Merger Controls

Presentation

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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/Grail*) 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

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

- **OECD**: Local Nexus and Jurisdictional Thresholds in Merger Control (2016); Theories of Harm for Digital Mergers (2023).
- **ICN**: Setting Notification Thresholds for Merger Review (2008); Non-Horizontal Mergers ICN RP Chapter (2024).
- **UNCTAD**: Challenges in the design of a merger control regime for young and small competition authorities (2017).

**International Organisations**

- **OECD**: Call-in power for below threshold transactions that may have competition concerns; parties may voluntarily notify (2023).
- **UNCTAD**: Setting Notification Thresholds for Merger Review (2008); Non-Horizontal Mergers ICN RP Chapter (2024).
- **ICN**: Challenges in the design of a merger control regime for young and small competition authorities (2017).

**EU**: Article 22 referral mechanism; Booking/Travel: Article 102 (Towercom).

**Sweden**: Call-in power where the combined domestic revenue threshold is satisfied; parties may voluntarily notify.

**Germany and Austria**: Deal value threshold in both jurisdictions where the target is “significantly active” in the relevant jurisdiction, provided that global (combined) and domestic (for one party) revenue thresholds are met (2017).

**UK**: Merger Assessment Guidelines (2021); DMCC Act 2024 - new threshold where one party has 33% market share and UK turnover over £350 million, and another party has a UK nexus; Guidance on the merger reporting requirements for SMS firms (2024).

**EUROPEAN COMMISSION**

**EU**: Local Nexus and Jurisdictional Thresholds in Merger Control (2016); Theories of Harm for Digital Mergers (2023).

**USA**: Perpetual power to challenge below threshold transactions; DOJ and FTC’s Merger Guidelines (2023).

**Mexico**: Call-in power for below threshold transactions up to one year after completion.

**Costa Rica**: Call-in power for below threshold transactions where there are competition concerns.

**Brazil**: Call-in power for non-reportable transactions within a year of closing.

**Chile**: Call-in power for below threshold transactions where there are competition concerns.

**Kenya**: Call-in power to require the submission of a notification for below threshold transactions where there are competition or public interest concerns.

**Reviewing Below-Threshold Transactions**

**Call**: Power to review transactions within six months after closing where only one of the two domestic thresholds are met, or where the combined worldwide turnover exceeds €5bn, provided that the transaction raises competition concerns; parties may voluntarily notify (2022/2024 update).

**South Korea**: Power to review below threshold transactions that could restrict competition.

**Philippines**: Power to review below threshold transactions where there may be competition concerns.

**Indonesia**: Power to investigate below threshold transactions which could have anti-competitive effects.

**Egypt**: Call-in power for below threshold transactions within one year after closing where there are competition concerns.

**Japan**: Power to review below threshold transactions where there may be competition concerns; Policy encourages engagement based on deal value and domestic effects 2019 Merger Policy.

**China**: Call-in power for below threshold transactions that may eliminate or restrict competition in China; possibility to voluntarily notify (2022).

**Nigeria**: Call-in power for below threshold transactions where there are competition concerns; parties may voluntarily notify.

**COMESA**: Call-in power for below threshold transactions that COMESA believes are likely to harm competition; New deal value threshold proposed for digital market transactions.

**South Africa**: Call-in power for below threshold/small mergers (with deal value threshold guideline) within six months post-closing (Small Merger Notification Guideline (2022)).
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.

- **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...