

Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report

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Executive Summary

The Merger Streamlining Group (MSG)¹ commissioned a survey of competition agencies and private law firms in 67 International Competition Network (ICN) member jurisdictions. Analysis of responses yielded the following findings regarding the ICN's initial Recommended Practices for Merger Notification Procedures² relating to Jurisdictional Nexus, Notification Thresholds and Timing of Notification:

- Responses were received from agencies in 59 per cent of jurisdictions contacted and from law firms in 63 per cent of the jurisdictions. Adjusting

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1 The members of the Group are Alcan Inc, British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Goldman Sachs International, NERA, Rio Tinto plc and Vodafone Group plc. The MSG is assisted by a project team consisting of Janet McDavid (Hogan & Hartson LLP), Phillip Proger (Jones Day), Michael Reynolds (Allen & Overy), and J William Rowley QC and Neil Campbell (McMillan Binch LLP). The assistance of Casey Halladay, Les Chaiet, Michael Hollinger and Todd Prendergast of McMillan Binch LLP in the implementation of the survey and preparation of this report is gratefully acknowledged.

2 Available online, at www.internationalcompetitionnetwork.org/2003_practices.pdf (hereinafter the 'Recommended Practices').

for overlaps, the responses cover a total of 54 (ie 81 per cent) of jurisdictions ('Responding Jurisdictions'). Forty-six of those jurisdictions have mandatory merger notification regimes, and it is these jurisdictions (which we have termed 'Notification Jurisdictions') to which most of the analysis in this report relates.³

- No Notification Jurisdiction is completely inconsistent with all three Recommended Practices, although only six are Substantially Consistent across the board.
- Over one-third of these jurisdictions are Substantially Consistent with at least one Recommended Practice, and nearly 90 per cent are at least partially consistent with all three.
- While there are few cases of complete inconsistency when the components of a specific Recommended Practice are considered, most jurisdictions have areas of partial inconsistency with individual Recommended Practices that create significant opportunities for implementing positive change.

The partial consistency category may include full consistency with some, and complete or partial inconsistency with other, component elements of each Recommended Practice. Some of the most notable findings within specific Recommended Practices are summarised below:

- Jurisdictional Nexus. Almost half of jurisdictions require notification of transactions where only the acquirer has a local presence.
- Notification Thresholds. Approximately one-third of jurisdictions rely partially (or, in rare cases, exclusively) on non-objective notification criteria such as market shares.
- Timing of Notifications. Fifty per cent of 'suspensive' jurisdictions (ie those that employ a no-close period for mergers under review) employ notification filing deadlines (many of which are commercially unreasonable), despite the admonition against doing so in the Recommended Practices.⁴ Sixty per cent of non-suspensive jurisdictions also employ a filing deadline.

The survey also collected merger caseload data, which enables some comparisons of activity levels between jurisdictions:

- The average number of mergers reviewed by Notification Jurisdictions in 2000–2002 was 373 per agency per year. However, the activity levels vary enormously, with virtually none in some jurisdictions with new notification regimes and a high of 2,830 per year in the United States.

³ Eight of the 54 (ie 15 per cent) Responding Jurisdictions indicated that they did not employ a mandatory notification regime, and consequently did not answer many of the survey questions (which were not applicable to these jurisdictions).

⁴ Recommended Practices, at III.B.

- A 'Minimum Financial Threshold' (MFT) was determined for each jurisdiction by identifying the minimum local revenue or asset levels of merging parties that could give rise to a filing. The average MFT was US\$77 million, but MFTs varied enormously, from extremely low in numerous jurisdictions to US\$607 in Denmark.
- Multiple regression analysis of merger volumes against GDP and MFT levels found that GDP had a large explanatory effect while the MFT relationship to merger review volume was not statistically significant (probably due to a combination of small sample size and simplifications inherent in the MFT determination). Nevertheless, six countries (Brazil, Germany, Italy, Poland, Taiwan and Ukraine) reviewed over 30 per cent more mergers than projected by the regression, which suggests that re-examination of thresholds may be appropriate.⁵
- With the exception of Italy and Zambia (five each), respondents were only aware (based on historic records, with no time limit) of isolated cases in which mergers had been found to require a remedy where only one or neither of the merging parties had a local presence in the jurisdiction. This is remarkably rare (relative to approximately 11,500 merger reviews per year by the 31 jurisdictions providing caseload data) and calls into question the acceptance of such reviews in the Jurisdictional Nexus Recommended Practice.

The survey responses also provided information regarding the level of government policy activity in the first seven months after the ICN's inaugural meeting:

- Public Statements. Governments in almost one-third of the Responding Jurisdictions had made supportive statements regarding implementation of the ICN's Guiding Principles for Merger Notification and Review⁶ or the Recommended Practices, and 80 per cent of those had made supportive statements with regards to both.
- Implementation of reforms. Fewer than ten per cent of Responding Jurisdictions had made changes to laws/regulations/guidelines which implement elements of the Guiding Principles or Recommended Practices in the short time period since adoption. An additional one-quarter indicated that changes are planned or under consideration. Of those jurisdictions planning or considering changes, three-quarters expected to

⁵ The number of mergers reviewed in Taiwan and Poland declined substantially in 2002 as compared to 2001 and 2000. This may indicate that these jurisdictions have already addressed the appropriateness of their respective thresholds.

⁶ Available online at www.internationalcompetitionnetwork.org/mergers_guiding.pdf (hereinafter, the 'Guiding Principles').

incorporate aspects of both the Guiding Principles and the Recommended Practices.

Background and objectives

ICN members indicated after the endorsement of the Guiding Principles and the first set of Recommended Practices that implementation would be left to the initiative of individual jurisdictions. The former Chairman of the ICN and other senior officials from member agencies have encouraged private sector participants to take an active role in promoting such implementation.⁷

This survey and report is one response to that request. It was commissioned by the MSG – a group of firms that are interested in the public policy issues related to the competition law review of multijurisdictional transactions. The MSG has previously published Best Practices for the Review of International Mergers,⁸ submitted a response to the European Commission’s Green Paper on the Review of the Merger Regulation,⁹ provided the US–EU Bilateral Merger Working Group with a report entitled ‘Best Practices for Merger Review: Analysis and Recommendations for Review Processes in the United States and the European Union,¹⁰’ and made comments on aspects of the proposed new EU Merger Regulation.¹¹

A survey was developed to obtain information from both competition law enforcement agencies and private law firms that are regularly involved in merger reviews. It was designed to gather information that is as objective as possible in order to allow an assessment of the degree of consistency or inconsistency with the Recommended Practices relating to Jurisdictional Nexus, Notification Thresholds and Timing of Notification.

7 See, for example, Konrad Von Finckenstein’s remarks to the 2003 Antitrust Conference, ‘Antitrust Issues in Today’s Economy’, New York, 19 March 2003: ‘All that being said, there is certainly a role for NGAs in advocating that members adopt the Recommended Practices and marshal support for their implementation. For example, I believe there will be questions about conformity to ICN recommendations in the next Global Competition Review survey.’ For additional discussion of the role of private sector stakeholders, see J W Rowley QC, ‘Merger Reform Needs Words and Actions’ (2003) 6 *Global Competition Review* 18 at 21.

8 *Global Competition Review*, October/November 2001, at 27.

9 Unpublished, March 2002; available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>.

10 Unpublished, November 2002; available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>.

11 Unpublished, April 2003; available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>.

This Final Report provides an analysis of the degree to which the initial round of Recommended Practices is currently in operation. It expands on a June 2003 Preliminary Report which was made available for the ICN's second annual meeting in Mérida.¹² Coming less than a year after the ICN's inaugural meeting in Naples, it can be expected that many jurisdictions whose regimes were not consistent with the Recommended Practices would not yet have effected any changes. However, this report seeks to ensure that areas of inconsistency are identified, so that changes which would implement the Recommended Practices can be considered.

Survey process

The survey consisted of 23 questions relating to components of the individual Recommended Practices, related narrative and statistical information, and a general discussion of past and anticipated future governmental activities related to implementation. A copy of the survey is attached as Appendix 1 to this report.

The survey was sent to competition agencies and law firms in late April and early May 2003, with a request for responses within approximately three weeks. A copy of the explanatory cover letter to agencies (the private law firm version was not materially different) is reproduced at Appendix 2. Follow-up reminder e-mails were sent to agencies and law firms that had not responded as the initial deadline approached. Responses were received and tabulated until 16 June 2003 for the Preliminary Report. A few responses received subsequently have also been included in this Final Report.

The list of the 67 competition law agency contacts was compiled primarily from the ICN website¹³ and supplemented from other sources. Private sector law firm survey recipients with merger review expertise in these same jurisdictions (one per country) were compiled primarily from the chapter authors of *International Mergers: The Antitrust Process*¹⁴ supplemented by various other firms as needed. The jurisdictions surveyed and the responding agencies and firms are listed in Appendix 3.

12 The Preliminary Report is available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>. It contained an initial analysis based on the tabulation of all responses received by June 2003. Follow-ups were undertaken to expand the analysis as well as with respect to a small number of ambiguities and inconsistencies between agency and private sector responses.

13 See www.internationalcompetitionnetwork.org/members.html.

14 J W Rowley QC and Donald I Baker, *International Mergers: The Antitrust Process* (3rd edn, looseleaf) (London: Sweet & Maxwell, 2000).

Response rates

The response data in respect of surveys sent to competition agencies is summarised in Table 1.

Table 1: Competition agency response rate		
Response	No	%
Substantially Complete	32	48
No Mandatory Merger Notification Regime	7 ¹⁵	11
Declined to Participate	3	4
Incomplete	0	0
No Response	25	37
Jurisdictions Surveyed	67	100

The response data for surveys sent to a private law firm in each ICN jurisdiction is summarised in Table 2.

