best Practices provide guidance to the parties and the NCAs themselves on when co-operation is useful for ensuring a smooth review process and for achieving consistent outcomes. The EU Best Practices should assist the NCAs in jointly approaching similar competition problems raised by one and the same merger in different jurisdictions. They should also ensure that remedies are not inconsistent. NCAs are encouraged to liaise with each other regularly and discuss process, timing and substantive issues in order to align their reviews as much as possible.

In particular, the EU Best Practices include so called “state-of-play” meetings with the notifying parties to inform them about the state of the review process and to inform each other about the next steps. Co-ordination concerning timing of notifications is an essential issue in the Best Practices. In particular merging parties are encouraged to provide basic information on multijurisdictional concentrations as soon as possible (pre-notification stage) and to contribute to the alignment of the review proceedings.

The EU Best Practices emphasize that it is important that confidential information can be shared amongst the NCAs, through the provision of confidentiality waivers. Confidential information and business secrets are protected under national law in all Member States. NCAs should therefore discuss with each other, prior to any exchange of confidential information, how it may best be protected.

US/EU Best Practices on Co-operation in Merger Investigations (October 2011)

The revised US/EU Best Practices on Co-operation in Merger Investigations build on the experience gained in a significant number of cases in which the authorities co-operated pursuant to the 1991 US/EU Co-operation Agreement and the initial set of Best Practices issued in 2002. The 2011 revised version describes when and how the EU and US authorities communicate with each other, and suggests ways the merging parties and third parties can facilitate co-ordination and resolution of their merger reviews, including during the remedial process.

The revised Best Practices encourage prompt initial contact, but do not set a time frame for the initiation and initial steps of co-operation, as they recognise that the nature and frequency of the communications may differ depending on the characteristics of the particular case. However, they recommend that the co-operating authorities should seek to agree on a tentative timetable for regular inter-agency consultations at the start of any investigation requiring substantial co-operation. The revised Best Practices provide that co-operation is most effective when the reviewing authorities' respective investigation timetables allow for meaningful communication throughout the process. To facilitate co-ordination, the revised Best Practices call for the reviewing U.S. agency and the Directorate General for Competition of the European Commission to keep one another informed of important developments related to timing throughout their respective investigations and to co-ordinate phases of their investigations, including through joint calls or meetings with merging parties to discuss timing.

The Best Practices recognise that the success of the authorities' efforts depends on the active participation and co-operation of the merging parties. They identify several ways in which the merging parties can facilitate the co-operative process. First, they suggest that the parties inform the reviewing authorities of a merger requiring review in both jurisdictions as soon as feasible, by providing basic information on the merger. The revised Best Practices then encourage merging parties to time the filing of their notifications to allow the authorities to communicate and co-operate meaningfully at key decision-making stages of their respective investigations. They recognise that even if the parties have not made their filings in the U.S. and the EU in parallel, meaningful co-operation can still be achieved as long as the timing of the filings allows for co-operation of the authorities at key decision-making points of their investigations. They also illustrate how the merging parties can facilitate inter-agency co-ordination throughout the process, from pre-notification consultations in the EU to the use of timing agreements in the U.S.

5. Resources and Powers of Competition Authorities

According to the Recommendation, OECD Members and non-members should ensure that the competition authorities have sufficient powers to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers. Sufficient resources should be awarded to competition authorities to be able to fulfil these tasks.

None of the OECD Member countries have reported insufficient powers or resources. Despite severe budgetary cuts in many OECD Member countries, competition authorities are still able to perform their duties.⁸⁹ Austerity

⁸⁹ According to the responses received, staff involved in merger cases usually represents less than 20% of the total personnel. The only exception is the US, where more than 50% of the staff is devoted to merger control. In some

measures may however have significant impacts in some countries.⁹⁰ Several competition authorities have also observed that they would be able to work more effectively should the level of staff be increased.⁹¹

Country example - Enhancing powers of the authorities and reducing costs

The most commonly used and acknowledged power of the authorities is the request for information.⁹² The German Federal Cartel Office (the Bundeskartellamt) is planning to improve its information gathering powers with the use of an internet platform for investigations. Companies could be asked to provide information in response to an information request on an internet platform of the Bundeskartellamt. This way, the authority can not only obtain and process data easier and faster, but the companies' costs related to providing the information requested would be significantly reduced.

In a few countries, single competition authorities responsible for merger review were established only recently, for example in Spain (2007), France (2009) or Brazil (2012); and in the UK (as of 2014). In Chile, the competition authority (the Fiscalía Nacional Económica) was empowered to bring a merger for review before the Competition Tribunal in 2009.

In a few OECD Member countries, investigatory powers and level of penalties were increased, for example in Slovenia in 2008 or in Mexico in 2011. Even though the competition authorities currently consider their investigatory powers to be sufficient, Slovakia reported problems obtaining information from companies located abroad; conversely, other OECD Member countries that specifically addressed this topic did not experience any difficulties.

To guarantee the highest possible quality of merger review, lawyers and economists are employed by all Member countries and are closely involved in

countries where there is no separated merger unit (e.g. Germany, Slovenia, Spain), such percentages cannot be exactly estimated.

⁹⁰ Estonia, for example, reported a lack of sufficient financial and human resources. According to its response, the Slovenian competition authority also suffered from financial limitations.

⁹¹ For example, in Estonia only 3 case handlers usually deal with complex merger cases (such as Phase II investigations) and that causes sometimes a high workload.

