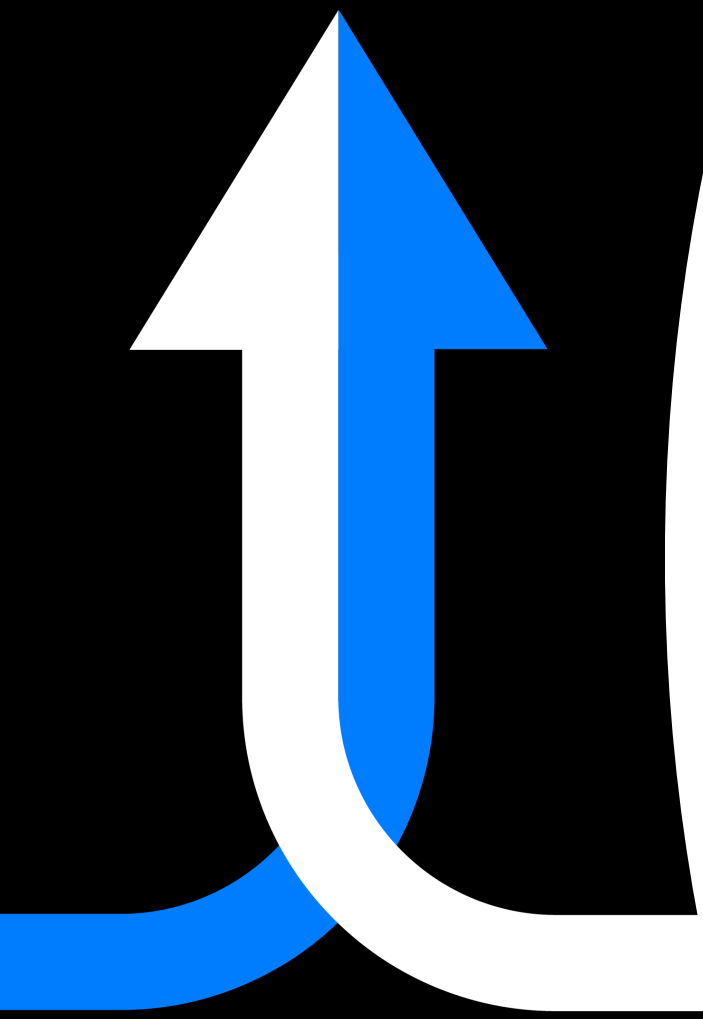

Merger Control

Recommendations

ICC

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Background

Over the last 40 years, a growing number of countries have adopted merger control rules to foster competition and prevent market monopolisation. In the early 1980s, only a few countries had meaningful merger control regulations, most notably the United States and Germany. Since then, more than 120 countries around the world have put in place a merger control system or have modernised their existing merger control regime. This unprecedented regulatory development has resulted in inconsistencies, procedural issues and, in some cases, excessive enforcement.

ICC reviewed merger control rules in more than 20 jurisdictions and shares the conviction that a proper enforcement of merger control regulations is only possible if companies, private practitioners, and antitrust agencies jointly reflect on the best manner to meet the following objectives: (i) ensure that transactions are reported in jurisdictions where they might have an impact on competition; (ii) secure and dedicate resources that are proportionate to the issues at stake in an individual case; and (iii) enhance predictability and legal certainty.

The set of recommendations set forth below is the result of a cooperative effort including nearly 200 ICC in-house counsel and private practitioners who are members of the following national committees of ICC: ICC Argentina, ICC Australia, ICC Belgium, ICC Brazil, ICC Canada, ICC Chile, ICC China, ICC France, ICC Germany, ICC India, ICC Italy, ICC India, ICC Japan, ICC South Korea, ICC Poland, ICC Portugal, ICC Russia, ICC South Africa, ICC Spain, ICC Switzerland, ICC Turkey, ICC United Kingdom, and USCIB.

These recommendations endeavour to encourage a number of reforms, which could significantly alleviate the administrative burden and costs that companies face, when conducting cross-border transactions involving several merger control jurisdictions.

1. A common concept of reportable merger: change of control over a business activity

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

2. Notification thresholds: finding a balance between efficient self-assessment and effective merger control enforcement

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

3. Notification forms: tailoring information requests to antitrust issues

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or

(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.

4. Funding antitrust agencies: the issue with filing fees

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

5. Guidelines: an essential input for antitrust agencies and companies

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

6. Gun jumping fines: a true deterrent requires consistency across jurisdictions

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

ANNEX

Argentina

Australia

Brazil

Chile

China

Czech Republic

European Union

France

Germany

India

Italy

Japan

Poland

South Africa

South Korea

Switzerland

Turkey

United Kingdom

United States

Argentina

Agustín Waisman, Beccar Varela

Marcelo den Toom, Bomchil

Godofredo Agustín Ortíz, Bomchil

Gabriel H. Lozano, Bruchou & Funes de Rioja

Federico Volujewicz, De Dios & Goyena

Julian Razumny, Tavarone, Rovelli, Salim & Miani

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

There are no approved guidelines that clarify the concept of reportable mergers/concentrations. However, there is rather uncontroversial administrative case law of the Argentine Competition Agency (the "**CNDC**") on the concept of reportable mergers/concentrations.

Section 7 of the Argentine Competition Law No. 27,442 (the "**ACL**") defines "economic concentration" as the acquisition of control of one or more undertakings by means of a merger, the transfer of going concerns, the acquisition of ownership or any right over shares or other equity participations or debt instruments of any type granting rights to be converted into shares or capital participations or to have any type of influence over the decisions of the issuer, when such acquisition gives the acquirer the control or a substantial influence over the undertaking, and any act or agreement which may transfer to a person or economic group the assets of an undertaking or give them a decisive influence in the passing of resolutions in an undertaking related to its ordinary or extraordinary management.