Table 2: Private law firm response rate		
Response	No	%
Substantially Complete	37	56
No Mandatory Merger Notification Regime	4 ¹⁶	6
Declined to Participate	0	0
Incomplete	1	1
No Response	24	37
Law Firms Surveyed	67¹⁷	100

While it was disappointing not to receive responses from all ICN member agencies and law firms that were contacted, the 59 per cent and 63 per cent rates of response¹⁸ provide a sizeable profile of the current state of implementation of the Recommended Practices. Indeed, when jurisdictions

15 The agencies which indicated that their jurisdictions did not have a mandatory merger notification regime are Australia, Indonesia, Jamaica, New Zealand, Norway, Thailand and Yugoslavia.

16 The jurisdictions in which private law firms indicated that there was no mandatory merger notification regime are Australia, Chile, New Zealand and Norway.

17 Only 66 law firm surveys were sent as there was no local counsel counterpart for the Andean Community agency.

18 These percentages consider 'Substantially Complete', 'Incomplete' and 'No Mandatory Regime' responses in the rate of response.

with overlapping agency and private sector responses are consolidated, jurisdictions from which there was neither a governmental nor a private sector response amounted to only 19 per cent of jurisdictions surveyed.

The slightly higher private sector response rate may reflect resource availability (although efforts were made to keep the survey as unburdensome as possible) and/or possible self-selection biases. Agencies which are not committed to implementation of the Recommended Practices may have been less inclined to respond, while private law firms were presumably not subject to the same disincentive and may have welcomed the opportunity for visible participation in the public policy process.

Analysis of responses

Reassuringly, where responses were received from both the competition agency and a law firm for a particular jurisdiction, the detailed answers were generally congruent and the resulting conclusions regarding the level of consistency with the individual Recommended Practices were almost always the same.¹⁹

By analysing the responses to the various questions relating to each Recommended Practice, a jurisdiction's law/policies/practices were evaluated as 'Substantially Consistent', 'Partially Consistent' or 'Inconsistent' with the specific ICN recommendations (and, where applicable, commentaries). While the survey questions used standard and objective response options whenever possible, each of the Recommended Practices has multiple components, some of which contain a degree of subjectivity. The overall categorisations were determined in the following manner:

- **Substantially Consistent:** the jurisdiction's law/policies/practices are consistent with all or most of the significant elements of the Recommended Practice.
- **Inconsistent:** the jurisdiction's law/policies/practices are Inconsistent with all or most of the significant elements of the Recommended Practice.
- **Partially Consistent:** the jurisdiction's law/policies/practices are neither Substantially Consistent nor Inconsistent with the Recommended Practice. This may include partial consistency across all elements. Alternatively, there may be full consistency or inconsistency with a particular element, accompanied by differing levels of consistency with respect to other elements.

¹⁹ Where differences arose, the agency response was normally employed in lieu of the law firm response. In the evaluation of three Recommended Practices for the 24 jurisdictions where both agency and private law firm responses were received, there was only one instance (four per cent) where the conclusion regarding the level of consistency differed (Tunisia), and only with respect to Jurisdictional Nexus.

To obtain an assessment of the overall extent of implementation, each jurisdiction's results were then aggregated to determine whether it was consistent with all, some or none of the three Recommended Practices.

Findings

Overall level of implementation

Table 3 summarises the overall level of consistency of jurisdictions with the three Recommended Practices on a combined basis.

Table 3: Overall implementation of recommended practices		
Conclusion	Notification Jurisdictions	
	No	%
Substantially Consistent with All Three	6	13
At Least Partially Consistent with All Three	34	74
Some Consistency and Some Inconsistency	6	13
Inconsistent with All Three	0	0
Total	46	100

Table 3 indicates that few jurisdictions have regimes that are Substantially Consistent with all three Recommended Practices. These results suggest a significant opportunity for the ICN's work to generate improvement through increased implementation of the Recommended Practices. However, it is also encouraging that no jurisdictions were found to be completely Inconsistent. Moreover, almost three-quarters of jurisdictions are at least Partially Consistent with all three regimes, which provides a good platform for incremental change.

Implementation of specific Recommended Practices

Table 4 provides a comparative summary of implementation levels for each Recommended Practice based on the jurisdiction-by-jurisdiction analysis of responses which is set out in Appendix 3.²⁰

When the Recommended Practices are considered individually, it is

²⁰ More detailed charts showing response data for the questions relating to each Recommended Practice are provided in Schedule I (Jurisdictional Nexus), Schedule II (Notification Thresholds) and Schedule III (Timing Notification), each of which is available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>.

Table 4: Implementation of individual recommended practices						
	Jurisdictional Nexus		Notification Thresholds		Timing of Notification	
	No	%	No	%	No	%
Substantially Consistent	18	39	17	37	17	37
Partially Consistent	28	61	27	59	25	54
Inconsistent	0	0	2	4	4	9
Total	46	100	46	100	46	100

apparent that more than one-third of jurisdictions are Substantially Consistent in at least one area. Most of the remainder are Partially Consistent with each Recommended Practice. Outright Inconsistent situations are rare. However, as noted above, the Partially Consistent category may mask Inconsistent components of the multifaceted structure of each Recommended Practice.

Jurisdictional Nexus – key components

The Recommended Practices state that notification thresholds should ‘incorporate appropriate standards of materiality as to the level of ‘local nexus’ required, such as material sales or assets levels’ within the jurisdiction concerned.²¹ The survey asked respondents what kinds of local activity were sufficient to establish jurisdiction over the parties to a merger transaction. Table 5 contains the results from this question.²²

Table 5 shows that the type of activity considered in establishing jurisdiction over the merging parties is generally consistent with the Recommended Practice. It was somewhat surprising that only 74 per cent of jurisdictions indicated that a local presence was sufficient to establish jurisdiction over merging parties. It is possible that the survey question, which offered multiple answer options, was drafted in a way that created some confusion (although it did indicate that respondents should ‘check all boxes that apply’). However, of the 12 jurisdictions that indicated that local presence was not sufficient,²³ most²⁴ did at least rely on the ‘sales in or into’ aspect of the Recommended Practice to establish jurisdiction. Worldwide sales almost never form the sole basis on which to assert jurisdiction and very few jurisdictions reported that other activity is used to establish jurisdiction over merging parties.

21 Recommended Practices, at I.B.

22 For the underlying source data, see the responses to Survey Question No 6 in Schedule I.

23 Belgium, European Union, Germany, Iceland, Italy, Kenya, Macedonia, Malta, Slovenia, Sweden, Switzerland and Turkey.

24 The exceptions were Kenya, Macedonia and Switzerland.

Table 5: Local activity sufficient to establish jurisdiction

Extent of Local Activity ²⁵	Notification Jurisdictions	
	No	%
Local Presence (Assets/Subsidiary)	34	74
Sales to Local Distributor	31	67
Other Sales into Jurisdiction	31	67
Worldwide Sales	1 ²⁶	2
Other	2	4

Another important dimension of the Jurisdictional Nexus Recommended Practice is that a ‘material’ amount of local activity should be required in order to justify a notification requirement.²⁷ Unfortunately, since materiality is a subjective and context-sensitive concept, no quantitative guidelines have been put forward.

In an effort to provide some data that could advance debate in this area, the survey gathered information regarding actual filing thresholds. Such responses take a wide variety of forms, since: the financial measures vary (eg revenues, assets, etc); many jurisdictions apply two or more thresholds in either ‘necessary’ or ‘sufficient’ permutations; the number of parties considered to calculate the financial measure used by each permutation varies (eg the revenues or assets of a single party, a first party and a second party, all parties combined, each of at least two parties, etc); the basis of measurement differs (eg domestic, import and/or export sales); and there are assorted other technical measurement issues. Notwithstanding these complexities, we attempted to develop the concept of an MFT which reflected the lowest level of local revenues or assets that may give rise to a filing based on the overall operation of the reported thresholds.²⁸ While this method of

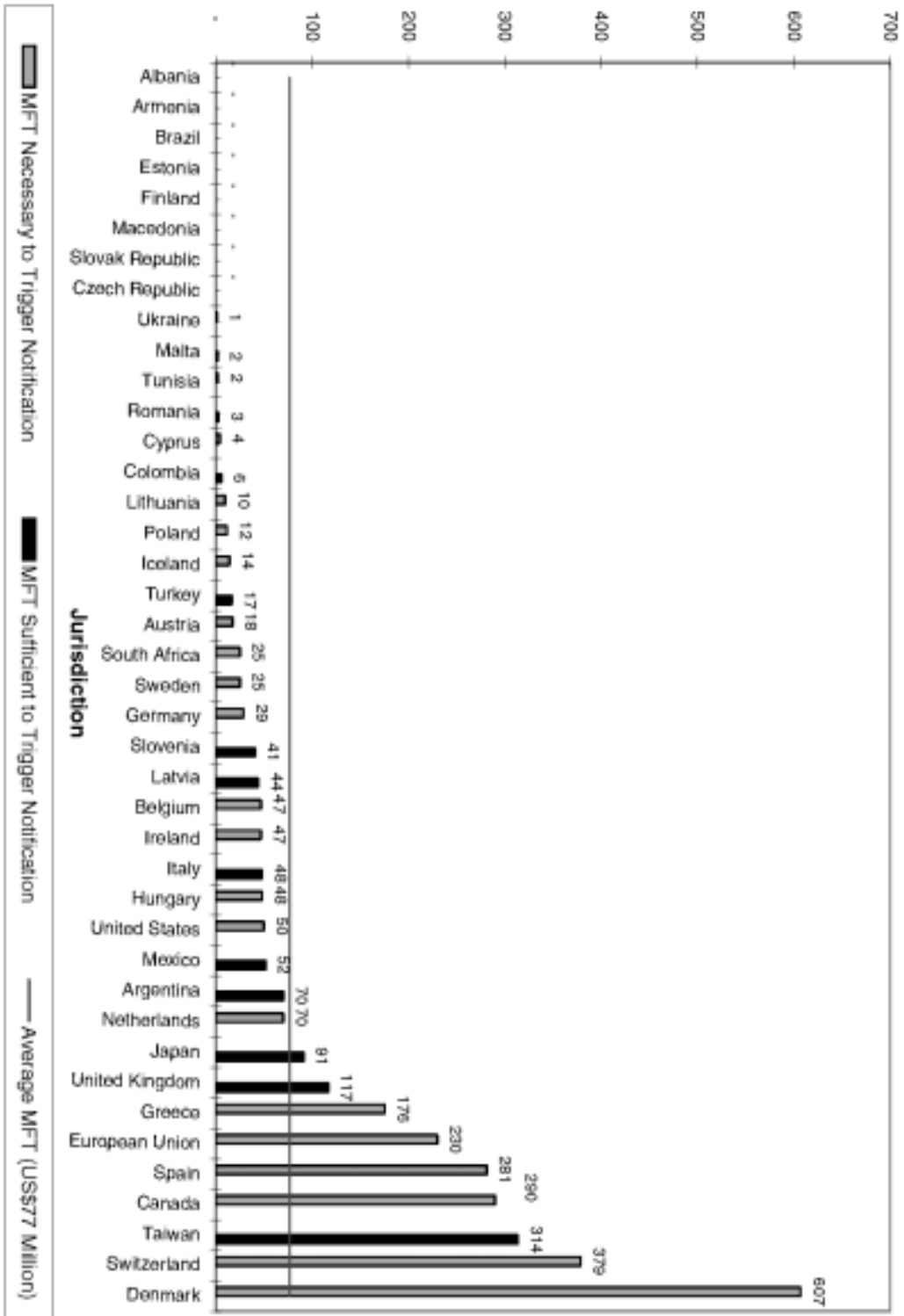
²⁵ Please note that as the question allowed for multiple responses (eg local presence, sales to local distributor, etc), the sum of responses in Table 5 exceeds the 46 Notification Jurisdictions.