⁹² On-site inspections were also mentioned in the responses, but this is an investigative tool which is rarely used in merger investigations.

the review and analysis of merger cases. In some instances, industry experts are also employed by competition authorities to increase their in-house industry-specific knowledge. A significant number of jurisdictions have separate legal and economic departments as dedicated supporting units to the investigative teams. Many competition authorities have recently adjusted their internal structure in order to ensure the quality and consistency of their economic and legal analysis. Most of the OECD Member countries institutionalised the position of chief economists in recent years,⁹³ and involve them in merger review.⁹⁴ Some jurisdictions hire external experts on a case-by-case basis if the depth of the analysis requires a special knowledge which is not available in-house. Almost all respondents emphasized that the notifying parties are helped in the process by formal guidance issued by the authorities. Past merger decisions are also available on the websites of many authorities.

6. Periodic Review

According to the Recommendation, the OECD Members and non-Members should review their merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.

Since 2005, all OECD Member countries who responded to the survey have amended their merger review rules, either the legislation or soft law or both, frequently referring to the Recommendation. Several OECD Member countries are currently working on revisions of their merger regimes. The review, though frequent, is however only rarely done on a periodic basis.⁹⁵ Only

⁹³ See for example Denmark, France, Hungary, New Zealand and the EU that emphasised in their responses that the Chief Economist team is often involved in complex merger cases.

⁹⁴ The impact of more rigorous economic analysis will be discussed below in Section 7.2.

⁹⁵ Usually legislation is reviewed to respond to a specific issue experienced in the authority's practice. For example, in Estonia some mergers were consummated years after the approval decision was made. In these cases, the market situations which led to the approval of the transaction might have changed in the intervening time and the transaction might have a different impact on competition. In response, the authority has proposed that authorization decisions should be valid for 6 months only, with a possible extension up to one year. Past this deadline, if the transaction has not been consummated, it must be subject to a new review process. The proposal was pending at the time of the survey. In Australia, creeping acquisitions (i.e. a series of small acquisitions that individually do not have a significant effect on competition, but whose cumulative effect over time may be substantial)

a few OECD Member countries have such obligations, concerning mainly the notification criteria. A few respondents reported that the notification criteria are periodically reviewed in order to ensure an appropriate nexus with the jurisdiction.⁹⁶ A few OECD Member countries have an obligation to periodically review the effectiveness of their competition policy.⁹⁷

have raised some competition concerns recently. One aspect of these concerns resulted in an amendment of the Competition and Consumer Act to clarify the ACCC's ability to scrutinise a small merger which might substantially lessen competition in a local market.

⁹⁶ For example, notification thresholds are reviewed every two years in Turkey and every three years in Belgium. In some OECD Member countries, the thresholds are adjusted every year with respect to the GDP (e.g. Canada, Italy and the United States). In Mexico the notification thresholds are linked to the minimum wages defined by the state. In Korea there is a mandatory review of the competition regulation in every 3 years starting in 2009.

⁹⁷ In Mexico, an assessment of the effectiveness of the competition policy has to be done at least every 5 years. In Switzerland, the revised competition act requires the authority to assess the effects of the revisions after five years.

Reviews of merger rules - Country examples

Slovak Republic - A full review of the merger regulation has recently taken place in the Slovak Republic. The amendments aimed at bringing the Slovak merger control system in line with international standards (especially with the OECD Recommendations and ICN principles). For example, the fixed time limit for notification and the requirement of a signed contract were abolished (a letter of intent is now considered a sufficient event to trigger a notification requirement); a new turnover criteria was introduced and procedural changes were put in place (a two-phase procedure and shorter review periods were introduced). The substantive test was changed from the dominance test to the Significant Lessening of Competition test. These changes were adopted to increase flexibility and effectiveness of the merger control system.

Denmark - A number of amendments to the Danish merger regulation entered into force in 2010. The reform lowered the turnover thresholds for notification, extended the legal deadlines for filing a merger, introduced a simplified procedure for uncomplicated mergers and a preliminary statement of concerns after the Phase II investigation. The stated rationale for introducing these changes was to bring the Danish merger system further in line with the merger regulations of the European Union and of other OECD countries.

Portugal – A new competition act came into force in July 2012. Due to the reform – among others – the notification thresholds and some time deadlines were changed, the notification deadline was abolished and the significant impediment to effective competition (“SIEC”) test was introduced.

7. Other developments in the area of merger control

Merger control is one of the most dynamic and fast-evolving areas of competition law and the Competition Committee and its working parties have discussed competition policy issues related to merger review for many years now. A list of the main policy discussions that have taken place in the Committee since 1996 is included in Annex II to this Report. These discussions have shown that there are areas of merger control not covered by the Recommendation that have experienced significant developments.

Three areas have been identified on the basis of policy discussions at the OECD after the adoption of the Recommendation:

- i) the convergence on the substantive criteria with respect to which mergers are reviewed;

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- ii) the increasingly economics-based framework for merger review; and
 - iii) recent developments in the remedies imposed by the authorities when approving potentially anti-competitive transactions.

7.1 Convergence on the substantive criteria for the assessment of mergers

Over the last ten years, many jurisdictions have modified their merger control statutes to adopt a new legal standard for the review of mergers. This wave of legislative reform has led to a much more uniform situation at international level and significantly contributed to the convergence of methods and tools used by competition authorities as they review and assess mergers.

Competition authorities generally rely on one of two main tests applied to assess whether a merger has anti-competitive effects: the dominance test and the substantial lessening of competition (“SLC”) test; some countries have a hybrid test, which combines the dominance and the SLC standards.⁹⁸

⁹⁸ SLC test or a hybrid test (a combination of SLC and the dominance test, such as the Significant Impediment to Effective Competition or SIEC test) is used by the vast majority of the OECD Member countries: Australia, Belgium, Canada, Czech Republic, Denmark Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel (which also uses a public interest test) Japan, Netherlands, New Zealand, Norway (which uses also an efficiency test), Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, UK, US and the EU. Some of these jurisdictions have changed their test to SLC test recently, like Finland, Germany, Portugal and the Slovak Republic. Both the SLC and the dominance test are applied by Iceland, Korea and Mexico.