Essentially, the ACL provides that any act whereby a person or economic group acquires *de jure* control of an undertaking by obtaining the votes necessary to prevail in ordinary shareholders meetings, or *de facto* control by exercising for any reason a decisive influence on the passing of resolutions concerning the management of the undertaking, will be included under the ACL's merger control provisions.

On the *de facto* control, the CNDC have set forth the principle that the acquisition of a minority interest in an enterprise will amount to an acquisition of control if the acquirer is also granted veto rights in relation to the "competitive strategy" thereof (*i.e.* approval of the budget or business plan, high investments or the appointment of key executives). Changes from sole to joint ownership or vice versa, or entailing a modification in the nature of control, are also covered.

Under Section 7.d) of the ACL, joint ventures are reportable if they are pre-existing and there is a change of control. Full-function joint ventures that do not comply with the foregoing condition are not reportable under the ACL. A bill approved by the Argentine Senate in 2021 included the concept of full-function joint ventures within the concept of reportable mergers/concentrations of the ACL, but it lost parliamentary status in 2023.

Also, in February 2019 the CNDC published for comments the "Draft Guidelines for the Notification of Economic Concentration Transactions", which included full-function joint ventures within the concept of reportable mergers/concentrations to the extent that they have the full functions of an autonomous economic entity, having operational or functional autonomy. To have "functional autonomy" under said item, the Draft Guidelines required the company or economic agent: (a) to perform all the functions normally performed by companies participating in the market in which such company will participate, (b) not to perform the activities of the firms that enter into the contract, hence, its activity must exceed the mere assistance or support to the firms that control it, being part of a market that exceeds them, and (c) the company must be planned on a permanent basis.
It must be noted, however, that the Draft Guidelines were not approved so far and, in any case, as to its provisions regarding full-function joint ventures as reportable mergers/concentrations they would require an amendment of the ACL.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Under the ACL jurisdictional thresholds are not defined by neither market share nor asset value thresholds, but rather by a local turnover threshold. Under Section 9 of the ACL, mergers and acquisitions are subject to mandatory notification if the undertakings involved in the transaction—the acquirer and the target or the merging parties, but not the seller—had turnover in Argentina in their latest fiscal year in excess of 100 million Mobile Units (*Unidades Móviles*, "**UM**") a variable amount which is fixed every year by regulation and mirrors inflation. The merger must also have effects in Argentina.

In 2023 the value of each UM is ARS162.55 (thus, the threshold being ARS16.255 billion, or around US$64.6 million). Turnover is calculated by deducting sales discounts, value added taxes and other taxes directly related to the business volume, from revenues from the sale of products or the provision of services. The business volume of the parties to the proposed merger includes the business volume of all controlling and controlled companies.

An “asset value” threshold, however, is used for the *de minimis* exemption to notification (that is, only if the turnover threshold is exceeded) contemplated under Section 11.e of ACL, which is subject to the practical issues raised in the question.

There are no approved guidelines on the definition of concepts such as “turnover”, “asset value” or “market share”. However, as mentioned the definition of turnover is included in the ACL, and neither of the two other concepts are used as a primary jurisdictional threshold.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

We refer to the response provided on question 1. There are no approved guidelines clarifying the merger control thresholds.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn’t we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Section 4 of ACL establishes that the provisions thereby stipulated are applicable to any individual or corporation, public or private, for profit or non-for-profit, which activities are held in Argentina, or when activities are engaged abroad, if their actions may have effects in the domestic market.

In the same vein, Section 9 of the ACL states that the notification thresholds shall be calculated considering the total turnover of the group of companies affected in the transaction, in Argentina.

Hence, Argentina´s merger control regime, requires for local nexus, which consists on the fact that: (i) the total turnover of the activities undertaken by the involved companies in Argentina shall exceed the notifications thresholds[1] and (ii) whenever the activities of a company are not held in Argentina, such activities shall produce or may have the capacity to produce effects in Argentina´s national markets.

This local nexus requirement applies whether the transaction consists of a joint-venture or not, indistinctly.

[1] These are confined to the buyer´s economic group activities in Argentina and the acquired party´s sales and/or assets of the business(es) being acquired, also in Argentina.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

The acquisition of minority interests can amount to a merger whenever it leads to a change in the control of one or more undertakings, or to the acquisition of a substantial influence over the undertaking. ACL sets forth that whenever a person or economic group acquires *de jure* control of an undertaking by obtaining the votes necessary to prevail in ordinary shareholders meetings, or *de facto* control by exercising for any reason a decisive influence on the passing of resolutions concerning the management of the undertaking, will be included under ACL´s merger control provisions.

Regarding the *de facto* control, the case law of the CNDC has set forth the principle that the acquisition of a minority interest in a company will amount to an acquisition of control if the acquirer is also granted veto rights in relation to the "competitive strategy" thereof. Changes from sole to joint ownership or vice versa, or entailing a modification in the nature of control, are also covered.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

Although (so far) it has not been applied in practice, the ACL states the payment of a filing fee. We agree with the proposal in this regard.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

It does require the submission of market shares for all the relevant markets (for the three years preceding filing).

Since turnover is one of the main tools used by the ACL to assess the impact of the merger, and Argentine regulations require the CNDC to analyse the HHI index, it seems extremely difficult that in practice such a change is accepted in Argentina without changing other regulations.

8. **What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?**

Although the ACL provides for a pre-closing merger control review, given certain legal steps that have not yet occurred, currently mandatory filings continue to be post-closing.

Failure to notify or a delay to notify shall be subject to daily fines of up to 0.1% of the consolidated national turnover achieved on the previous fiscal year by the economic group that failed to notify the economic concentration.