²⁶ However, there were discrepancies between the agency and local counsel responses for Spain and Finland, with local counsel indicating in each case that worldwide sales alone were sufficient for the agency to assert jurisdiction.

²⁷ Recommended Practices, at I.B and I.C.

²⁸ In general, where any one among two or more thresholds was *sufficient* to trigger a filing, the lowest such threshold was identified as the MFT. Conversely, where two or more thresholds were each *necessary* before a filing was required, the highest of the *financial* thresholds was used and any non-financial tests (eg a market share requirement) were ignored. Whether the threshold is necessary or sufficient is identified by colour coding on Graph 1.

Graph 1 - Minimum Financial Threshold (MFT) For Merger Notification



simplification results in a focus on activity levels that *could* (as opposed to *would*) result in a filing, it does provide an interesting basis for comparisons between jurisdictions. Graph 1 presents the MFT for each jurisdiction that uses a quantitative filing threshold based on revenue or asset levels in ascending order.²⁹

As can be seen, some jurisdictions have an MFT in excess of US\$100 million. However, many others have dramatically lower MFTs of US\$25 million or less.

Even with due allowance for the limitations of MFT as a comparative measure, the wide variations which exist illustrate that the materiality admonition in the Recommended Practices deserves further attention. We did not attempt to make materiality evaluations as part of the assessment of consistency with the Jurisdictional Nexus Recommended Practice. However, it may be useful for jurisdictions whose MFT falls significantly below the observed average of US\$77 million to consider whether the materiality principle would suggest that an increase in all or part of their threshold levels is appropriate.³⁰

The Recommended Practices state that significant local activities by each of at least two parties to the transaction are an appropriate predicate for notification. However, if notification may be required solely on the basis of one merging party's activity, it should be that of the acquiree. Table 6 demonstrates the responses related to this question.³¹

Table 6: Implementation of Recommended Practice relating to number of parties with a local presence		
Local Parties Required	Notification Jurisdictions	
	No	%
Two	15	34
One (Acquiree)	9	20
One (Acquirer)	1	2
One (Either)	19	42
Neither	1	2
Total	45 ³²	100

29 For the underlying source data, see the responses to Survey Question No 2 in Schedule I.

30 A subsequent section of this report discusses the relationships between MFT, mergers reviewed and GDP: see 'Relationship between merger volume, GDP and thresholds' below.

31 For the underlying source data, see the responses to Survey Question No 4 in Schedule I.

32 The Armenian agency did not provide a response to this question.

Slightly more than half of respondents are consistent with this component of the Jurisdictional Nexus Recommended Practice. It is also encouraging that only two per cent indicated that notification could be required for mergers where neither party has local activities. However, 44 per cent of jurisdictions noted allow local activities of the acquirer alone to trigger merger notification, which highlights an important opportunity for improvement through adoption of the Recommended Practice.

Notification Thresholds – key components

The Recommended Practices seek to foster certainty for merging parties and enforcement agencies through the use of objective measures (usually based on revenue or other financial statement data) rather than non-objective criteria (eg market shares, which require both the definition of relevant markets and the estimation of competitors' sales).³³ The incidence of objective versus non-objective thresholds is summarised in Table 7.³⁴

Nature of Threshold	Notification Jurisdictions	
	No	%
Objective	28	61
Mixed	16	35
Non-objective	1	2
No Threshold	1	2
Total	46	100

These data are quite encouraging. Nearly two-thirds of jurisdictions already rely exclusively on objective criteria and only one has entirely non-objective thresholds.

Timing of Notification – key components

The Recommended Practices identify rigorous pre-requisites to filing (eg signing of a definite legal agreement) as unnecessarily restrictive.³⁵ Good faith intent to pursue a transaction and/or the signing of a 'letter of intent' or 'memorandum of understanding' are regarded as reasonable

³³ Recommended Practices, at II.B.

³⁴ For the underlying source data, see the responses to Survey Question No 9 in Schedule II.

³⁵ Recommended Practices, at III.A.

prerequisites³⁶ for jurisdictions that wanted some assurance that enforcement resources would not be wasted on transactions that are unlikely to proceed.³⁷ Table 8 reports the extent of such restrictions.³⁸

Prerequisite	Notification Jurisdictions	
	No	%
No Restrictions	11	24
Good Faith Intent/LOI/MOU	18	39
Agreement Signed	14	30
Other Significant Restrictions	3	7
Total	46	100

It is apparent that a good faith test or an LOI/MOU requirement is the most common approach. However, roughly one-third of jurisdictions require the negotiation of a definitive agreement or impose other significant restrictions. At the opposite end of the spectrum, a sizeable number of jurisdictions operate systems that contain no restrictions. This approach should be considered by others in view of the independent incentives of private parties not to make speculative filings.³⁹

The Recommended Practices do not take a position on the use of ‘no-close waiting periods’ or other provisions which have a ‘suspensive effect’ on the consummation of merger transactions. Nevertheless, the relative incidence of these two approaches was considered to be of interest – both as a matter of regulatory policy generally and because the Recommended Practices approach filing deadlines differently in these two contexts. Table 9 contains the data gathered in response to this question.⁴⁰

It is evident that suspensive provisions have emerged as the predominant model. While the Recommended Practices do not oppose the use of ‘no-close’ periods, they clearly state that suspensive jurisdictions should not impose deadlines for notifying the transaction – parties will normally be

³⁶ *Ibid.*

³⁷ There is no evidence that this is a real problem in practice: the time, cost and scrutiny inherent in a review (not to mention filing fees) are likely to deter speculative filings in any event.

³⁸ For the underlying source data, see the responses to Survey Question No 13 in Schedule III.

³⁹ See *supra* n 37.

⁴⁰ For the underlying source data, see the responses to Survey Question Nos 16 and 18 in Schedule III.

Table 9: Suspensive and non-suspensive jurisdictions

Approach	Notification Jurisdictions	
	No	%
Suspensive	36	78
Non-suspensive	10	22
Total	46	100

sufficiently motivated to file expeditiously in order to close their transaction.⁴¹ Table 10 tabulates the incidence and duration of filing deadlines which are applicable in the subset of jurisdictions that have suspensive provisions.⁴²

Table 10: Filing deadlines in suspensive jurisdictions

Deadline	Suspensive Jurisdictions	
	No	%
None	16	50
One Week or Less	12	38
8-29 Days	1	3
30+ Days	3	9
Total	32 ⁴³	100

Surprisingly, about 50 per cent of jurisdictions which have protected their review processes with suspensive periods have also imposed unnecessary filing deadlines. Of even more concern is that 12 jurisdictions (ie more than one-third) use completely unreasonable filing deadlines of seven days. This surely emerges as a priority area where movement towards the Recommended Practice is needed.

In jurisdictions that operate without a suspensive mechanism, the Recommended Practices properly recognise that a filing deadline is appropriate.⁴⁴ However, it should be commercially reasonable having regard to the tight confidentiality surrounding most merger negotiations and the possible need to examine and prepare filings in dozens of jurisdictions once

41 Recommended Practices, at III.B.

42 For the underlying source data, see the responses to Survey Question No 17 in Schedule III.

43 Colombia, Latvia and Tunisia did not indicate whether or not there was a filing deadline, and Ukraine indicated that its deadline is the date that the merged entity is registered by the state.

44 Recommended Practices, at III.C.

an agreement is concluded.⁴⁵ While the ICN has not quantified the concept of a ‘reasonable’ filing deadline, the survey provides a profile of the time periods which are in use in non-suspensive Notification Jurisdictions in Table 11.⁴⁶

Deadline	Non-suspensive Jurisdictions	
	No	%
No Deadline	4	40
One Week or Less	2	20
8-29 Days	2	20
30+ Days	2	20
Total	10	100

While less significant than the many commercially unreasonable deadlines in suspensive jurisdictions noted above, it is nonetheless of concern that there are as many non-suspensive jurisdictions employing a one-week filing deadline as there are those employing the more reasonable 30-day deadline.

Merger review volumes

The survey requested data on the number of mergers reviewed over the period from 2000 to 2002. The period reflects both a high point and a low point for recent merger activity. The average annual number of mergers reviewed for this three-year period was calculated for each jurisdiction.

