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Merger Controls

Presentation

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22ND SESSION OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON COMPETITION LAW AND POLICY – MERGER CONTROL

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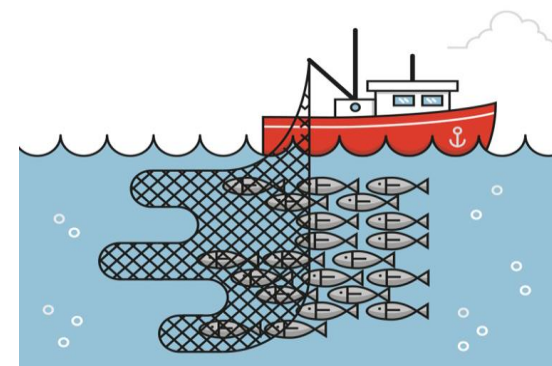


Merger Thresholds - international best practice

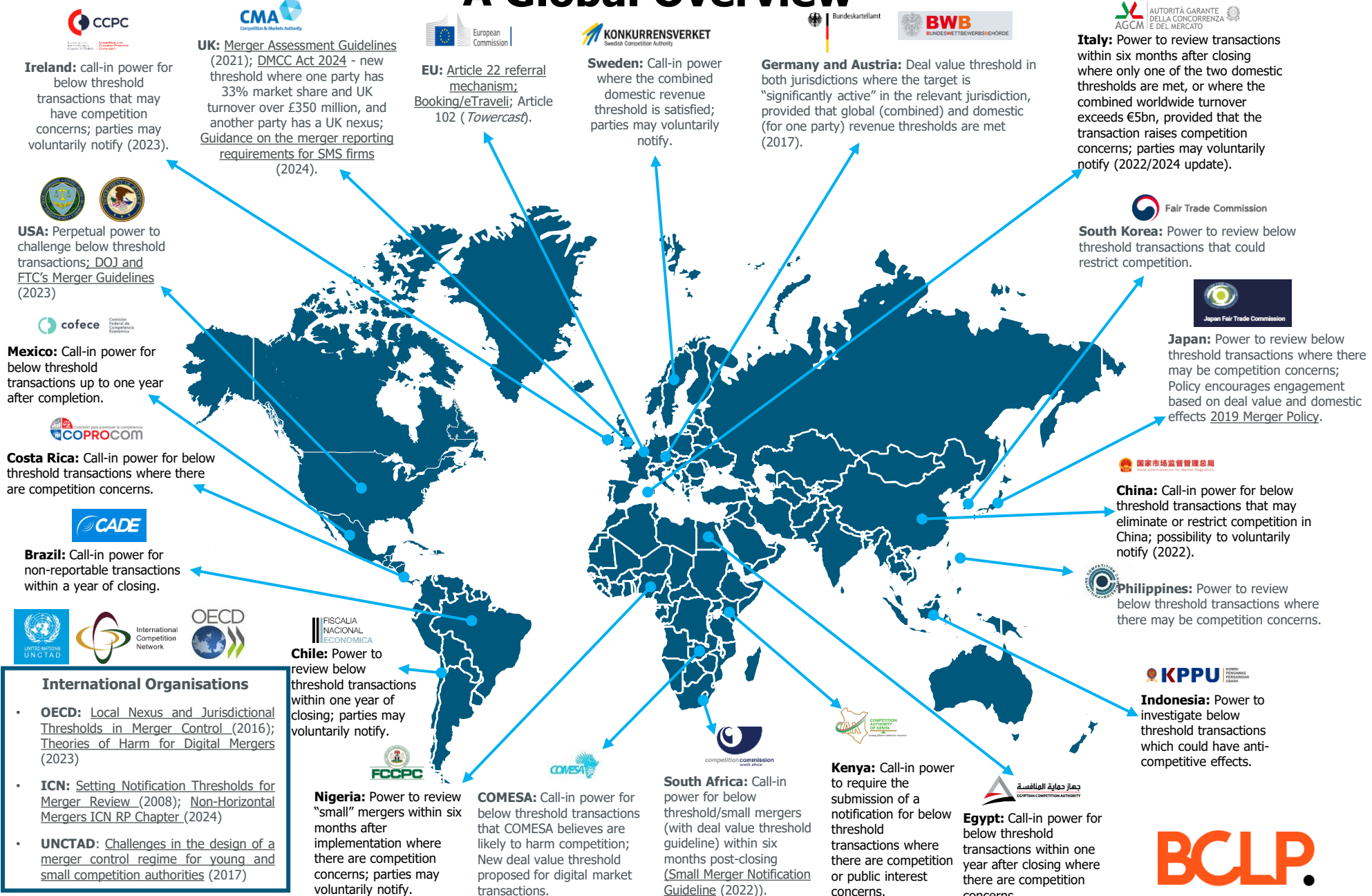
- ICN *Guiding Principles and Recommended Practices (RPs) for Merger Notification and Review Procedures* (2002-today) - two of the ICN's earliest global consensus documents
 - Contains key concepts for thresholds to foster global convergence to enhance predictability, legal certainty and consistency globally, a few key RPs relevant to merger thresholds:
 - Use appropriate "**Material Nexus**" thresholds linked to the jurisdiction based on the activities of at least two parties and/or the target in the territory (RPII(A)-(C)) – to catch relevant deals, save agency/parties' resources/time
 - Thresholds should be **clear and understandable** based upon **objectively quantifiable** criteria using information **readily available** to the parties (RPII(D)-(F)) (UNCTAD too - see 2017 "*Challenges in the design of a merger control regime for young and small competition authorities*") – to aid compliance and save time/resources
 - "**Below threshold/residual jurisdiction**" systems need a material jurisdictional nexus and should have time limits/voluntary filing options (RPII(A))
 - 2024 EU Court of Justice Advocate General (*Illumina/Graii*) agrees with ICN RP principles/policies: "*...every system of merger control existing at global level seeks to strike a balance between effective scrutiny of competition and avoidance of unnecessary costs and delays for both the merging parties and the [agency]....it is impossible to overemphasise the importance that predictability and legal certainty have, especially for merging parties.*" (emphasis added)
 - RP compliant thresholds promote merging parties' compliance and respect for the agency within the business community while saving agency resources (from too many filings, jurisdictional consults) to focus on deals with clear nexus/substantive relevance
- ICN "Setting Notification Thresholds For Merger Review" Report (2008) – lots of good guidance for creating new regime thresholds and for the reform of existing ones (including below threshold/residual powers)