If such criteria cannot be applied, the fine may be up to ARS121,912,500 a day (approximately US$487,000 to the current FX official rate). Once an ex ante-merger control regime is to be implemented (that is, one year after the functioning of the future Argentine Antitrust Authority), the aforementioned fines shall also be applicable to any act which prematurely implements an economic concentration without obtaining the prior approval of the CNDC (gun-jumping). Finally, ACL sets forth that directors, managers, controllers, officers, and attorneys-in-fact whom by their action or omission contribute to the failure to notify will be jointly liable for the fine. In order to establish the amount of the fine, the ACL must consider the severity of the infringement, the damage caused, the size of the market affected, whether the company has already been involved in other infringements to the ACL, its economic capacity and the collaboration provided within the investigation process.

Recently, the CNDC recommended the Secretary of Commerce to impose three fines for late filing. On December 13, 2022, the Secretary of Commerce imposed two fines to Muzquin S.A. for late filing when acquiring the exclusive control over (i) Laboratorios Poen S.A.C.I.F. and (ii) the acquisition of the exclusive control over Max Vision S.R.L., Laboratorios Rowe S.R.L., Raymos S.A.C.I., Gemabiotech S.A.U., Zelltek S.A., Protech Pharma S.A. and Incubatech S.A. (the "Megapharma Group"). The fine related to the acquisition of Laboratorios Poen S.A.C.I.F. amounted to ARS250,350 (approximately US$1,050 to the current FX official rate), given that the delay was solely for 1 day.

The acquisition of Megapharma Group was notified with a 65-days delay, and the fine imposed amounted to ARS16,272,750 (approximately US$65,000 to the current FX official rate). Finally, on December 26, 2022, the Secretary of Commerce, imposed a fine for late filing to Fiden S.A. which

amounted to ARS4,172,500 (approximately US$16,500 to the current FX official rate) as a result of 25-days delay in filing the mandatory notification.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

As explained in answer 8, it is important to highlight that, in Argentina, the independent Argentine Antitrust Authority created by the ACL is not functioning yet.

Consequently, merger control review continues to be entrusted to a double-tier structure composed of the *Comisión Nacional de Defensa de la Competencia* ("CNDC"), which performs the technical analysis and renders a non-binding decision to the Secretaría de Comercio - Secretary of Trade-, which issues all final decisions related to the ACL. The Secretary of Trade is part of the Executive National Branch within the scope of the Ministry of Economy.

Additionally, Argentina still operates under a post-merger control regime. In addition to the complexities that embodies this fact, it should also be noted that the regular practice of the CNDC is to conduct its procedures with a long-term delay, for its final approvals/rejections. A regular filing could be ruled after more than a year (regularly almost two years). On top of the lack of certainty for the economic agents, this implies an abuse by the authority when requesting information from the parties which, in the end, it is merely to grant the CNDC with additional time to analyse the filings.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

N/A

Position on recommendations from ICC: Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for	FOR

Draft recommendations	Comments
transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis,	FOR

Draft recommendations	Comments
financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	FOR
Filing fees: summary description of existing competition rules, if any	The ACL provides for a filing fee. However, it is not implemented yet.
"Negative experience" reports	Argentina: lack of implementation of the independent antitrust authority; still a post-closing merger control regime; delays in the analysis and abuse of requests for information by the authority.

Australia

Carolyn Oddie, Allens

Georgina Foster, Baker McKenzie

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept ofreportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

Reportable mergers

The notification of mergers and acquisitions in Australia is voluntary and there is no minimum turnover or other monetary threshold for notifying mergers to the Australian Competition and Consumer Commission ("**ACCC**").

However, the ACCC's Merger Guidelines indicate that the ACCC expects to be notified of mergers in advance where the products of the merger parties are either substitutes or complements; and the merged firm will have a post-merger market share greater than 20% in the relevant market.[1]

Parties are also encouraged to notify the ACCC in situations where these indicative thresholds are not met, but there are other reasons to consider that the transaction may raise competition issues or the ACCC has indicated to a firm or industry that notification of transactions by that firm or in that industry would be advisable.[2]

The ACCC will investigate and review all acquisitions it becomes aware of that have the potential to raise issues under section 50 of the Competition and Consumer Act 2010 ("**CCA**") regardless of whether the acquisition has been notified. Section 50 prohibits the acquisition of shares or assets if they have the effect or likely effect of substantially lessening competition in any market in Australia. The ACCC will become aware of any transaction that is notified to the Foreign Investment Review Board ("**FIRB**"), which can trigger an ACCC review of the transaction if it has not previously been notified to the ACCC. FIRB will often withhold its approval until the ACCC advises FIRB that it has no objections.

If a decision to file is made, there are two available options for obtaining merger clearance:

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1 ACCC Merger Guidelines, November 2017, s 2 <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF> (***ACCC Merger Guidelines***).

2 *Ibid.*, para 2.4.

i. An informal clearance process under which parties approach the ACCC on an informal (and sometimes confidential) basis for clearance. There is no statutory basis for this clearance, and it does not prevent third parties from subsequently challenging the transaction. The process followed by the ACCC in an informal review is set out in the ACCC's Informal Merger Review Process Guidelines.[3] It is the main method of obtaining clearance in Australia.

ii. A merger authorisation process that came into effect (in its current form) on 6 November 2017. The ACCC can grant merger authorisation if it is satisfied that either the proposed acquisition would be unlikely to substantially lessen competition or the likely public benefit from the proposed acquisition outweighs the likely public detriment. Where authorisation is granted and any conditions attached to the authorisation are complied with, an action cannot be brought by the ACCC or third parties on the basis that the acquisition contravenes section 50 of the CCA. The ACCC's Merger Authorisation Guidelines outline the legislative requirements and procedural steps for parties wishing to apply to the ACCC for authorisation of proposed mergers and acquisitions.[4]

The ACCC has recently proposed a number of changes to the merger regime including a proposal to replace the current voluntary merger regime with a mandatory regime (**Mandatory Regime Proposal**). The ACCC is yet to specify any recommended thresholds but has said it will look to international merger regimes when formulating its recommendations. The ACCC proposes to reserve the power to call in any transactions below those thresholds.