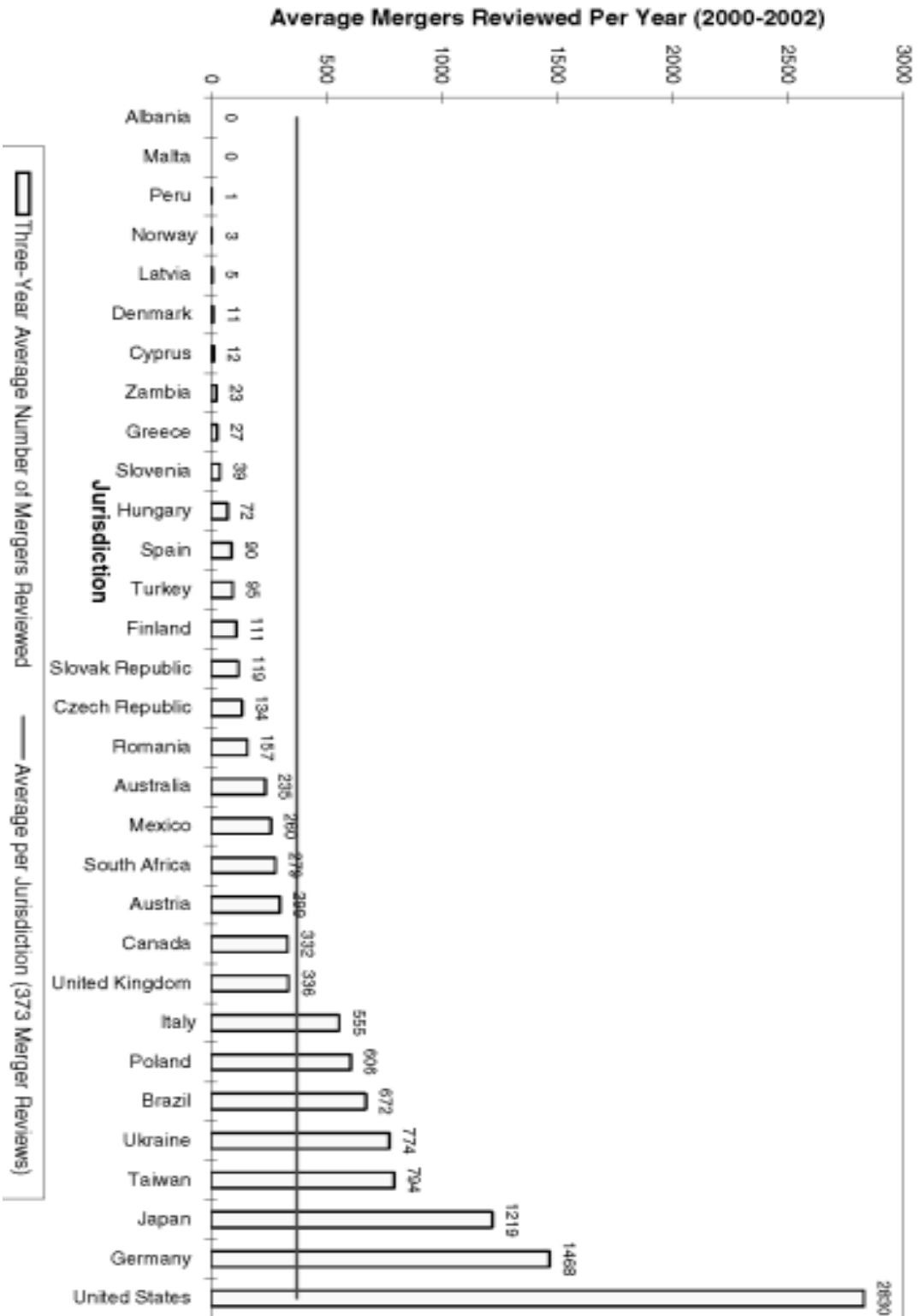
The average across the 31 jurisdictions which responded to this question was 373 mergers. However, the average annual number of reviews exhibited extremely wide variation. For example, the United States averaged 2,830 merger reviews per year, whereas Latvia reviewed an average of only five mergers per year and some small jurisdictions with new competition enforcement agencies had not undertaken any significant activity. Graph 2 presents the caseloads in ascending order by jurisdiction.

The annual average of 373 per jurisdiction was exceeded substantially by the United States, Germany and Japan, which collectively accounted for nearly

⁴⁵ The Recommended Practices indicate that the filing period ‘should accord the parties a period of time necessary to prepare the necessary submissions that is reasonable in view of the information requirements to be satisfied’: *ibid.*

⁴⁶ For the underlying source data, see the responses to Survey Question No 19 in Schedule III.

Graph 2- Three-Year Average Number of Mergers Reviewed by Jurisdiction



half of the average annual merger reviews among the 31 jurisdictions which provided such data. However, it was surprising and potentially worrisome to see five countries with much smaller economies (Brazil, Italy, Poland, Taiwan and Ukraine) also reviewing between 500 and 800 mergers per year. The range in annual notifications is enormous and raises questions regarding the Recommended Practice that a material mandatory notification threshold be employed.⁴⁷

Relationship between merger volume, GDP and thresholds

To explore this issue further, we examined whether the number of notifications was related to a jurisdiction's reported Gross Domestic Product (GDP)⁴⁸ or the MFT determined from the survey responses related to the magnitude of notification thresholds.⁴⁹ Graphs 3 and 4 depict the number of annual merger reviews in relation to GDP and MFT, respectively.

Based on the foregoing, GDP appears to have a closer relationship than MFT to transaction volume. This is confirmed by a multiple regression analysis which was able to explain approximately 80 per cent of the observed variations in merger review volumes. Most of the explanatory power arose from GDP. The regression analysis estimated that the number of merger reviews increases by 27 for every US\$100 billion of GDP (statistically significant at a one per cent confidence level), whereas merger reviews did not show a statistically significant correlation to MFT.⁵⁰ The latter result seems surprising (since intuitively one would expect a close relationship between threshold levels and notifiable transaction volumes), but likely arises from the degree of simplification and consolidation used to construct the MFTs, as well as the small sample size available for this analysis. The MFT and the 'dummy' variable, reflecting whether the MFT was based on a necessary or

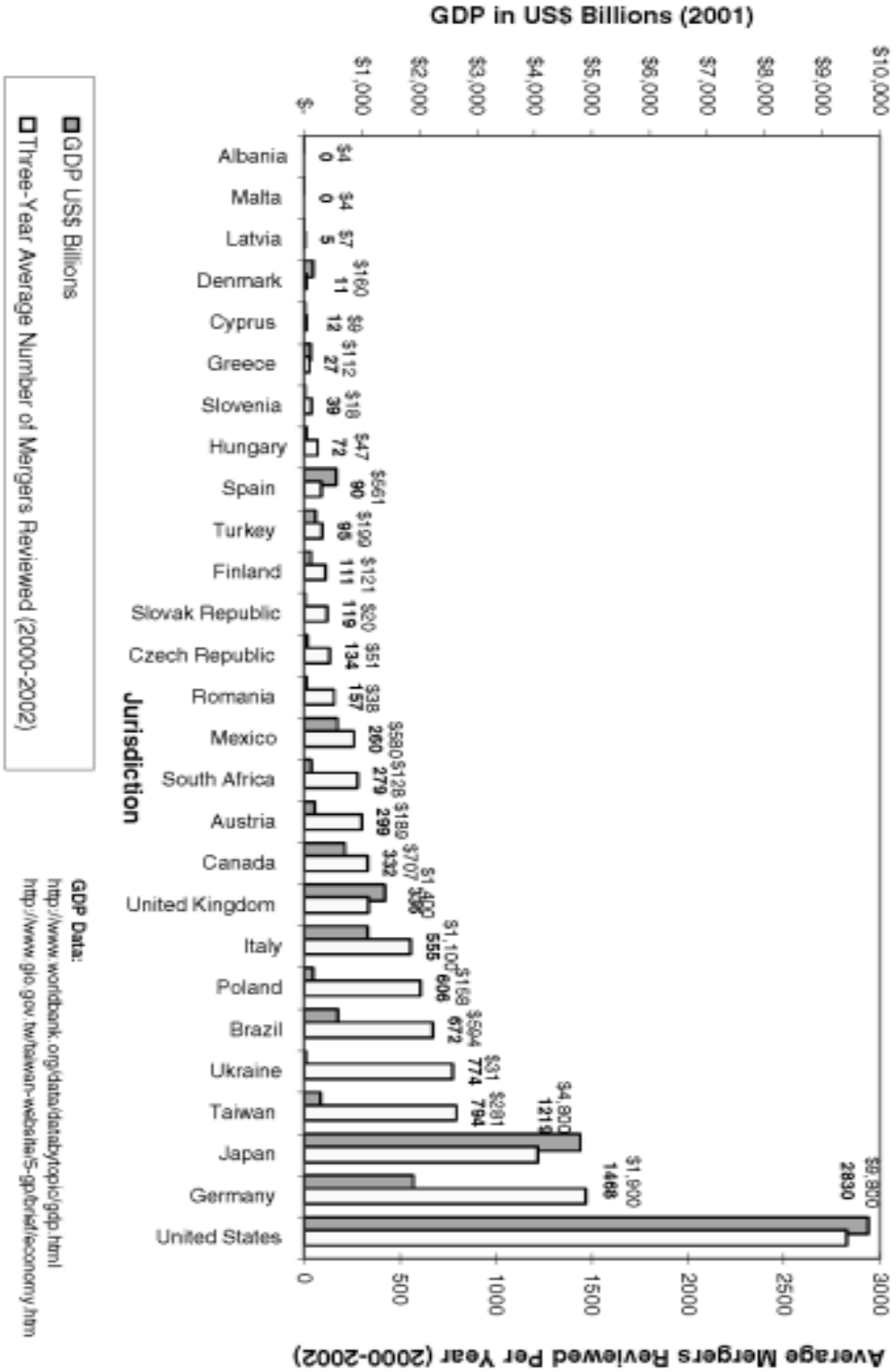
47 See Recommended Practice at I.B, Comment 1, which states: 'In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of 'local nexus' required, such as material sales or assets levels within the territory of the jurisdiction concerned.'