Fewer and fewer jurisdictions persist in using the dominance test, so the number of the countries using this test has been reduced to the following 4 countries: Austria, Italy, Turkey and Switzerland. The last jurisdiction at the present use the dominance test, but there are proposals to change the test to a SIEC test.

Legal standards for the review of mergers

Under the *dominance test* a merger is anti-competitive and can be prohibited if it strengthens or creates a dominant position in the market. The notion of dominance is not clearly defined in economics but it certainly reaches situations in which a market leader with a degree of independence from competitive pressures is created. Dominance can be interpreted either narrowly whereby it covers only situations where the merged firm becomes dominant or more broadly as covering also collective dominance, i.e. situations where the merger affects the competitive structure of the market in a manner that is conducive to creating a co-ordinated equilibrium among competitors.

Under the *substantial lessening of competition* (“SLC”) test, a merger is considered to have anti-competitive effects if it is likely to substantially lessen competition in the market. In comparison with the *dominance test*, the SLC test focuses on the effects of the merger on the market and on the loss of competition among firms rather than on threshold structural issues such as market shares. Under the SLC test, the investigation and assessment of a merger are more concerned with whether prices are likely to rise after the merger is consummated.

Under the *hybrid tests*, a merger is anti-competitive if it significantly impedes effective competition in the market in particular through the creation or strengthening of a dominant position. This is the test, for example, currently in force in the European Union.⁹⁹ By listing the creation or strengthening of a dominant position as one of the ways in which effective competition may be impeded, the hybrid test combines the standards of both SLC and dominance. Doing so may allow countries that change from dominance to the SLC test to maintain clear continuity with past decisional practice and case law. Generally, the hybrid test is viewed as being nearly identical to the SLC test and hence is treated as part of the SLC family.

The Competition Committee discussed the substantive criteria for merger review first in October 2002.¹⁰⁰ WP3 revisited again the discussion on substantive criteria for merger review in June 2009.¹⁰¹ The discussion indicated a clear move away over the last ten years from the dominance test. Many jurisdictions have changed and others are contemplating changing the legal standard for the review of mergers from a standard based on the creation or

⁹⁹ More details in the next box.

¹⁰⁰ OECD Report on Substantive Criteria used for Merger Assessment, [DAFFE/COMP\(2003\)5](#).

¹⁰¹ OECD Report on Standard for Merger Review, [DAF/COMP\(2009\)21](#).

strengthening of a dominant position to an SLC standard.¹⁰² Today the SLC test or hybrid tests are used in the vast majority of jurisdictions. The overall experience with changing from dominance to SLC test has been positive and jurisdictions that had changed standard did not experience any increase in intervention rate or a negative impact on legal certainty.

Countries have decided to adopt the SLC test for a variety of reasons:

- In some countries, the move from dominance towards an SLC test was necessary because the narrow interpretation of the notion of dominance adopted by domestic courts led to a potential enforcement gap with respect to mergers that presented co-ordinated effects problems.¹⁰³ In these countries, the change from one standard to the other made a marked difference in the review of mergers. This was the case for example in Australia.
- Other jurisdictions moved to the SLC test principally to eliminate the uncertainty over the reach of the dominance standard, for example, whether it extended to situations where horizontal mergers would lead to unilateral effects¹⁰⁴ without creating a clear market leader. This was the case of the EU, while other countries (e.g. Czech Republic and Poland) have switched to the SLC test to adapt their standard to that of other countries or jurisdictions.

¹⁰² No OECD jurisdiction is reported to have switched from the SLC to the dominance test.

¹⁰³ The 2010 US Horizontal Merger Guidelines define co-ordinated effects as follows: “A merger may diminish competition by enabling or encouraging post-merger co-ordinated interaction among firms in the relevant market that harms customers. Co-ordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm’s incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm’s incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.” (Section 7)

¹⁰⁴ 2010 US Horizontal Merger Guidelines define unilateral effects as follows: “The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case.” (Section 6)

- In other countries, the introduction of the SLC test was used to enhance the role of economic analysis in merger review.
- In some jurisdictions the reform was justified by the consideration that the SLC test allows them to properly assess mergers that would have been more problematic to evaluate under the dominance standard, such as non-horizontal mergers.
- Many OECD Member countries reported that one of the reasons for changing the test was to align their merger regimes to that of other jurisdictions.¹⁰⁵
- Some countries, finally, argued that the SLC standard allows for a more flexible and appropriate assessment of some mergers because it reduces the reliance on a formal market definition.¹⁰⁶

¹⁰⁵ This was the case of many EU member states, and of Australia and New Zealand.

¹⁰⁶ In the UK experience, for example, there are cases in which it is not necessary to formally define the market because at a “quick look” it is clear that the merger is not anti-competitive regardless of how one defines the market. In such cases, the merger review can be much faster under an SLC standard, since formal market definition often takes a significant amount of time. In all cases the UK does not consider that any market definition determines the outcome of the Authorities’ analysis.

The new merger test in the European Union

The European Union adopted its first merger statute (the Merger Regulation)¹⁰⁷ in 1989 and the substantive test for all merger cases was the dominance test. Article 2(3) of the Merger Regulation stipulated that a concentration “which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.”

In 2004, the Merger Regulation was amended¹⁰⁸ and a new substantive test for mergers was adopted. According to the merger regulation itself, the reform of the merger test was necessary to fill the perceived gap in the dominance test. Today, the European Commission applies a SLC-type test for all mergers and acquisitions. According to Article 2.2 of the Merger Regulation, “a concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market”¹⁰⁹. The SIEC is considered to be equivalent to a SLC and is interpreted as extending, beyond the concept of dominance, to the anti-competitive effects of a concentration resulting from the non-co-ordinated behaviour of undertakings which would not have a dominant position on the market concerned.