Joint ventures

There is no special treatment for joint ventures under Australia's merger rules. Joint ventures involving the acquisition of shares or assets are also regulated under section 50 and can be reviewed by the ACCC under merger clearance processes. The ACCC's Guidelines and Section 50 do not specifically address joint ventures.

There are other provisions of the CCA that may also need to be considered in relation to joint ventures, including civil and criminal provisions regulating cartel conduct and a separate provision regulating anti-competitive arrangements.[5] While there are exceptions to the cartel offences for joint ventures for the production, supply or acquisition of goods or services,[6] strict criteria must be satisfied for these to apply.

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33 ACCC Informal Merger Review Process Guidelines, November 2017 <https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013> (***ACCC Informal Merger Review Process Guidelines***).

44 ACCC Merger Authorisation Guidelines, October 2018, <https://www.accc.gov.au/publications/merger-authorisation-guidelines> (***ACCC Merger Authorisation Guidelines***).

5 CCA, Part IV.

6 *Ibid*, ss 45AO and 45AP.

The authorisation process under the CCA[7] also applies to the other provisions of the CCA. The ACCC can authorise conduct, including conduct to establish and give effect to a joint venture, where it is satisfied that the proposed conduct is not likely to substantially lessen competition (provided that authorisation is not sought for conduct that may otherwise contravene the cartel provisions) or the likely public benefit of the proposed conduct outweighs the likely public detriment.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Jurisdictional thresholds

Section 50 prohibits the acquisition of shares or assets if they have the effect or likely effect of substantially lessening competition in any market in Australia. There are no minimum turnover or asset value thresholds for section 50 to apply, and acquisitions of any size (including of minority interests) could potentially be captured by the provisions.

The definition of 'market' in section 50 includes a market for goods or services in Australia or in a region, territory or state of Australia.[8] The market does not need to be 'substantial' and can include local markets.[9] In addition, while section 50 refers to a market in Australia, the ACCC recognises the existence of markets that are global or regional in nature, and in such cases will examine the effect on competition in terms of the part of the global or regional market that exists within Australia.[10]

As mentioned above, the ACCC expects to be notified of mergers which would lead the merged firm to have a post-merger market share greater than 20% in the relevant market.[11]

As explained above, the ACCC proposes to introduce mandatory review thresholds as part of its Mandatory Regime Proposal but is yet to provide greater specificity.

Should ICC encourage countries using asset-based or market-share thresholds to consider amending their respective thresholds?

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7 *Ibid*, Part VII, div 1.
8 CCA, s 50(6).
9 ACCC Merger Guidelines, para 4.28 – 4.31.
10 Ibid.
11 *Ibid*., s 2.

We favour international convergence in principle. Consistency between jurisdictions/regimes gives businesses greater certainty when conducting their activities and facilitates international commerce.

However, the ACCC's indicative market share threshold has worked well in Australia, as part of its voluntary regime, to capture mergers that have the potential to materially impact competition. Although there is a degree of uncertainty as to when parties should file (as whether the parties meet the indicative threshold will depend on how the relevant market(s) are defined), this has not been a significant obstacle. Most parties would seek legal advice and the ACCC's decisions (where publicly available) often provide guidance on the ACCC's likely view of market definition (although they are not binding).

Turnover-based thresholds can lead to over-capture and unnecessary filings (as parties may be required to file even when there is no significant local effect on competition), and this can be less appropriate for smaller jurisdictions with limited resources. Turnover-based thresholds may be more appropriate for larger jurisdictions which can handle a larger number of filings as it can help them streamline their processes and ensure all economically significant mergers are captured.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

Please see our response to question 1 above – the ACCC publishes Merger Guidelines,[12] Informal Merger Review Process Guidelines[13] and Merger Authorisation Guidelines.[14]

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Local nexus requirement

Section 50 will apply to acquisitions that occur outside Australia if they involve bodies corporate incorporated in or carrying on business within Australia, or Australian citizens or persons

[12] ACCC Merger Guidelines <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

[13] ACCC Informal Merger Review Process Guidelines <https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013>.

[14] ACCC Merger Authorisation Guidelines <https://www.accc.gov.au/publications/merger-authorisation-guidelines>.

ordinarily resident within Australia. It may be sufficient if the acquirer 'carries on a business in Australia' through a subsidiary or other representative, even though the acquirer itself has no direct operations in Australia.

In relation to transactions that occur wholly outside Australia but that affect Australia, section 50A of the CCA provides that the Commonwealth Treasurer, the ACCC or any other person may apply to the Australian Competition Tribunal for a declaration if:

i. the acquisition of a controlling interest in a corporation that carries on business in Australia would have the effect or likely effect of substantially lessening competition in a market in Australia; and

ii. the acquisition would not result in a public benefit that offsets the lessening of competition.

In both cases, there is a local effects test, which is whether the acquisition will have the effect or likely effect of substantially lessening competition in a market in Australia. In the case of section 50A, public benefits are considered in mitigation of any anticompetitive effects. Joint ventures (including international joint ventures) which involve the acquisition of shares or assets are also regulated under sections 50 and 50A of the CCA.

Should local nexus guidelines be adopted?

We are in favour of a local nexus requirement in all cases. A requirement on parties to file in the absence of any local effect on competition results in a significant waste of resources and time for both businesses and the regulator for no offsetting benefit to competition. We see a benefit to local nexus tests being introduced alongside turnover thresholds (where they are already used).

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Acquisitions of minority shareholdings

Acquisitions of any size (including of minority interests) could potentially be captured by section 50 or 50A.

Section 50 does not refer to 'control', but rather to the effect of an acquisition on competition. It applies to all acquisitions of shares or assets, regardless of whether they deliver 'control' of the target firm, if the acquisition leads to a substantial lessening of competition.