48 GDP data for jurisdictions for 2001 was obtained from <http://www.worldbank.org/data/databytopics/gdp.html> and <http://www.gio.gov.tw/taiwan-website/5-gp/brief/economy.htm>. GDP was used as a rough proxy for the level of merger activity in an economy.

49 See the responses to Survey Question No 2 in Schedule I and the analysis in 'Jurisdictional Nexus – key components' above.

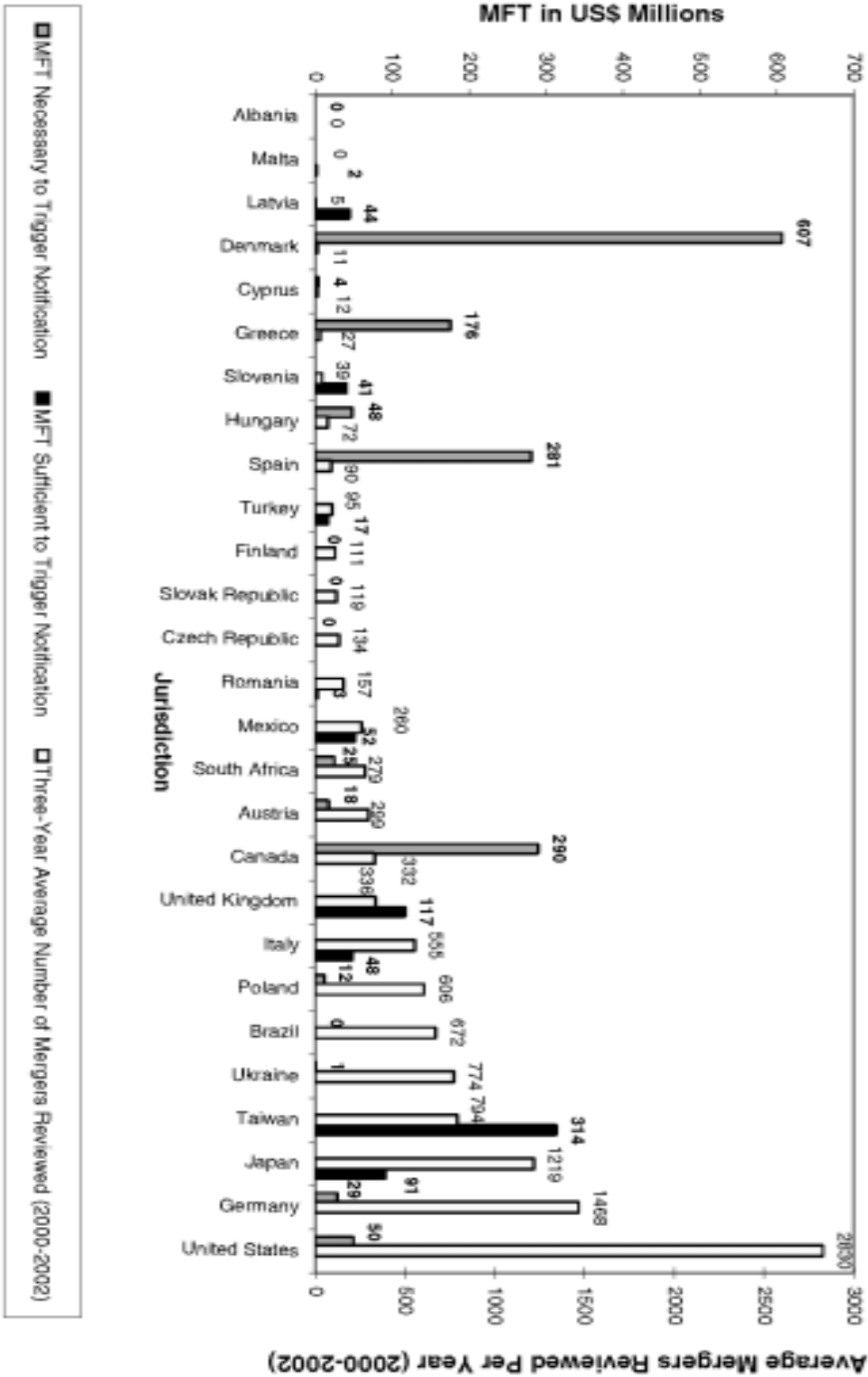
50 Details regarding the regression analysis are reported in Appendix 4.

Graph 3 – GDP Compared to Three-Year Average Number of Mergers Reviewed (2000-2002)



GDP Data:
<http://www.worldbank.org/data/daatbytopic/gdp.html>
<http://www.glo.gov.tw/baseweb/stat/5-gdp/en/economy.htm>

Graph 4 - Minimum Financial Threshold (MFT) Compared to Three-Year Average Number of Mergers Reviewed (2000-2002)



sufficient condition threshold, yielded coefficients with relatively large standard errors.

Using the regression, we projected the volume of merger reviews that would be expected for each jurisdiction having regard to its GDP and MFT. Table 12 lists those in which the actual review caseloads exceed by greater than 15 per cent the levels projected from the overall GDP and MFT relationships for the 27 jurisdictions from which this data was available.

Table 12: Jurisdictions whose actual merger review volumes exceed predicted levels

Jurisdiction	GDP (US\$ billions)	MFT (US\$ millions)	Volume of Mergers		% Difference (Predicted vs Actual)
			Predicted Volume	2000-2002 Average	
Taiwan	281	310	125	794	533
Ukraine	31	1	264	774	193
Poland	158	12	295	606	105
Germany	1,900	29	760	1,468	93
Brazil	594	–	416	672	62
Italy	1,100	48	422	555	31

It is important to recognise that these results derive from a statistical analysis of a moderate-sized sample. Also, the regression analysis simply reflects the average current relationships between merger review volumes and GDP or MFT. Whether the thresholds reflect an appropriate level of materiality relative to the size of an economy is an open question. Nevertheless, the jurisdictions which exceed the average predicted levels may wish to make the materiality assessment mandated by the Recommended Practices a priority.

Competition concerns in the absence of local presence⁵¹

The survey requested the number of cases in which remedies were obtained by competition agencies in respect of a transaction where only one (or neither) merger party had a local presence (ie assets and/or a domestic legal entity). This question was included to obtain empirical data relevant to

⁵¹ For an analysis of local presence requirements, see 'Jurisdictional Nexus – key components' above.

the policy debate regarding the appropriateness of imposing pre-notification burdens in respect of transactions that would raise only ‘potential competition’ (rather than actual horizontal overlap) concerns and/or might not be subject to effective remedies.⁵²

The vast majority of respondents reported that the competition authority had not challenged, blocked or obtained any remedy in respect of a merger in which only one (or neither) merging party had a local presence. Of the jurisdictions for which data was obtained, only Italy⁵³ and Zambia reported multiple cases (five each), while one case was reported in each of Finland, Germany, Romania and the United Kingdom.⁵⁴

Since the question requested all cases of which the respondent was aware (no time limit), it is clear that mergers which raise competition concerns without both parties having a local presence are extraordinarily rare (ie 14 known cases in jurisdictions which have collectively been conducting an average of about 11,500 merger reviews per year in recent years⁵⁵). This appears to be a strong confirmation that imposition of pre-notification requirements in such circumstances cannot be regarded as a ‘best practice’ and should be discouraged.

Government statements and actions

The concluding section of the survey invited agencies (and the law firm respondents to the extent they were able to do so) to comment on the extent to which agency or other government officials had publicly commented on, and/or were implementing, the Recommended Practices and the more general Guiding Principles within their jurisdiction. The agency responses were, not surprisingly, more comprehensive than those of the private law firms. Agency responses, where available, have therefore been used as the

52 This issue caused the deferral of the proposed Jurisdictional Nexus Recommended Practice at the ICN’s initial Naples meeting and the revision of the related commentaries prior to adoption at the subsequent Mérida meeting.

53 There was a discrepancy between the Italian agency and private law firm responses regarding the number of mergers that had been challenged where only one (or neither) merging party had a local presence: the agency reported zero challenges; the law firm reported five challenges, namely the Euler/Siac, Promodes/Gruppo, Solvay/Sodi, Demag/Techint/Italmipianti and Alitalia/Mavel mergers.

54 Respondents in Canada, Greece, Japan, Norway and Turkey also indicated that they believed such situations had arisen. However, they were unable to identify the number or names of any specific cases.

55 Even if it was assumed that all 14 cases arose during 2000–2002, this would imply that only approximately 0.1 per cent of mergers result in substantive competition concerns in the absence of both parties having a local presence within the relevant jurisdiction.

Table 13: Government statements regarding the ICN Guiding Principles and Recommended Practices				
Type of Statement	Guiding Principles for Merger Notification Review: Responding Jurisdictions⁵⁷		Recommended Practices for Merger Notification Procedures: Responding Jurisdictions	
	No	%	No	%
Support	14	28	13	27
Neutral	5	10	4	8
Opposition	0	0	0	0
None	31	62	32	65
Total	50	100	49 ⁵⁸	100

basis for the analysis which follows (supplemented by private law firm responses where the agency did not respond).

Table 13 illustrates the types of statements that have been made by the governments of Responding Jurisdictions regarding either the Guiding Principles or the Recommended Practices.⁵⁶

Based on the survey responses, it appears that 15 jurisdictions have shown leadership through clear public statements of support for the Guiding Principles and/or the Recommended Practices: Albania, Armenia, Brazil, Canada, Czech Republic, Denmark, European Union, Germany, Greece, Japan, Mexico, Taiwan, Thailand, United States and Zambia.⁵⁹ This group represents an encouraging mixture of geographical regions and economic stages of development. However, it is disappointing that almost two-thirds of the jurisdictions had not made any public statements about either the Guiding Principles or the Recommended Practices within the seven months after their discussion at the Naples meeting. In Mérida and the subsequent Global Forum on Competition conference in Mexico City, additional

56 For the underlying source data, see Schedule IV, available online at <http://www.mcbinch.com/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>.

57 Four jurisdictions for which there is no mandatory merger notification regime did provide answers to the questions on Government Statements and Changes Implementing the Guiding Principles and Recommended Practices (Australia, Indonesia, New Zealand and Norway). Therefore, for the purposes of Tables 13 and 14, 'Responding Jurisdictions' consist of those jurisdictions that have a mandatory merger notification regime from which either an agency and/or a private sector survey response was received, as well as these four additional jurisdictions.