Merger Thresholds – worried about missing deals?

- Remember first – the vast majority of mergers do not give rise to substantive issues – so thresholds and review procedures need to be calibrated to reduce costs/burdens/delays for the agency and the parties, to keep merger control efficient and effective
- Missed cases/blindspots – “*low revenue/high importance*” targets
 - Not a new topic – 2002 ICN “Recommended Practices” and 2008 “Setting Notification Thresholds” Report addressed this in designing thresholds/regimes, some regimes have had “call-in” powers/policies for a long time (e.g., Sweden, US, Brazil, COMESA, Philippines, Mexico), some adapted to this more recently (Germany, Austria, Italy, Japan, South Africa, China)
 - Balance in not creating uncertainty and/or too many filings while providing a way to review such deals
 - Various threshold design options to catch “low revenue/high importance” deals – how to build your “net”
 - Mandatory filings - Transaction value threshold with effects test
 - Residual/Voluntary - “Call-in” powers with time-limits on jurisdiction
 - Market share tests/overlap
 - Catch the right kind/amount of fish, but don’t swamp the boat
 - If you build it (a new net), use best practice...and harmonize with other regimes
 - ICN RPs – thresholds with nexus, but also remember filing info requirements; agency capacity; review timing-limits; voluntary filing option



Reviewing Below-Threshold Transactions: A Global Overview



Informal Cooperation and Private Parties

- Where you stand often depends on where you sit
 - Merging parties
 - Often favored by merging parties to assist and expedite international investigations
 - Agencies
 - Experience, Trust, Reciprocity, Transparency, Capacity, Understanding counterpart agency procedures
- Regardless...
 - It's all about incentives/consequences and trust among the agencies and parties
 - Informal international cooperation is gaining traction and usage as experience (public and private) develops
- Informal Cooperation vs Formal Cooperation instruments (Bilats/Mlats, MOUs)
 - Informal often most useful for merger cases (need for speed)