While the concept of 'control' is not specifically defined for merger control purposes, ACCC practice is to treat an acquisition by one company of a controlling interest in another company in the same way as an acquisition of all shares of the target company. While a majority

shareholding will in many cases ensure control, the acquisition of a minority shareholding may nonetheless be found to give rise to effective control. Factors that will be taken into account by the ACCC when considering whether the acquisition of a minority shareholding is sufficient to deliver control of a company include:[15]

i. the ownership distribution of the remaining shares and securities;
ii. the likely exchange of competitively sensitive information;
iii. whether other shareholders are active or passive participants at company meetings;
iv. any other contracts or arrangements between the parties;
v. the composition of the board of directors; and
vi. the company's constitution, including veto rights under majority or special majority matters.

Further, the ACCC may raise issues under section 50 even where no control is achieved, if it alters the incentives of the parties or otherwise has the effect of substantially lessening competition. Some of the anti-competitive effects that the ACCC has considered in this context include:[16]

i. horizontal acquisitions that may increase the interdependence between rivals and lead to muted competition or coordinated conduct;
ii. joint acquisitions of assets by rivals may have coordinated effects;
iii. vertical or conglomerate acquisitions may increase the acquirer's incentive to foreclose rival suppliers;
iv. acquisitions may provide access to commercially sensitive information in relation to competitors; and
v. acquisitions may block potentially pro-competitive mergers and rationalisation.

The ACCC's Merger Guidelines do not, however, provide any guidance on the application of the ACCC's recommended filing thresholds to the acquisition of minority interests.

There is a requirement that a 'controlling interest' is obtained for the transaction to be reviewable under section 50A, which relates to acquisitions wholly outside Australia. A controlling interest will be obtained if a company becomes a subsidiary of the acquirer, or if the acquirer:[17]

i. controls the composition of the target's board of directors;
ii. is in a position to cast, or control the casting of, more than half of the maximum number of votes that might be cast at a general meeting of the subsidiary's shareholders; or

[15] ACCC Merger Guidelines, para 10.
[16] *Ibid.*, para 11.
[17] CCA, s 50AA(8)(b).

iii. holds more than half of the allotted share capital in the subsidiary.

Action taken in relation to minority shareholdings

There are very few instances where the ACCC has taken action in relation to the acquisition of a minority interest, although it has often reviewed acquisitions of minority interests. Four of these instances are described below. The ACCC has also previously accepted statutory undertakings from parties in relation to minority acquisitions.[18]

Dye & Durham / Link

The ACCC cleared this acquisition in September 2022, subject to divestment undertakings. The acquirer, Dye & Durham ("**D&D**"), provides information search and broking services, practice management software and manual property settlement services. The target, Link Administration Holdings, owns a 43% interest in PEXA (which operates an electronic lodgements network, enabling users to complete property lodgements and settlements electronically).

The ACCC considered the acquisition would lead to significant vertical integration in the conveyancing workflow, as D&D is a significant supplier of upstream software services and PEXA has a near monopoly position downstream as an electronic lodgements network operator.

Although the acquisition would lead the merged entity to have a minority shareholding in PEXA (43% only), the ACCC considered the extent to which the merged entity would have the ability and incentive to engage in mutual preferential dealing and foreclose competitors. In its Statement of Issues,19 the ACCC outlined the following considerations in relation to the minority interest:

i. Link is the largest individual holder of shares and associated voting rights in PEXA. It is one of only two substantial shareholders and the remaining shareholdings are widely dispersed;

ii. Link can nominate 2 of the 8 directors on PEXA's Board of Directors; and

iii. It was clear from Link's financial statements that Link considered it had significant influence over PEXA.

In its Statement of Issues, the ACCC stated that it would continue to consider the degree of influence D&D would be likely to have over PEXA as a result of the acquisition but said that "*in any case, [its preliminary competition concerns], are not reliant only on D&D-Link being able to*

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[18] For example, National Australia Bank's acquisition of a 25% shareholding in Cash Services Australia (a joint venture between the other three major Australian banks) (2005). See public competition assessment 'National Australia Bank Limited – proposed acquisition of 25% equity in cash services Australia', 15 December 2005, <https://www.accc.gov.au/system/files/D05%2B763436bea.pdf>.

[19] See ACCC Statement of Issues, 16 June 2022, <https://www.accc.gov.au/system/files/public-registers/documents/Dye%20and%20Durham%20Link%20-%20SoI%20-16%20June%202022.pdf>.

control PEXA post-acquisition but are present in any event as the Proposed Acquisition creates alignment between D&D and PEXA. Should D&D-Link in fact achieve significant influence over PEXA's strategy and behaviour, this would enhance the [concerns]."

The ACCC did not reach a concluded position as it cleared the acquisition subject to D&D undertaking to divest its Australian businesses.

Spirit Super and Palisade / Port of Geelong

A request for merger clearance by Spirit Super and Palisade Investment Partners Consortium was withdrawn on 26 August 2022 after the ACCC expressed concerns with the transaction due to common ownership and management of interests in the competing ports of Port of Geelong and Port of Portland.

In this case, a consortium of investors comprised of Spirit Superannuation, the Diversified Infrastructure Fund managed by Palisade Investment Partners ("**Palisade**") and the Commonwealth Superannuation Corporation ("**CSC**") (a managed client of Palisade) proposed to acquire the Port of Geelong. The ACCC was concerned that post-acquisition Palisade would effectively control a 49% interest in the Port of Geelong; funds managed by Palisade would have held a 24.5% interest and Palisade would have also been responsible for manging the 24.5% interest held by CSC. Investors managed by Palisade had a 100% interest in the Port of Portland, which the ACCC considered competed with the Port of Geelong.