58 The Armenian agency did not answer the question on Government Statements regarding the Recommended Practices.

59 Twelve of these jurisdictions made supportive statements about both the Guiding Principles and the Recommended Practices.

Table 14: Changes implementing the ICN Guiding Principles and Recommended Practices				
Status of Changes	Guiding Principles for Merger Notification Review: Responding Jurisdictions		Recommended Practices for Merger Notification Procedures: Responding Jurisdictions	
	No	%	No	%
Yes	3	6	2	4
Planned	4	8	3	6
Under Consideration	8	16	10	20
No	35	70	35	70
Total	50	100	50	100

announcements of support were made.⁶⁰ It is to be hoped that further explicit support will continue to emerge.

Actual implementation was assessed according to whether changes (of any magnitude) were completed, planned or under consideration. Table 14 summarises the responses.⁶¹

At this early stage, only four agencies reported having made changes to legislation, regulations or guidelines which implement elements of the Guiding Principles or the Recommended Practices: Japan (speed and transparency of prior consultation policies); Mexico (notification exemptions, simplified information requirements and reduced review times); Romania (increased clarity in notifications procedures); and Turkey (notification materiality threshold increased by 150 per cent). While this is a short list, it is encouraging that several additional jurisdictions have changes planned or under consideration: Albania, Australia, Brazil, Czech Republic, European Union, Finland, Greece, Indonesia, Ireland, Malta, Mexico, Norway, Pakistan, Taiwan, United States and Zambia. Moreover, 12 of these 16 jurisdictions are considering changes that reflect aspects of both the Guiding Principles and the Recommended Practices.⁶²

⁶⁰ Of particular note were the public commitments at the Global Forum Conference on 26 June 2003 by the head of the Mexican Agency (Sanchez Ugarte, Chairman of the Mexican Federal Competition Commission) and the principal Brazilian agency (Joao Grandino Rodas, President of the Conselho Administrativo de Defesa Economica), that they intended to move their systems towards conformity with the Recommended Practices.

⁶¹ For the underlying source data, see Schedule IV.

⁶² These jurisdictions are Albania, Brazil, European Union, Greece, Indonesia, Ireland, Malta, Netherlands, Pakistan, Taiwan, United States and Zambia.

Conclusions

The ICN's Recommended Practices are a vitally important response to the spiralling scope, complexity and diversity of international merger review processes. It is hoped that this report on the survey commissioned by the MSG will play a constructive role in fostering implementation of the unanimously adopted Recommended Practices by identifying those areas where there is already substantial consistency and those where changes could be considered to increase consistency. The survey results indicate that such opportunities exist in most jurisdictions.

For further information regarding the survey process and results, please contact J William Rowley QC (+1 (416) 865 7008; msg.survey@mcmillanbinch.com).

Appendix 1

MERGER STREAMLINING GROUP INTERNATIONAL COMPETITION NETWORK MEMBER AGENCIES SURVEY REGARDING IMPLEMENTATION OF THE ICN'S RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES

28 April 2003

NOTES:

1. This survey is directed to the government agency(ies) with primary responsibility for review of merger transactions under domestic competition/antitrust laws (hereafter, the 'Competition Authority').
2. Where 'Relevant Provisions' are requested (which may include legislation, regulations, guidelines, etc.), please provide a citation and if possible an English-language copy or website link.
3. The ICN *Recommended Practices for Merger Notification Procedures* are reproduced in bold italics (without the accompanying Working Group Comments, which can be found at http://www.internationalcompetitionnetwork.org/wg1_1practices_principles.html).
4. Please return responses by Wednesday, 21 May 2003 to the attention of
J. William Rowley QC
Email – wrowley@mcmillanbinch.com (preferred)
Suite 3500, South Tower, Royal Bank Plaza, Toronto, Ontario M5J 2J7
Telephone 416.865.7008. Facsimile 416.865.5519
5. Instructions – Type any answers in the fields located throughout the document. Use your mouse to click any applicable checkboxes.

Responding Jurisdiction:

Responding Agency:

Contact Person (name, phone, fax and/or email):

I. NEXUS TO REVIEWING JURISDICTION

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.

Q1 Please summarize the extent to which merger review filing requirements are based on local activities of the merging parties versus worldwide sales/turnover or other non-local activities.

Overview:

Relevant Provisions:

Q2 Is there a materiality threshold below which transactions are not subject to merger review filings?

Yes. Amount (please indicate sales, assets, etc. and provide local currency plus US\$ or Euro (€) equivalent):

No

Comments:

Relevant Provisions:

Q3 The ICN Working Group accompanied the *Recommended Practices* with a Comment that: 'The local nexus thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired.' Do your jurisdiction's thresholds require consideration of the activities of non-acquired businesses (e.g. all the assets or revenues of a vendor of assets or shares which is retained other businesses) *[sic]*?

- Yes
- Sometimes (please elaborate):
- No

Comments:

Relevant Provisions:

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.

Q4 How many parties must have local activities in order to establish jurisdiction for a merger review filing under your law?

- At least two parties are required to have local activities (SKIP TO Q6)
- Local activity of one party is sufficient. Which?:
- (i) acquired business must have local activities
- (ii) acquiring entity must have local activities
- (iii) either acquired business or acquiring entity may have local activities
- Neither party is required to have local activities

Comments:

Relevant Provisions:

Q5 If local activities of only one party are sufficient to confer jurisdiction, the ICN Working Group has issued a Comment accompanying the *Recommended Practices* which indicates that 'to the extent that the 'local nexus' requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy'.

- (i) Please discuss whether and how the notification threshold(s) reflect such an approach

Comments:

- (ii) Mergers Reviewed - 2002: 2001: 2000: .

Note: please indicate if time period is other than calendar year or if any other explanations of the data are needed

Q6 What kind of local activity is sufficient to establish jurisdiction over the merging parties? (check all that apply)

- Local presence (assets and/or a domestic legal entity)
- Sales into the jurisdiction to a local third party distributor

- Other sales into the jurisdiction from abroad
- Worldwide sales regardless of whether there are local assets or sales in or into the jurisdiction
- Other (please specify):

Comments:

Relevant Provisions:

Q7 Has the Competition Authority challenged, blocked or obtained any other remedy in respect of a merger in which only one (or neither) merging party had a local presence (ie. assets and/or a domestic legal entity)?

- No
- Yes. Please provide a breakdown of the number of cases:
- (i) in which remedies were obtained where there were sales in or into the jurisdiction by both merging parties
 - (ii) in which remedies were obtained where there were sales in or into the jurisdiction by only one of the merging parties
 - (iii) in which remedies were obtained where there were not sales in or into the jurisdiction by any of the merging parties
 - (iv) for comparative purposes - total number of mergers reviewed by the Competition Authority in the past 10 years

Comments:

II. NOTIFICATION THRESHOLDS

A. Notification thresholds should be clear and understandable.

Q8 Please summarize your jurisdiction's notification thresholds, and indicate whether and why they are perceived to be 'clear and understandable'.

Overview:

Relevant Provisions:

B. Notification thresholds should be based on objectively quantifiable criteria.

Q9 What type(s) of notification threshold criteria are used? (check all that apply)

- Sales/Revenues/Turnover
- Assets
- Other financial statement measures (please specify):
- Transaction value
- Other objectively quantifiable criteria (please specify):
- 'Market' shares
- Potential transaction-related effects (please specify):
- Other analytical/judgmental criteria (please specify):

Comments:

Relevant Provisions:

Q10 Are there clear and publicly available rules/guidelines regarding the following measurement issues related to the thresholds?

- (i) Geographic Scope (e.g. domestic vs. worldwide): Yes: Partially*: No:
 (ii) Time Period (e.g. fiscal year end): Yes: Partially*: No:
 (iii) Currency Conversions (e.g. dates and rate source): Yes: Partially*: No:

Comments: (*please include explanations for any 'Partially' responses):

Relevant Provisions:

Q11 Is the treatment of the following items clear in the application of the notification thresholds?:

- (i) Determination of which related entities are to be included or excluded (e.g. ultimate parent entities, subsidiaries, minority equity interests, etc) Clear Unclear Not Applicable
 (ii) Use of Gross vs. Net Sales in Revenue/Turnover Calculations Clear Unclear Not Applicable
 (iii) Inclusion or Exclusion of Intra-Company Sales in Revenue/Turnover Calculations Clear Unclear Not Applicable
 (iv) Inclusion or Exclusion of VAT, Sales or Other Taxes in Asset or Revenue/Turnover Calculations Clear Unclear Not Applicable
 (v) Inclusion or Exclusion of Depreciation in Asset Calculations Clear Unclear Not Applicable
 (vi) Adjustments for Subsequent Events (e.g. acquisitions or divestitures) After Last Financial Statements Clear Unclear Not Applicable

Comments (please elaborate regarding any which are unclear):

Relevant Provisions:

C. Notification thresholds should be based on information that is readily accessible to the merging parties

Q12 Are the notification thresholds based on information that normally is readily available to merging parties?

- Yes – Financial Statements
 Yes – Other (please specify):
 Partially (please elaborate):
 No

Comments:

Relevant Provisions:

III. TIMING OF NOTIFICATION**A. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.**

Q13 How early may a filing be made in a merger case?

- Not until a definitive agreement has been signed (or a formal take-over offer has been made)
- Once a letter of intent, memorandum of understanding or similar statement of intentions has been signed
- Where the parties can attest to or demonstrate a good faith intention to proceed with the transaction
- Other necessary pre-conditions (please specify):
- No restrictions (SKIP TO Q15)

Comments:

Relevant Provisions:

Q14 If a pre-condition must be satisfied before a filing can be made, is the Competition Authority prepared to engage in pre-filing substantive and/or procedural discussions?