The trend towards the adoption of the SLC test by an increasing number of countries sparked a lively debate in the competition community on the potential risks of such a change. Some commentators were concerned that the adoption of an SLC test would give competition authorities too much more discretion in the analysis of mergers than they had under the more formalistic dominance test, and consequently lead to over-enforcement and to a chilling effect on pro-competitive mergers. In this respect, the experience of OECD countries that have moved to the SLC test indicates that the intervention rate against mergers has not increased following the adoption of the SLC test. This may be attributed to the fact that the change to an SLC test has, for most countries, aligned the wording of the test with the existing enforcement practice.

¹⁰⁷ See Council Regulation Nr. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.

¹⁰⁸ See Council Regulation Nr. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings.

¹⁰⁹ In practice, the new merger test reverses the two limbs of the old dominance test and the creation or strengthening of a dominant position becomes now only one possible theory of harm under which a merger can be considered incompatible with the common market.

With respect to legal certainty, arguments were made that the SLC test is inherently more complex than the dominance test, and that the latter provides bright line rules and therefore offers firms a higher degree of legal certainty. However, many delegations emphasized that the SLC standard can provide a comparable level of legal certainty, in particular if accompanied by the adoption of guidelines explaining in detail how the test is applied. OECD Member countries (Australia (2008), Canada (2004 and 2011), Japan (2011), Korea (2007), the US (2010)) and the European Union (2004 and 2008) have recently adopted explanatory guidelines or reviewed and updated existing guidance documents,.

This trend towards a standard of review of mergers based on the SLC test has two important consequences:

- First, the SLC test lends itself more to an economics-based approach to assessing mergers. It concentrates the analysis on the effects of the transactions, whereas the dominance test follows a more structural approach, putting more emphasis on market definition and market shares.¹¹⁰ However, even countries that still have the dominance test in their merger statute engage in more effects-based analysis.
- Second, greater homogeneity in the standard of review among mergers facilitates international co-operation between enforcers on cross-border merger cases. The same standard provides competition authorities with the same frame of reference and allows them to focus on similarities rather than differences.

7.2 The increased reliance on economic analysis to assess likely anti-competitive effects

Another important distinct trend in the last years has been the increased importance of economic, effects-based analysis in the review of the likely effects of mergers on competition.¹¹¹ The antitrust community has increasingly recognised over the last 10-15 years that maximisation of consumer welfare is best achieved by a competition policy centred on the analysis of the likely effects of firms' conduct. It also acknowledges that effects analysis should be solidly grounded in economics. The growing acceptance of the importance of economics is reflected not just in the enforcement practice of national

¹¹⁰ See also discussion below.

¹¹¹ This was the case not only with merger review, but with collusive and unilateral practices as well.

competition authorities but also in the attitude of national courts. In particular, there have been increasing demands on competition authorities for substantial economic support for arguments advanced in a competition law context.

Modern antitrust analysis is sophisticated, challenging and complex. This is particularly the case in the field of merger control. Defining the relevant markets, assessing if the merging firms will have market power, analysing the competitive effects of the transaction, and assessing and quantifying likely efficiencies, are complex exercises central to the review of many mergers. Investigating such transactions, often under strict statutory deadlines, is challenging and requires sophisticated analyses and expertise. These analyses provide specific tools that help inform the examination of particular issues in a given case and bring complex factual settings to coherence.¹¹²

Competition authorities of OECD Member countries frequently rely on statistical, econometric or other advanced quantitative techniques for complex merger analysis. These techniques require careful data gathering and systematic processing. The use of econometrics and other quantitative techniques to assess complex mergers is widespread among competition authorities. Both large, long-established authorities and smaller, newer authorities regularly report using a variety of these relatively new analytical tools. These techniques have been used in a variety of contexts and to address issues such as defining the relevant market, measuring market power, analysing unilateral or co-ordinated effects and quantifying likely efficiency gains.

¹¹² See also the ICN Recommended Practices on merger analysis available at http://www.jftc.go.jp/en/international_relations/icn/kyoto-materials/pdf/Merger_WG_1.pdf.

Upward Pricing Pressure and Merger Simulation models

Upward Pricing Pressure (“UPP”) indices measure diversion ratios and capture the incentives of merging parties to raise prices post-merger. They can be useful screening measures. UPP measures based on the diversion ratio between two firms and the margins of the firms are simple measures that capture the *incentives* of the merging parties to raise prices post-merger. They are useful screening measures, allowing competition authorities to assess whether a more in-depth investigation to consider factors such as barriers to entry, buyer power etc, is needed. However, UPP measures should not be treated as predictors of future price rises or “merger simulation lite”. The measures are sensitive to the values of the inputs and so the range of plausible input values can lead to a large range for the UPP.

Merger simulations attempt to predict directly the effect of a merger rather than using indirect measures such as market definition. Merger simulations are usually treated with care as their results can be very sensitive to the assumptions made, particularly with respect to the nature of demand. It is difficult to estimate elasticities precisely and to model the exact nature of competition within a market. Authorities have found that merger simulations are useful when they take account of the particular facts of the market in question. For example, merger simulation has been adopted to assess electricity generation mergers, as the institutional arrangements for the market are clear and lead to clear models for competitive interaction. However, even a well-designed merger simulation is only part of the story, and can omit a number of factors usually considered very important in merger analysis including barriers to entry, buyer power, product repositioning and non-price competition. Merger simulations have been carried out in a number of countries, but because of their limitations their use was not as extensive as originally predicted.

Competition authorities generally agree on both the value and limitations of quantitative and statistical approaches. New analytical tools increase the precision of the analysis and make it easier to consider and simulate different consequences based on different assumptions. However, authorities agree that the outcome of the analysis depends entirely on the model selected as well as on the quality of the data used. For this reason, competition authority decisions can never rely solely on econometric modelling. The analysis takes time and talent, and often both are in short supply given the restrictions that authorities have to deal with in the merger process. This process cannot be automated. Rather, any good model must be based on a firm understanding of the characteristics of the industry. In general, models and econometric analysis must pass a “common sense” test. A review of country experiences with models shows that simulations, surveys and market studies can be very useful, but as complements to traditional tools and techniques, not substitutes for them.