The ACCC was concerned that the merger would reduce competition between the ports, arguing in its Statement of Issues that the common ownership by Palisade, coupled with Palisade's degree of influence over Port of Geelong, would reduce Port of Portland's incentives to compete for customers as aggressively as it otherwise would.[20]

Qantas / Alliance Aviation

In February 2019, the ACCC investigated Qantas Airways Ltd's ("**Qantas**") acquisition of a 19.9% interest in Alliance Aviation ("**Alliance**"). Alliance is a charter flight operator competing with Qantas primarily on regional routes and fly-in, fly-out services for the resources sector. The parties had not notified the ACCC.[21]

The ACCC investigated whether Qantas' stake (which would make it Alliance's largest shareholder) would affect Alliance's ability to raise funds, consider takeovers or participate in commercial ventures, and whether Qantas was attempting to exert influence on Alliance's

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[20] See ACCC Statement of Issues, 31 March 2022, <https://www.accc.gov.au/system/files/public-registers/documents/Spirit%20Palisade%20CSC%20Consortium%20acquisition%20of%20Port%20of%20Geelong%20-%20Statement%20of%20Issues..pdf>.

[21] See ACCC press releases 'Qantas stake in Alliance Airlines raises concerns', 1 August 2019, <https://www.accc.gov.au/media-release/qantas-stake-in-alliance-airlines-raises-concerns>, and 'Investigation into Qantas's stake in Alliance Airlines continues', 1 June 2020, <https://www.accc.gov.au/media-release/investigation-into-qantas%E2%80%99s-stake-in-alliance-airlines-continues>.

decision-making or operations. The ACCC said it would consider enforcement action if there was evidence that the Qantas shareholding was compromising Alliance's ability to be a strong competitor to Qantas either now or in the future.[22]

The ACCC also said that any further increase in Qantas' stake in Alliance is likely to raise significant competition concerns under the CCA. In June 2020, the ACCC stated that the deal was of heightened concern due to COVID-related industry-wide upheaval in aviation.[23]

In response to the investigation, Qantas stated that the shareholding is entirely passive as the interest does not include board representation, and Qantas has no influence on the management of Alliance.[24]

The ACCC ended its investigation in April 2022 without taking action against either Qantas or Alliance Airlines.[25]

In May 2022, Qantas announced its intention to acquire the remaining shares in Alliance Airlines.[26] The ACCC opposed this acquisition in April 2023 based on concerns that it would likely substantially lessen competition in markets for the supply of air transport services to resource industry customers in Western Australia and Queensland.[27]

AGL / Loy Yang

The ACCC declined to clear Australian Gas Light Company's ("**AGL**") proposed acquisition of a 35% interest in Loy Yang in 2003. AGL was a large gas and electricity retail operator and Loy Yang was one of the largest base load electricity generators.[28]

The ACCC considered AGL would have an interest which, even if short of control, would enable it to take "*an active and influential role in the business affairs of Loy Yang*" e.g. by vetoing board special matters and participating in board consideration and approval of business plans and budgets. The ACCC was concerned AGL would have the ability and the incentive to influence the prices at which Loy Yang offered to despatch electricity, as well as to pursue a foreclosure

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22 ACCC press release 'Investigation into Qantas's stake in Alliance Airlines continues', 1 June 2020.

23 Ibid.

24 See Australian Financial Review, 'ACCC's year-long probe into Qantas' Alliance stake heats up', 1 June 2020, <https://www.afr.com/companies/transport/accc-s-year-long-investigation-into-qantas-alliance-stake-heats-up-20200601-p54ya3>.

25 See Australian Financial Review, 'ACCC ends Qantas, Alliance probe without action', 5 April 2022, <https://www.afr.com/companies/transport/accc-ends-qantas-alliance-probe-without-action-20220405-p5aavv>.

26 See ACCC public merger register entry 'Qantas – proposed acquisition of Alliance Airlines', commenced 18 May 2022, <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/qantas%E2%80%99-proposed-acquisition-of-alliance-airlines> and market inquiries letter, 18 May 2022, <https://www.accc.gov.au/system/files/public-registers/documents/Qantas%20Alliance%20-%20Market%20inquiries%20letter%20-%2018%20May%202022.pdf>.

27 See ACCC press release 'ACCC opposes Qantas' acquisition of Alliance', 20 April 2023, <https://www.accc.gov.au/media-release/accc-opposes-qantas-acquisition-of-alliance>.

28 See ACCC press release 'ACCC opposes AGL acquiring a stake in Loy Yang Power', 13 June 2003, <https://www.accc.gov.au/media-release/accc-opposes-agl-acquiring-a-stake-in-loy-yang-power>.

strategy by reducing the level of hedge contracts it was prepared to supply to downstream retail competitors of AGL.[29]

Following the ACCC's opposition, AGL sought a declaration from the Federal Court that the acquisition would not breach Section 50. The Court did not consider AGL's interest in Loy Yang would change the company's incentives in a way that would be likely to substantially lessen competition in the market. The Court further found the AGL-appointed directors (three of the eight directors on the Loy Yang Board) were sufficiently constrained from acting in AGL's interests (contrary to the interests of Loy Yang) by other directors and other shareholders.[30]

Should there be a legal requirement to notify the acquisition of minority shareholdings that does not allow the acquirer to exercise any control or influence over the target?

There should not be a requirement to notify such acquisitions given the very limited impact on competition (if any). Although such acquisitions may, in some cases, give parties access to commercially sensitive information in relation to their competitors, it is our experience that this risk can be managed in most cases.

However, we expect that there may be strong pushback from regulators that actively review minority acquisitions (e.g., the ACCC, which has reviewed minority interests of less than 10%). One alternative option may be to only require parties to report the acquisition of minority interests where it is a transaction between competitors.

Where jurisdictions have mandatory regimes, a further option may be to have a minimum shareholding below which parties do not have to file, *i.e.* a safe harbour. As to the threshold for the safe harbour, we expect that the ACCC is unlikely to be comfortable with a threshold of more than 10%.

6. Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

There are no fees for informal clearances by the ACCC. The filing fee for a merger authorisation is currently A$25,000.[31]

Should there be filing fees?