Int'l Cooperation (outside of regional organizations)

■ **Non-confidential information**

- Agencies engage in direct agency-to-agency exchanges of non-confidential information without any recourse to the parties
- In merger control, informal sharing often involves:
 - Public information; analysis; market definition; economic theories of harm; draft RFIs; empirical evidence needed to test theories; remedies; procedure/timing
 - See the UNCTAD Secretariat Note "*Informal Cooperation Among Agencies in Specific Cases*" Guiding Policies/Procedures (GPP); US-EU "*Best Practices on Cooperation in Merger Investigations*"; ICN "*Practical Guide to International Enforcement Cooperation in Mergers*", "*Framework for Merger Review Cooperation*" and "*RPs for Merger Notification and Review*"

■ **Confidential information**

- But to get more detailed information which can facilitate deeper cooperation, confidential business information disclosure "**waivers**" from private parties are usually needed
- The OECD/ICN Cooperation Reports have found waivers were one of the most **frequently used and relevant cooperation** tools by agencies experienced in international cooperation
 - But a **lack of waivers** was a key significant barrier to cooperation
 - So...how to address this? One way...

Incentives for private parties to cooperate/grant waivers

- Private parties may be amenable to cooperate and grant waiver requests **where it makes sense for that case** as there are many incentives and benefits, as cooperation/waivers can:
 - Save us time, money, avoid duplication on data/info supply;
 - Help us to get everyone on the same page/same terms;
 - Help us tell our global story in a coordinated/efficient manner;
 - Sometimes allow a “lead” agency(ies) to help the others which can focus and expedite an investigation;
 - Help us coordinate procedure/remedies where necessary;
 - Ultimately help facilitate convergence in approach and consistency in decision-making

Disincentives for private parties to cooperate/grant waivers

- But private parties and their counsel may be **hesitant** to give waivers - where we are unsure as to:
 - The benefits – are they clear, consistent, certain, transparent
 - The burdens – are they proportional, reasonable, bearable
 - The position of the country in question with regard to the handling of our information by the enforcement agency:
 - Can it be used for other enforcement proceedings? Other agencies?
 - Can it be accessed by third parties?
 - Position of the receiving country?
 - The agency's confidentiality protections and treatment of legal privilege
 - The agency's track record with regard to leaks of confidential information
 - Whether the agency practice is consistent with international best practices
 - The relevancy/precise scope of the information that may be requested

5 Tips for Creating a Waiver-Friendly Environment

- Agencies, in particular those with limited international cooperation experience, can build an “environment” of trust for the granting waivers by:
 1. Clarifying their protection rules/policies by issuing public statements or waiver guidelines
 2. Producing or following existing model/template waivers, such as the ICN, EC and US model waivers for merger investigations
 3. Making public the agency’s policy of maintaining confidentiality (and how)
 4. Engaging in waiver “advocacy” - explaining to the private bar and business community the incentives and benefits of waivers, as well as explaining/clarifying the agency’s policies on confidentiality and use
 5. Generate a track record on confidentiality in merger cases and publicize it
- If your agency can take these steps, it will help private parties to engage with you seriously and meaningfully in discussing and granting waivers (which will then help deepen your inter-agency cooperation)

A word of encouragement to young agencies new to international cooperation

- OECD/ICN survey found 100% of survey respondents said international cooperation was beneficial for their authority
 - Improve efficiency/effectiveness; improving relationships, trust and transparency
- International Cooperation is still emerging and developing
- Merger control is one of the most productive areas for cooperation and waivers are a key tool to informal cooperation
- International interest among agencies is at all-time high – more agencies involved than before
 - So now is a good time to engage and benefit standing on the shoulders of the work in these organizations, best practices, frameworks, templates...
- Practical Steps your agency can take right away, e.g., ask the UNCTAD Secretariat for advice/GPP, Join the ICN Merger Framework (JFTC), Look to actualize the 5 Waiver-Friendly Environment Tips...



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