In order to deal with the complexities of the extensive use of economic tools in mergers analysis and to provide the merging parties with a clear legal framework for the use of economic tools in support of their case, a number of competition authorities have issued “Best Practice Guidelines” for the presentation of economic evidence in merger cases.¹¹³ These guidelines stress a number of important characteristics that economic evidence should exhibit. Economic evidence should be based on clear economic theory; it should make clear what question it is seeking to answer and why this question is relevant; it should be transparent and replicable, so that each side can understand the analysis and reassure themselves that the analysis is sound; and it should ideally be intuitive so that non-economists are able to understand the significance of the analysis. It is therefore necessary to: (i) ensure that economic analysis meets certain minimum technical standards at the outset, (ii) facilitate the effective gathering and exchange of facts and evidence, in particular any underlying quantitative data, and (iii) use in an effective way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative. These disciplines apply as much to competition authorities as to the parties to a merger.

7.3 *Recent trends in merger remedies*

The area of remedial actions that competition authorities can request to approve a merger which may have anti-competitive effects absent the remedies has seen important developments in recent years. Remedies were discussed by the Competition Committee in October 2003 and by WP3 in June 2011. The increasing number of transnational mergers has also caused more intensive co-operation among competition authorities.¹¹⁴

Remedies are conventionally classified as either *structural* or *behavioural*.¹¹⁵ Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing remedies that are designed to modify or constrain the

¹¹³ See for example the European Commission Best Practices for the Submission of Economic Evidence and data Collection in Cases concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, Staff Working Paper, October 201 (provisionally applicable); and the German Federal Cartel Office Best practices for expert economic opinions, 20 October 2010.

¹¹⁴ See Section 4.3.

¹¹⁵ In some jurisdictions, behavioural remedies are referred to also as “conduct remedies”.

behaviour of merging firms. In many jurisdictions there is a strong presumption, at least for horizontal mergers, that a structural remedy is preferable to behavioural remedies.

Traditionally, most competition authorities have a strong preference for structural remedies in the form of divestitures. Given that mergers bring about structural, permanent changes in the market, a structural remedy frequently will be the most appropriate solution as it addresses the cause of the competitive detriment directly, and will incur lower ongoing costs of monitoring or possible market distortion. In addition to being more effective, structural remedies also typically are easier to administer because they do not require ongoing monitoring by authorities. Despite the preference for structural remedies, competition authorities have increasingly started considering behavioural remedies,¹¹⁶ particularly if offered as part of a remedy package with structural elements, but they continue to endorse the principle of priority of structural measures.

The structural/behavioural dichotomy however does not imply that the two sorts of remedies are mutually exclusive. It is sometimes necessary to use a combination drawn from both categories, and some behavioural measures can be regarded as quasi-structural. Some behavioural remedies, such as the obligation to grant access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights and essential inputs, might have in certain circumstances effects equivalent to a divestiture.¹¹⁷ These remedies might be suitable to address the adverse effects of a merger by facilitating competitors' market access/expansion in those cases where it is sufficiently clear that there will be actual entry/expansion of competitors that would eliminate such adverse effects. Some competition authorities find that structural remedies in the form of divestitures are not always more efficient and less costly than behavioural remedies. In particular where divestiture would be impracticable or disproportionate in order to remedy the adverse effects arising from a merger, behavioural remedies might sometimes be preferable. This will apply especially in the case of mergers with vertical elements, and where markets are quickly developing and future developments are difficult to anticipate.

¹¹⁶ In Belgium most conditional approval decisions contain behavioural rather than structural remedies. In Korea, the KFTC has recently relied more on behavioural remedies than in the past but it continued to endorse the principle of priority of structural measures.

¹¹⁷ These commitments are usually behavioural remedies with structural effects and not purely behavioural ones.

The success of a structural divestiture depends largely (if not exclusively) on the existence of suitable purchasers interested in acquiring the assets to be divested. The recent financial and economic turmoil has emphasized the fact that there may be circumstances when there are simply no purchasers interested in the assets. According to many jurisdictions this deprives the reviewing authority of a structural solution to the concerns identified during the investigation, and leaves it with the only option of prohibiting the transaction. Similar issues can arise in small economies where structural remedies might sometimes be more difficult to implement than behavioural remedies, simply because the consolidated nature of certain industries excludes most incumbents from considering the purchase of the divested assets.

In light of these various constraints that may limit the use of structural remedies, authorities have started increasingly to consider the possibility of accepting behavioural remedies, particularly if offered as part of a remedy package with structural elements. Purely behavioural remedies are used cautiously, as the implementation of such remedies needs to be closely monitored.

Use of behavioural remedies in recent US merger cases

Behavioural remedies have been applied by US enforcement authorities in several recent merger cases. Some recent examples illustrate this approach to remedies:

- In **Comcast Corp. / NBC** (2011), the Department of Justice expressed concerns that the deal would disadvantage Comcast's video programming distribution competitors by giving Comcast the power to deny access to, or raise the cost of, NBC's programming. Among other things, the settlement required Comcast (i) to make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors, and (ii) to offer an OVD broadcast, cable and film content that is similar to, or better than, the content the distributor receives from any of the joint venture's programming peers. The settlement also prohibits Comcast from retaliating against any broadcast network (or its affiliate), cable programmer, production studio or content licensee for licensing content to a Comcast/NBC competitor, or for raising concerns with the Federal Communication Commission or Department of Justice. Additionally, Comcast is required to give other firms' content equal treatment under any of its broadband offerings that involve usage-based pricing. Comcast, finally, may not (with certain narrow exceptions) require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.
- The Antitrust Division adopted a tailored approach to the settlement of the **Ticketmaster / Live Nation** (2010) acquisition whereby both structural and behavioural remedies were used. Under the terms of the decree, Ticketmaster agreed (i) to license its primary ticketing software to its competitor AEG, (ii) to divest certain recently acquired ticketing assets, allowing the purchaser of such assets to compete head-to-head with the merged entity, and (iii) to comply with provisions prohibiting the merged firm from retaliating against any venue that chooses to use another company's primary ticketing services and from conditioning the provision of live entertainment events on the customer refraining from contracting with a competitor for primary ticketing services or conditioning the provision of primary ticketing services on the customer refraining from contracting with a competitor for provision of live entertainment events. The decree also required firewalls to protect confidential and valuable competitor data, preventing the merged firm from using information from its ticketing business in the operation of its promotions or artist management business.
- In **PepsiCo Inc. / Pepsi Bottling** (2010) - PepsiCo's USD 7.8 billion acquisition of its two largest bottlers and distributors - the Federal Trade Commission decree required that PepsiCo restrict its access to confidential

competitive information of rival Dr Pepper Snapple Group, as the acquired companies also distributed Dr Pepper Snapple Group carbonated soft drinks. Under the order, PepsiCo is required to set up a firewall to ensure that its ownership of these bottlers does not give PepsiCo's employees access to commercially sensitive and confidential information of Dr Pepper Snapple marketing and brand plans.

The increased use of behavioural remedies, either on a stand-alone basis or as part of a complex remedies package, to address anti-competitive issues arising from mergers requires some form of monitoring with a view to guaranteeing the correct implementation of the commitment by the merged entity.¹¹⁸ It is for this reason that the use of behavioural remedies is increasingly accompanied by the use of arbitration clauses, whereby the merged entity undertakes *erga omnes* to submit to an arbitration panel questions related to the implementation of the remedies attached to the conditional merger decision, i.e. any litigation arising from an alleged infringement of the obligations under the remedy package. These types of remedies have proved particularly successful with so-called “access commitment” issues, i.e. in cases involving remedies providing for the granting of access for third parties to a particular facility or infrastructure controlled by the merged entity, such as access to a physical network, a key technology, media content or more generally access to any important infrastructure or asset.

The peculiarity of arbitration clauses used as remedies in merger decisions is that the merging parties take obligations towards those third parties (normally competitors or customers) which are intended to benefit from the remedy and countervail the increase in the merging party's market power as a result of the merger. Thus, in addition to relations between the merging firm and the competition authority, which remains responsible for the effective enforcement of the remedies, the commitments also give rise to obligations for the merging firm towards private parties and to corresponding rights for the latter. The arbitrator's jurisdiction is limited to adjudicating the civil law consequences of the incorrect implementation or non-implementation of the remedies in question. In other words, the arbitrator is only empowered to award private law remedies. The competition authority, on the other hand, preserves its prerogative to impose the traditional public law sanctions on a merged entity

¹¹⁸ The need for ongoing monitoring of the implementation of behavioural remedies, which makes these types of remedies more burdensome to administer, is one of the reasons why authorities tend to view structural remedies as the preferred type of remedy.

which does not comply with its obligations under the merger decision (*e.g.* the imposition of fines).

The advantage of these forms of dispute resolution is that through the arbitration process the competition authority can ensure the monitoring of the relevant behavioural commitments, without having to overstrain public resources. Essentially, the option to resort to arbitration offers all potential third-party beneficiaries an incentive to ensure the accurate implementation of the remedies by the merged entity and directly to enforce the rights they derive from those remedies before an arbitral tribunal. Hence, the potential beneficiaries' private interest will serve as a monitoring mechanism, which could potentially be more effective than monitoring by the competition authority.

The use of arbitration clauses under the EU Merger Regulation

The European Commission has a relatively long-standing expertise with the use of arbitration clauses in merger remedies packages. The first instance in which these clauses were included in a conditional merger clearance dates back to 1992 (case Elf/Aquitaine-Thyssen/Minol). This experience is reflected in the 2008 Merger Remedies Notice, which states at paragraph 66:

“Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them (...). Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned.”

Recent examples of arbitration clauses in EU conditional merger decisions include¹¹⁹:

- *Access commitments and arbitration clauses:* Lufthansa/Austrian, Lufthansa/SN, Iberia/Vueling/Clickair 5 Airline cases with access to slots commitments); Deutsche Bahn/EWS – (access in the railway sector); Axalto/Gemplus (access to patents and inter-operability information concerning smart cards); SFR/Télé2 (non-discriminatory access to pay-TV channels)
- *Alternative dispute resolution by Trustee and appeal to Commission/regulatory authority:* SNCF/LCR/Eurostar
- *Access commitments and dispute resolution by regulatory authorities:* Newscorp/Telepiù (Italian AGCOM); Alcatel/Finmeccanica (appointment of arbitrators by ESA/NASA); T-Mobile Austria/tele.ring (Austrian telecoms regulator RTR)
- *Arbitration within contractual relationships:* GdF/Suez (arbitration over gas storage transfer with purchaser); DFDS/Norfolk (arbitration over “Space Charter Agreement”); Akzo/ICI and Schering-Plough/Organon (arbitration over transitional arrangements and trademarks); Friesland/Campina (arbitration over supply agreements concerning Dutch Milk Fund); Newscorp/Premiere (arbitration over access to technical Pay-TV platform).

¹¹⁹

Recent U.S. Department of Justice merger consent decrees have also included arbitration provisions; see *Google/ITA*,

8. Areas of possible further discussion at the OECD Competition Committee

The discussion in the Competition Committee indicated that it will continue to consider merger control as one of its top priorities. Two main areas were identified as possible topics for future work for the Committee or its working parties:¹²⁰

- i) addressing the question of which transactions constitute a “merger” for the purpose of merger control review;
- ii) co-ordination in the definition and implementation of remedies in cross-border cases.