Eliminating filing fees would encourage parties to comply with notification requirements and help to streamline the filing process.

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29 Australian Gas Light Co v Australian Competition and Consumer Competition (ACCC) (No 3) (2003) 137 FCR 317; [2003] FCA 1525.

30 Ibid.

31 ACCC Merger Authorisation Guidelines, para 3.16.

However, filing fees may be appropriate in circumstances where they are needed to contribute to the cost of administering the system particularly in jurisdictions with relatively new merger control regimes.

We also see benefit in streamlining the payment process where filing fees are payable.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

Under the informal clearance system, the ACCC's Informal Merger Review Process Guidelines recommend that parties lodge an initial written submission that, among other information, includes the market shares of suppliers for each market. There is no prescribed form for this submission, although the ACCC's Informal Merger Review Process Guidelines provides guidance on the types of information the ACCC considers will assist it in its assessment.

There is no prescribed form for merger authorisation applications as such although the ACCC requires parties to provide certain information in their application, including an estimate of (i) the total market size and (ii) the current market shares for each of the parties and each competitor, for each relevant product or service in respect of which the parties overlap or have a vertical relationship.

The ACCC has not confirmed whether it will adopt a prescribed form if its Mandatory Regime Proposal is adopted.

Should a notification form that is similar to the US HSR form be adopted?

We do not favour this suggestion.

Having a notification form can be overly prescriptive and inflexible. As noted above, there is no prescribed form for the informal merger clearance regime in Australia and this has meant parties can (and generally do) provide a level of information and substantive argument that is commensurate with the significance of overlaps. The ACCC can then issue voluntary requests for information and documents and/or statutory notices during its review if and when it considers it requires further information. This is efficient for both businesses and the ACCC.

We also do not favour notification forms which request parties produce documents upfront (such as the HSR form). Such a requirement tends to be onerous for parties as parties will often need to undertake costly and resource-intensive document review regardless of the size/complexity of the transaction. Additionally, a close examination of the parties' documents would only be warranted in a small proportion of cases. It would not meaningfully assist the regulator's review in many cases eg, where the merger raises minimal competition concerns or is unlikely to have any local effects on competition.

As part of the ACCC's Mandatory Regime Proposal, the ACCC has proposed to make available a simpler 'notification waiver' process for acquisitions that are above the notification thresholds but are unlikely to raise serious competition concerns, effectively enabling merger parties to proceed with the acquisition without the need for a public review.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

There is no fine for failure to notify/late notification but the ACCC may seek an injunction from the Federal Court of Australia to halt or prevent completion pending the ACCC's review,[32] or conduct a post-acquisition investigation, and may bring proceedings for breach of section 50 of the CCA. For example, in October 2021 the ACCC filed proceedings and was granted an urgent interim injunction to restrain Virtus Health's proposed acquisition of Adora Fertility. The parties, which both provide IVF services in Sydney, Melbourne and Brisbane, informed the ACCC of the intended merger but later advised they would complete the transaction even though the ACCC had not completed its informal review of the competition issues raised by the acquisition.[33] The ACCC was concerned that the acquisition would increase Virtus' already significant market share in Brisbane and Melbourne and there were strong indications that Adora had been a vigorous competitor, driving down prices for IVF services through a low-cost model. Virtus offered the ACCC a temporary 'hold separate' undertaking, under which it would commit to take some steps to keep the businesses separate. However, the ACCC considered that there were no compelling reasons other than commercial convenience for the transaction to proceed and that any hold separate undertaking was an inadequate option.

Consequences of breach of section 50 where a merger is found to have the effect or likely effect of substantially lessening competition in a market in Australia include:

i. penalties (greater of $50 million, three times the benefit obtained from the conduct, or 30% of the corporation's adjusted turnover during the 'breach turnover period'[34] for the act or omission);[35]

ii. forced divestitures; and

iii. potentially third party application for damages.

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[32] CCA, s 80.

[33] See ACCC press release, 'Virtus abandons proposed acquisition of Adora', 17 December 2021, <https://www.accc.gov.au/media-release/virtus-abandons-proposed-acquisition-of-adora>.

[34] 'Breach turnover period' means the period from when a business is found to have begun committing a contravention to when it ceased doing so. The minimum period is 12 months.

[35] Ibid., ss 76, 81 and 82 as amended by the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth).

Officers or employees who are knowingly concerned or aid and abet in breach of section 50 can also be personally liable for penalties of up to $2.5 million, and may be disqualified from managing a corporation.[36]

The time limit for the ACCC seeking an order to void the transaction or for divestment of any or all of the shares or assets acquired is three years[37] and for damages/pecuniary penalties, six years.[38]

There have not been many cases brought in relation to anti-competitive mergers. This is because in most instances where the ACCC has had concerns, it has sought and obtained undertakings not to complete the acquisition until the ACCC has completed its review or the parties have sought a declaration from the court that the acquisition was not likely to have the effect of substantially lessening competition or authorisation of the merger.

If the ACCC's Mandatory Regime Proposal is adopted, merger parties would bear the onus of satisfying the ACCC that their transaction does not substantially lessen competition. Currently the ACCC bears the onus of proving that the transaction substantially lessens competition when it applies to the Federal Court for an injunction (to prevent a transaction from completing pending its review) or for a declaration that the transaction contravenes 50 of the CCA.

Should there be a convergence of penalties imposed in different countries?

We consider that there are good reasons for penalties to diverge between jurisdictions. For example, there may be significant differences in the monetary position of companies in certain jurisdictions and it may therefore be appropriate for penalties to be set locally.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   N/A

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    N/A

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[36] *Ibid.*, ss 76 and 86E.
[37] *Ibid.*, s 81(2).
[38] *Ibid.*, s 77(2) and 82(2).