- Yes
- Partial/limited (please elaborate):
- No

Comments:

Relevant Provisions:

Q15 If a notification is made or pre-notification discussions are held prior to public announcement of a transaction, is the Competition Authority able and willing to defer third party 'market contacts' until after the transaction is publicly announced (assuming there is adequate post-announcement time to complete its review):

(i) Any applicable requirement that the receipt of a notification be published in an official government journal/register/gazette/etc

- Yes
- Sometimes (please elaborate):
- No
- Not applicable

(ii) Third party contacts

- Yes
- Sometimes (please elaborate):
- No
- Not applicable

Comments:

Relevant Provisions:

B. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.

Q16 Is there a mandatory 'waiting period', 'suspensive period' or 'no-close period' after a merger filing is submitted?

Yes (please specify):

No (SKIP TO Q18)

Comments:

Relevant Provisions:

Q17 If your jurisdiction's regime has a mandatory no-close period (see Q16 above), is there a deadline for submission of a filing (e.g. within a fixed number of days after a definitive agreement is signed)?

Yes (please specify the deadline; then SKIP TO Q19):

No (SKIP TO Q20)

Comments:

Relevant Provisions:

C. Jurisdictions that do not prohibit closing pending review by the competition agency should nevertheless allow parties a reasonable time in which to file notification following a clearly defined triggering event.

Q18 If your jurisdiction's regime does not prohibit closing pending review of a filing (see Q16 above), is there a deadline for submission of a filing (e.g. within a fixed number of days after a definitive agreement is signed)?

Yes (please specify the deadline):

No

Comments:

Relevant Provisions:

Q19 If a filing deadline is employed (with or without a no-close period), please comment on: (i) whether the triggering event is 'clearly defined'; and (ii) how reasonable the time limit is, having regard to the nature and extent of information required in the filing as well as the possibility that the merging parties may be coordinating filings in numerous jurisdictions and may have limited ability to prepare such materials prior to public announcement of the transaction.

(i) Comments – Clarity of Triggering Event:

(ii) Comments – Reasonableness of Time Limit:

IV. GENERAL QUESTIONS

Q20 Has the Competition Authority made any public comments within your jurisdiction regarding the ICN's general *Guiding Principles for Merger Notification and Review*? (The eight guiding principles are Sovereignty; Transparency; Non-Discrimination; Procedural Fairness; Efficient, Timely and Effective Review; Coordination; Convergence; and Protection of Confidential Information – see www.international.competitionnetwork.org/wg1_practices_principles.html)

- Support/endorsement/intention to implement
- Neutral/informational
- Opposition/concern
- None

Please elaborate and/or provide a copy of any relevant published material:

Q21 Has the Competition Authority made any public comments within your jurisdiction regarding the ICN's *Recommended Practices for Merger Notification Procedures*?

- Support/endorsement/intention to implement
- Neutral/informational
- Opposition/concern
- None

Please elaborate and/or provide a copy of any relevant published material:

Q22 Have there been any changes to legislation/regulations/guidelines which implement elements of the *Guiding Principles for Merger Notification and Review*?

- Yes (please elaborate below)
- Planned (please elaborate below)
- Under consideration (please elaborate below)
- No

Please elaborate and provide any published materials for reference:

Q23 Have there been any changes to legislation/regulations/guidelines which implement elements of the *Recommended Practices for Merger Notification Procedures*?

- Yes (please elaborate below)
- Planned (please elaborate below)
- Under consideration (please elaborate below)
- No

Please elaborate and provide any published materials for reference:

Thank you for completing this survey. We will provide you with a copy of the aggregated responses. Please indicate the contact person to whom it should be sent.

Appendix 2:
Sample cover letter to competition agencies

Reply Attention of *J. William Rowley QC*
Direct Line *416.865.7008*
Internet Address *wrowley@mcmillanbinch.com*
Our File No. *69459*
Date *April •, 2003*

[Addressee – each ICN member agency]

Dear •:

**Re: ICN – Survey Regarding Recommended Practices
 For Merger Notification Procedures**

The chairman and other members of the ICN have asked non-governmental advisors and other ICN stakeholders to play an active role in encouraging implementation of the ICN's outputs, including the *Guiding Principles for Merger Notification and Review* and the *Recommended Practices For Merger Notification Procedures* endorsed at the inaugural meeting in Naples last September.¹

The Merger Streamlining Group is a private sector participant in the ICN process with a particular interest in the development of best practices for international merger reviews.² The Group salutes the ICN for its adoption and endorsement of the *Guiding Principles* and *Recommended Practices* last September in Naples. But the true test of success will be by their being embraced by ICN member countries. In the hope to assist in that end, I am writing on behalf of the Group to request your agency's participation in a survey which is intended to assess and promote the implementation of the first three Recommended Practices dealing with Nexus to Reviewing Jurisdiction, Notification Thresholds and Timing of Notification.

The survey questions are designed to allow a rapid self-assessment in a standardised format by each ICN member agency of the degree to which these *Recommended Practices* are already followed in their jurisdictions and to identify areas where constructive change may be worthy of consideration. The Group plans to make the responses and a summary available to all ICN members and interested stakeholders prior to the ICN's next meeting in Mérida, 24-25 June, and at the conference being organised by the IBA's Global Competition Forum the following day in Mexico City.

We would be very grateful if you could take time to complete the survey. It has been structured as a series of questions which are organised under the individual *Recommended Practices*, followed by a few general questions. We expect that the questions will not require extensive research or analysis since they pertain to existing legislation, regulations and agency guidelines. We would appreciate receiving copies of the relevant provisions as well for reference.

In order to facilitate compilation and summarisation of the responses for dissemination by early June, we are requesting that the surveys be returned to us by Wednesday, 21 May 2003. We would be pleased to discuss any questions that arise during preparation of the responses.

Thank you in advance for assisting with this effort to support implementation of the ICN's *Recommended Practices* initiative.

With all good wishes.

Yours sincerely,

J. William Rowley QC, Chairman

¹ See <http://www.internationalcompetitionnetwork.org>.

² The members of the Group are Alcan Inc., British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Goldman Sachs International, NERA, Rio Tinto plc and Vodafone Group plc. The Group has previously published *Best Practices for the Review of International Mergers* (Global Competition Review, October/November 2002), submitted a response to the European Commission's *Green Paper on the Review of the Merger Regulation* (March 2002), and provided the US-EU Bilateral Merger Working Group with a report entitled *Best Practices for Merger Review: Analysis and Recommendations for Review Processes in the United States and the European Union* (November 2002).

Appendix 3: Summary of Implementation of ICN Recommended Practices for Merger Notification Procedures by Jurisdiction						
Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency	
			(‘A’ = Competition Agency Response; ‘P’ = Private Law Firm Response)			
Albania (A)	Competition Department	Partially Consistent	Inconsistent	Partially Consistent	Some	
Albania (P)	No Response					
Andean Community ¹ (A)	No Response					
Andean Community (P)	See the private law firm responses from member states Colombia and Peru					
Argentina (A)	No Response					
Argentina (P)	M & M Bomchil	Substantially Consistent	Partially Consistent	Partially Consistent	Some	
Armenia (A)	State Competition Commission	Partially Consistent	Partially Consistent	Substantially Consistent	Some	
Armenia (P)	No Response					
Australia (A)	Competition and Consumer Commission	No Mandatory Merger Notification Regime				
Australia (P)	Minter Ellison					
Austria (A)	Federal Competition Authority	Partially Consistent	Substantially Consistent	Substantially Consistent	Some	
Austria (P)	Freshfields Bruckhaus Deringer	Partially Consistent	Substantially Consistent	Substantially Consistent	Some	
Barbados (A)	No Response					
Barbados (P)	No Response					
Belgium (A)	Competition Council	Substantially Consistent	Substantially Consistent	Partially Consistent	Some	
Belgium (P)	Van Bael & Bellis	Substantially Consistent	Substantially Consistent	Partially Consistent	Some	
Brazil (A)	No Response					
1 The Andean Community comprises member states Bolivia, Colombia, Ecuador, Peru and Venezuela.						

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Brazil (P)	Stroeter, Royster & Ohno Advogados	Partially Consistent	Partially Consistent	Partially Consistent	Some
Canada (A)	Competition Bureau	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Canada (P)	McMillan Binch LLP	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Chile (A)	No Response				
Chile (P)	Claro y Cia	No Merger Notification Regime			
Colombia (P)	Brigard & Urrutia	Partially Consistent	Partially Consistent	Substantially Consistent	Some
Costa Rica (A)	No Response				
Costa Rica (P)	No Response				
Croatia (A)	No Response				
Croatia (P)	No Response				
Cyprus (A)	Commission for the Protection of Competition	Partially Consistent	Partially Consistent	Partially Consistent	Some
Cyprus (P)	Chrysses Demetriades & Co Law Office	Partially Consistent	Partially Consistent	Partially Consistent	Some
Czech Republic (A)	Office of the Protection of Economic Competition	Partially Consistent	Substantially Consistent	Partially Consistent	Some
Czech Republic (P)	Kocian Solc Balastik	Partially Consistent	Substantially Consistent	Partially Consistent	Some
Denmark (A)	Declined to Participate				
Denmark (P)	Gorrissen Federspiel Kierkegaard	Partially Consistent	Partially Consistent	Partially Consistent	Some
EFTA Surveillance (A)	No Response				
Estonia (A)	Declined to Participate				

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Estonia (P)	Hedman Attorneys	Partially Consistent	Partially Consistent	Inconsistent	Some
European Union (A)	DG Competition	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
European Union (P)	Allen & Overy	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Finland (A)	Competition Authority	Partially Consistent	Substantially Consistent	Inconsistent	Some
Finland (P)	Roschier Holmberg, Attorneys Ltd	Partially Consistent	Substantially Consistent	Inconsistent	Some
France (A)	No Response				
France (P)	No Response				
Germany (A)	Bundeskartellamt	Partially Consistent	Substantially Consistent	Substantially Consistent	Some
Germany (P)	Freshfields Bruckhaus Deringer	Partially Consistent	Substantially Consistent	Substantially Consistent	Some
Greece (A)	Competition Commission	Substantially Consistent	Substantially Consistent	Partially Consistent	Some
Greece (P)	M & P Bernitsas	Substantially Consistent	Substantially Consistent	Partially Consistent	Some
Hungary (A)	Office of Economic Competition	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Hungary (P)	Deloitte & Touche	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Iceland (A)	No Response				
Iceland (P)	A&P Logmenn and A&P Arnason	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Indonesia (A)	Commission for the Supervision of Business Competition (KPPU)	No Mandatory Merger Notification Regime			
Indonesia (P)	Declined to Participate				
Ireland (A)	Competition Authority	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Ireland (P)	McCann Fitzgerald	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Israel (A)	No Response				
Israel (P)	No Response				