8.1 *The notion of “merger” for merger control purpose*

The lack of an internationally agreed definition of what constitutes a “merger” for purpose of competition law creates different regulatory regimes for transactions with cross-border effects. Such transactions may be subject to antitrust scrutiny in certain jurisdictions (i.e. those which endorse a wider notion of “merger”) but not in others. The issue arises in particular with regards to creation of a joint venture, the acquisition of minority shareholding, and internal restructuring and consolidations.¹²¹

In most countries, only transactions which lead to an acquisition of control, or to a qualitative change in the nature of control, are subject to review. This is for example the case of the European Union merger review regime and of merger review regimes modelled after it. In other jurisdictions merger review rules apply to a wide range of transactions, including those which do not confer control. For example, the United Kingdom's Office of Fair Trading (OFT) has jurisdiction over transactions where one party acquires the ability to "materially

<http://www.justice.gov/atr/cases/f269600/269620.pdf>, and *Comcast/NBC*,
<http://www.justice.gov/atr/cases/f266100/266158.htm>.

¹²⁰ During the discussion, there was some interest also in (i) working on a definition what should constitute an “appropriate nexus” for purpose of jurisdiction on mergers, which could possibly be a point for future revision of the Recommendation; and (ii) looking into the reasons why there are still areas of non-compliance with the Recommendation.

¹²¹ See ICN paper on “Defining “Merger” Transactions for Purposes of Merger Review,” available at
<http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>.

influence" another party. "Material influence" is not equivalent to full control, so transactions falling short of the notion of control may nevertheless fall in the jurisdiction of the OFT. The German concept of a competitively significant influence is very similar to this approach. In the United States, the competition authorities have broad jurisdiction over mergers. The jurisdiction is not premised on the concept of change in the control of a company but extends to any acquisition of "the whole or any part of the stock or other share capital" of another firm and prohibits them where "the effect of such acquisition may be substantially to lessen competition".¹²²

Depending on the legal regime applicable, acquisitions of minority shareholdings may or may not qualify for a notification under the merger control rules. This may create enforcement gaps and generate risk of under enforcement. In 2008, WP3 discussed enforcement issues related to minority shareholdings and interlocking directorates,¹²³ and concluded that because of the different notions of what constitutes a reportable event under national merger control regimes, some acquisitions of minority stakes with anti-competitive effects may go unscrutinised. If merger control does not apply, competition law provisions concerning restrictive agreements and unilateral conduct can be applied to review the competitive effects of minority shareholdings. The application of rules on restrictive agreements, however, can be challenging because such rules apply only if an "agreement" exists and anti-competitive effects can be established. In a similar way, the application of the rules on unilateral conduct is limited by the need to show substantial market power and unlawful conduct.

¹²² See Section 7 of the Clayton Antitrust Act, 1914, 15 U.S.C. §§ 12-27.

¹²³ See [DAF/COMP\(2008\)30](#).

Possible anti-competitive effects of minority shareholdings

A minority shareholding can under some circumstances result in less output and higher prices. For example, if a firm owns equity in a competitor, the financial losses incurred by the competitor will affect the value of the firm's investment. In this scenario, the firm may have less incentive to compete against the company it has invested in. It may also have an incentive to unilaterally reduce output and raise prices, if it is in a position to recoup all or part of the lost sales through its financial participation in the target.

Structural links between competitors in the form of direct or reciprocal minority shareholdings may in certain circumstances facilitate express or tacit collusion; the minority shareholder is given access to information about the target, which facilitates collusion, or the monitoring of the target's adherence to the commonly agreed conduct. As with unilateral effects, minority ownerships might change the payoffs for the companies involved, or their respective incentives to deviate from a collusive agreement or to engage in a pricing war to punish deviations from a collusive agreement. Investments in competing companies may also signal to the rest of the market that there is an intention to compete less vigorously. This may induce the whole industry to reduce competition and favour a collusive equilibrium to the detriment of consumers.

Similarly, some jurisdictions subject joint ventures, or some types of joint ventures, to the same review process for mergers. This is, for example, the case in the European Union where full-function joint ventures having a community dimension are treated as mergers, and therefore can be submitted to the European Commission for clearance under its merger review system. Such clearance or notification is not required for joint ventures excluded from merger review, which are therefore subject to general rules on agreements between competitors. In a number of OECD Member countries, joint ventures are not subject to merger control rules at all, and in others joint ventures can be subject to both merger review and prohibitions against anti-competitive agreements.

When countries' laws have important differences in procedural and substantive treatment accorded to mergers as opposed to agreements between competitors, firms may have strong incentives to structure their joint ventures in ways that might be sub-optimal from a straight economic efficiency perspective. In other words, parent companies may have strong incentives to structure joint ventures so they either do or do not qualify for merger treatment, rather than simply adopting the form expected to be most profitable, i.e. usually the one most conducive to reaping efficiencies through the joint venture.

8.2 *International co-operation in the design, enforcement and monitoring of remedies*

Over the last years, merger enforcement has become increasingly more cross-border¹²⁴ and which remedial actions should be taken to counteract the anti-competitive effects of cross-border mergers is a key element of the decision-making process. In cross-border cases, the competition authorities involved in the review of the transaction face significant challenges. In particular, if they identify anti-competitive effects in their jurisdiction, they may have to consider adopting cross-border remedies in order to address domestic concerns. Conflicts could also arise if remedies are changed or reviewed after the transaction has been approved by all reviewing jurisdictions. In this case, the potential modification of remedies in one jurisdiction could result in inconsistencies with remedies applied in another jurisdiction, especially if there is no need to review the remedies previously agreed in this other jurisdiction.

Consultation and co-operation between competition authorities on the question of remedies in cross-border merger cases is especially important in light of the serious potential for conflict which can arise in a number of contexts. These contexts include:

- first, the relevant competition authorities might reach conflicting conclusions concerning the need for remedies in the same cross-border merger case, particularly if the “centre of gravity of the merger” is located in a jurisdiction which has decided not to take action against the merger;
- second, two competition authorities could identify competitive concerns with respect to different aspects of the same merger operation, in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority.

Bilateral co-operation in these contexts brings a number of important benefits to both the competition authorities and the merging parties. The

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The term “cross-border remedy” is used to refer to a situation where a competition authority is seeking a remedy in a merger case, but the merging parties and/or their assets are located abroad and therefore a remedy would require the sale of assets or certain conduct of the merged entity in another jurisdiction. Issues which could arise with cross-border remedies involve mainly (i) co-operation and co-ordination of enforcement actions among competition authorities reviewing the same transaction and seeking remedies; and (ii) monitoring and enforcing remedies that are not purely domestic.

benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case when co-operation enhances the prospects for effective design and implementation of a remedy in a particular case. Co-operation between competition authorities in the remedies phase is, therefore, of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussions at the OECD have explored different options for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities.

ICPAC Report¹²⁵ and cross-border remedies

The ICPAC Report in 2000 examined the possibility of work sharing arrangements in the remedies phase in great detail and concluded that employing these cooperative approaches more frequently could have significant benefits. It considered different scenarios in which these arrangements could be used: (i) joint negotiation, where each interested jurisdiction would identify its concerns regarding the likely anti-competitive effects of a proposed transaction, and separately implement jointly negotiated remedies; and (ii) designating one jurisdiction as “lead jurisdiction” which negotiates remedies with the merging parties that will address the concerns of the “lead jurisdiction” as well as other interested jurisdictions. The second case can include a situation in which the competitive concerns of all jurisdictions involved in the review are identical, but also a situation in which the “lead jurisdiction” seeks remedies that go beyond what it necessary to satisfy its own concerns in order to address competitive concerns of other cooperating jurisdictions.

The Competition Committee could explore under what circumstances such arrangements might work (or have worked in the past), whether such arrangements could be applied more frequently in the future, and which (legal and practical) obstacles exist to such arrangements. For example, the other jurisdictions reviewing the same merger might not be able to suspend their own merger review process and deadlines in order to grant another competition authority “lead agency” status in the remedies phase. Or because of *ultra vires* concerns, the jurisdiction that is designated as “lead jurisdiction” might not be able to impose remedies that address competitive concerns that exist only in other jurisdictions reviewing the same merger, but not in its own jurisdiction.

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ICPAC is the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust. It was formed in November 1997 to address the global antitrust problems of the 21st century and concluded its works in June 2000. The ICPAC recommendations and conclusions are included in a report published on 28 February 2000. The full report is available at <http://www.justice.gov/atr/icpac/finalreport.html>.

ANNEX I**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 14 December 1960;

HAVING REGARD to the Council's Recommendation concerning Co-operation between Member Countries on Anti-competitive 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 co-operation and co-ordination 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:
 - i) Assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;

- ii) 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;
 - iii) Set reasonable information requirements consistent with effective merger review;
 - iv) Provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance; and
 - v) 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. Co-ordination and Co-operation

1. Member countries should, without compromising effective enforcement of domestic laws, seek to co-operate and to co-ordinate 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 co-operation and co-ordination 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 co-operation and co-ordination.
3. Member countries should encourage merging parties to facilitate co-ordination 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 co-operate and co-ordinate 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.

“Merger 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 co-ordination and co-operation among authorities, including by co-ordinating 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 co-operation and co-ordination in the review of transnational mergers.

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

ANNEX II**LIST OF ROUNDTABLE DISCUSSIONS IN THE MERGER AREA**

(1996 – 2011)

- 1996 - Failing Firm Defence, [OCDE/GD\(96\)23](#)
- 1996 - Efficiency Claims in Mergers and Other Horizontal Agreements, [OCDE/GD\(96\)65](#)
- 2000 - Airline Mergers and Alliances, [DAFFE/CLP\(2000\)1](#)
- 2000 - Mergers in Financial Services, [DAFFE/CLP\(2000\)17](#)
- 2000 - Competition Issues in Joint Ventures, [DAFFE/CLP\(2000\)33](#)
- 2002 - Portfolio Effects in Conglomerate Mergers, [DAFFE/COMP\(2002\)5](#)
- 2002 - Merger Review in Emerging High Innovation Markets, [DAFFE/COMP\(2002\)20](#)
- 2003 - Substantive Criteria Used for the Assessment of Mergers, [DAFFE/COMP\(2003\)5](#)
- 2003 - Media Mergers, [DAFFE/COMP\(2003\)16](#)
- 2004 - Merger Remedies, [DAF/COMP\(2004\)21](#)
- 2007 - Vertical Mergers, [DAF/COMP\(2007\)21](#)
- 2007 - Dynamic Efficiencies in Merger Analysis, [DAF/COMP\(2007\)41](#)
- 2007 - Managing Complex Mergers, [DAF/COMP\(2007\)44](#)
- 2008 - Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates, [DAF/COMP\(2008\)30](#)
- 2009 - The Standard for Merger Review, with a Particular Emphasis on Country Experience with the change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test, [DAF/COMP\(2009\)21](#)

2009 - Failing Firm Defence, [DAF/COMP\(2009\)38](#)

2011- Cross-Border Merger Control: Challenges for Developing and Emerging Economies, [DAF/COMP/GF\(2011\)13](#)

2011 - Economic Evidence in Merger Analysis, forthcoming

2011 - Remedies in Merger Cases, forthcoming