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Italy (A)	Italian Antitrust Authority	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Italy (P)	Studio Legale Ughi e Nunziante	Substantially Consistent	Partially Consistent	Substantially Consistent	Some
Jamaica (A)	No Merger Notification Regime				
Jamaica (P)	No Response				
Japan (A)	Japan Fair Trade Commission	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Japan (P)	Nagashima Ohno & Tsunematsu	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
Kenya (A)	No Response				
Kenya (P)	Kaplan & Stratton	Partially Consistent	Inconsistent	Substantially Consistent	Some
Korea (A)	No Response				
Korea (P)	No Response				
Latvia (A)	Competition Council	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Latvia (P)	No Response				
Lithuania (A)	Competition Council	Substantially Consistent	Substantially Consistent	Partially Consistent	Some
Lithuania (P)	Lideika, Petrauskas, Valiunas & Partners	Substantially Consistent	Substantially Consistent	Partially Consistent	Some
Macedonia (A)	No Response				
Macedonia (P)	White & Case	Partially Consistent	Partially Consistent	Partially Consistent	Some
Malta (A)	Commission for Fair Trading & Economic Affairs	Partially Consistent	Partially Consistent	Inconsistent	Some
Malta (P)	Declined to Participate				
Mexico (A)	Comision Federal de Competencia	Substantially Consistent	Partially Consistent	Substantially Consistent	Some
Mexico (P)	Castaneda y Asociados	Substantially Consistent	Partially Consistent	Substantially Consistent	Some

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Netherlands (A)	Competition Authority	Partially Consistent	Substantially Consistent	Partially Consistent	Some
Netherlands (P)	No Response				
New Zealand (A)	Commerce Commission	No Mandatory Merger Notification Regime			
New Zealand (P)	Buddle Findlay				
Norway (A)	No Merger Notification Regime				
Norway (P)	Hjort Law Office	No Mandatory Merger Notification Regime			
Pakistan (A)	Monopoly Control Authority	Partially Consistent	Partially Consistent	Inconsistent	Some
Pakistan (P)	No Response				
Panama (A)	No Response				
Panama (P)	No Response				
Peru (A)	No Response				
Peru (P)	Muniz Forsyth Ramirez Perez-Taiman & Luna Victoria Asociados	Partially Consistent	Partially Consistent	Substantially Consistent	Some
Philippines (A)	No Response				
Philippines (P)	No Response				
Poland (A)	No Response				
Poland (P)	Kancelaria Prawnicza	Partially Consistent	Partially Consistent	Partially Consistent	Some
Portugal (A)	No Response				
Portugal (P)	No Response				
Romania (A)	Competition Office	Partially Consistent	Partially Consistent	Partially Consistent	Some
Romania (P)	Musat & Asocitaii	Partially Consistent	Partially Consistent	Partially Consistent	Some

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Russia (A)	No Response				
Russia (P)	No Response				
Slovak Republic (A)	Declined to Participate				
Slovak Republic (P)	Cernejová & Hrbeck	Partially Consistent	Partially Consistent	Partially Consistent	Some
Slovenia (A)	No Response				
Slovenia (P)	Odvetniska pisarna Jadek & Pensa	Partially Consistent	Substantially Consistent	Partially Consistent	Some
South Africa (A)	Competition Tribunal; Competition Commission	Partially Consistent	Substantially Consistent	Substantially Consistent	Some
South Africa (P)	Webber Wentzel Bowers	Partially Consistent	Substantially Consistent	Substantially Consistent	Some
Spain (A)	Servicio de Defensa de la Competencia; Tribunal de Defensa de la Competencia	Substantially Consistent	Partially Consistent	Substantially Consistent	Some
Spain (P)	B Cremades y Asociadoes	Substantially Consistent	Partially Consistent	Substantially Consistent	Some
Sri Lanka (A)	No Response				
Sri Lanka (P)	No Response				
Sweden (A)	No Response				
Sweden (P)	Mannheimer Swartling	Substantially Consistent	Substantially Consistent	Partially Consistent	Some
Switzerland (A)	No Response				
Switzerland (P)	Pestalozzi Gmuers & Patry	Partially Consistent	Partially Consistent	Partially Consistent	Some
Taiwan (A)	Fair Trade Commission, The Executive Yuan	Partially Consistent	Partially Consistent	Substantially Consistent	Some
Taiwan (P)	Lee and Li Attorneys	Partially Consistent	Partially Consistent	Substantially Consistent	Some

Jurisdiction	Respondent	Jurisdictional Nexus	Notification Thresholds	Timing of Notification	Level of Consistency
Thailand (A)	Department of Internal Trade	No Mandatory Merger Notification Regime			
Thailand (P)	No Response				
Tunisia (A)	Ministry of Trade	Substantially Consistent	Partially Consistent	Partially Consistent	Some
Tunisia (P)	White & Case	Partially Consistent	Partially Consistent	Partially Consistent	Some
Turkey (A)	Competition Authority	Partially Consistent	Partially Consistent	Substantially Consistent	Some
Turkey (P)	Cosar Ortak Avukat Burosu	Partially Consistent	Partially Consistent	Substantially Consistent	Some
Ukraine (A)	Antimonopoly Committee	Partially Consistent	Partially Consistent	Partially Consistent	Some
Ukraine (P)	No Response				
United Kingdom (A)	Office of Fair Trading; Competition Commission	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
United Kingdom (P)	Linklaters	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
United States (A)	Dept of Justice; Federal Trade Commission	Substantially Consistent	Substantially Consistent	Substantially Consistent	All
United States (P)	No Response				
Uzbekistan (A)	No Response				
Uzbekistan (P)	White & Case	Partially Consistent	Partially Consistent	Partially Consistent	Some
Venezuela (A)	No Response				
Venezuela (P)	No Response				
Yugoslavia (A)	Antimonopoly Commission	No Merger Notification Regime			
Yugoslavia (P)	No Response				
Zambia (A)	Competition Commission	Partially Consistent	Partially Consistent	Partially Consistent	Some
Zambia (P)	Incomplete Response				

Appendix 4: Notes on regression analysis

The multiple regression analysis was conducted using figures for the 27 jurisdictions, which provided the necessary data on merger review volumes and thresholds. The dependent variable was the average annual number of mergers reviewed in the period from 2000 to 2002. The independent variables were the country's 2001 GDP,¹ the MFT (as described in 'Jurisdictional Nexus – key components' above), and a 'dummy' variable which was assigned a value of 1 when the MFT reflected a threshold that was a necessary (but not sufficient) condition for a merger notification obligation, and a value of 0 when MFT was derived from a threshold that was a sufficient condition for notification.

The data used and results of the regression analysis are reproduced below.

Regression Data				
Jurisdiction	Three-Year (2000-2002) Average Number of Mergers Reviewed	GDP (US\$ billions)	Nature of MFT (Sufficient Condition = 0) (Necessary Condition = 1)	MFT (US\$ millions)
Albania	9	3.8	1	0.0
Malta	0	3.6	0	2.1
Latvia	5	7.2	0	44.4
Denmark	11	160.4	1	607.0
Cyprus	12	8.8	1	4.2
Greece	27	112.0	1	175.5
Slovenia	39	18.1	0	40.7
Hungary	72	46.6	1	48.1
Spain	90	560.9	1	281.2
Turkey	95	199.3	0	16.5
Finland	111	120.9	1	0.0
Slovak Republic	119	19.7	1	0.0
Czech Republic	134	51.4	1	0.0
Romania	157	38.2	0	3.1
Mexico	260	580.1	0	51.8
South Africa	279	127.9	1	25.0
Austria	299	188.7	1	17.6
Canada	332	706.6	1	290.0
United Kingdom	336	1,400.0	0	117.0
Italy	555	1,100.0	0	48.0
Poland	606	157.6	1	11.8
Brazil	672	593.8	1	0.0
Ukraine	774	31.3	1	1.2
Taiwan	794	281.2	0	310.0
Japan	1,219	4,800.0	0	91.3
Germany	1,468	1,900.0	1	28.8
United States	2,830	9,800.0	1	50.0

¹ GDP data for jurisdictions for 2001 was obtained from <http://www.worldbank.org/data/datatopics/gdp.html> and <http://www.gio.gov.tw/taiwan-website/5-gp/brief/economy.htm>. GDP was used as a rough proxy for the level of merger activity in an economy.

Summary Output Regression Statistics	
Multiple R	0.901408518
R Squared	0.812537316
Adjusted R Squared	0.788085662
Standard Error	283.0867055
Observations	27

ANOVA					
	<i>Df</i>	<i>SS</i>	<i>MS</i>	<i>F</i>	<i>Significance F</i>
Regression	3	7989052.391	2663017.464	33.2303615	1.56303E-08
Residual	23	1843175.905	80138.08283		
Total	26	9832228.296			

	<i>Coefficients</i>	<i>Standard Error</i>	<i>t Statistic</i>	<i>P-value</i>	<i>Lower 95%</i>	<i>Upper 95%</i>
Intercept	139.9805	96.9459	1.4439	0.1623	-60.5671	340.5281
MFT (US\$ millions)	-0.2912	0.3988	-0.7303	0.4726	-1.1162	0.5337
GDP (US\$ billions)	0.2695	0.0272	9.8922	9.37593E-10	0.2131	0.3259
Dummy (Sufficient = 0; Necessary = 1)	116.0447	113.0501	1.0265	0.3153	-117.8168	349.9063