Position on recommendations from ICC

While the Australian Taskforce supports most of the ICC draft recommendations, we consider certain proposals are not necessarily suitable for all jurisdictions and in all circumstances. We have set our comments on these aspects below.

To provide some context to our comments, we consider that some of the recommendations are not necessarily suited to all jurisdictions and should take account of differently situated regimes. In particular:

i. Some of the recommendations are more suited to jurisdictions that have a mandatory merger filing regime rather than jurisdictions with a voluntary regime. By way of example, while we agree that for mandatory merger filing regimes a turnover threshold is appropriate as it provides the necessary certainty as to when a filing is required, for jurisdictions with a voluntary merger filing regime a market share based filing threshold can often work well and ensure that only mergers that have the potential to raise competition issues trigger a filing.

ii. For smaller jurisdictions, many transactions that do not involve parties with high worldwide turnover have the potential to raise significant competition law issues in the local jurisdiction by reason of the parties' local presence and it is appropriate that those transactions are notified.

iii. Unlike many other jurisdictions that have a civil law system, Australia has a common law system under which the courts (rather than the ACCC)[39] determine the appropriate penalty for a contravention and weigh up a range of factors when exercising their discretion. In our experience, the ACCC strongly believes in the deterrent effect of penalties and often advocates for higher penalties. As such, we expect proposals to limit the scope of fines or penalties, and the circumstances to which they apply, to meet some resistance in Australia. We can also see important public policy reasons against limiting the application of fines in some cases.

In jurisdictions with newer competition law regimes, the competition authorities are often in a capacity building phase and may also be resource constrained. For instance, as discussed below, filing fees can be an important source of funding for those authorities and international companies often have greater capacity to pay.

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

[39] However, the ACCC can issue infringement notices for certain contraventions.

FOR. We support this recommendation in the interests of international convergence and certainty, but expect this recommendation may encounter resistance from the ACCC, which has raised issues even where control has not necessarily been achieved.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We support this recommendation in the interests of international convergence and certainty, however, we expect that there may be strong pushback from regulators that actively review minority acquisitions, e.g., the ACCC, which has reviewed minority interests of less than 10%.

One option may be to only require parties to report the acquisition of minority interests where it is a transaction between competitors.

Where jurisdictions have mandatory regimes, a further option may be to have a minimum shareholding below which parties do not have to file, i.e. a safe harbour. As to the threshold for the safe harbour, we expect that the ACCC is unlikely to be comfortable with a threshold of more than 10%.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR IN PRINCIPLE. We agree that only JVs with a meaningful market presence should be reportable and that greenfield JVs should be exempt from filing requirements. However, 'full functionality' in relation to JVs is a European concept that does not translate well to all regimes, including the one in Australia and others in Asia. In Australia, parties generally do not make a merger filing unless the JV (which can be an unincorporated JV) involves an acquisition of shares or assets and has the potential to substantially lessen competition in a market in Australia.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

AGAINST. In our experience, market share thresholds have worked well to capture mergers that have the potential to materially impact competition in voluntary regimes.

In addition, turnover-based thresholds in less developed jurisdictions can be problematic. We would support the use of turnover-based thresholds where a jurisdiction has a mandatory regime. We agree that parties need sufficient certainty about whether they have triggered the thresholds

if they face penalties for failing to file. A market-share based threshold would be less appropriate in these circumstances.

The ICC report further states that antitrust agencies "*should favour the combination of a relatively high worldwide turnover threshold with a requirement of at least two companies meeting each a national turnover threshold that would be sufficiently high*".[40] We have reservations about adopting a 'relatively high worldwide turnover' threshold in combination with a requirement of at least two companies meeting a national turnover test. Such a 'worldwide turnover' threshold is unlikely to capture all mergers that may materially impact competition, e.g., mergers of parties with a high Australian turnover (but low worldwide turnover) and smaller local mergers affecting narrower markets (such as local markets for supermarkets, hospitals, etc).

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We agree that turnover-based thresholds are preferable to asset-value thresholds, as asset values can be difficult to ascertain, do not necessarily reflect economic activity in a jurisdiction and can create uncertainty.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We are in favour of a local nexus requirement in all cases. A requirement on parties to file in the absence of any local effect on competition results in a significant waste of resources and time for both businesses and the regulator for no offsetting benefit to competition. We see a benefit to local nexus tests being introduced alongside turnover thresholds (where they are already used).

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR IN PRINCIPLE. We do not support the adoption of notification forms generally. Having a notification form can be overly prescriptive and inflexible. However, for jurisdictions that require the use of notification forms, we support simplified notification forms where the parties activities do

[40] ICC Report, para 14.

not overlap and are not vertically related, or where the parties combined market share is below a certain threshold.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.
If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR IN PART. We partly support this recommendation. We do not support abolishing filing fees in all cases as we are aware of regulators in newer and/or smaller regimes which rely on filing fees to fund their agencies and capacity-build. We do, however, agree that parties should pay filing fees commensurate with the administrative costs borne by the regulator (or the actual likely economic impact of the transaction on the territory of the country concerned).

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We support both the publishing of relevant guidelines and the issuance of translations of guidelines into English to ensure that they are available to the global antitrust community. Our experience has been that the ACCC's guidelines are helpful in clarifying when it expects mergers to be notified, the various phases and timing of its review, the applicable legal test and the factors it will take into consideration as part of its assessment. Antitrust agencies should publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; and (vii) gun jumping.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less

than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR IN PRINCIPLE. We support this recommendation but consider it is more suited to mandatory-suspensory notification regimes as opposed to voluntary-non suspensory regimes.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

NOTED. We note the Dutch Competition Authority's position but do not support limiting fines to a share of a party's turnover (whether the target or the acquirer) and consider instead the fine should be based on the severity of the gun jumping conduct.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR IN PRINCIPLE
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	AGAINST
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds,	FOR

Draft recommendations	Comments
which are much easier to assess and to implement.	
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR IN PRINCIPLE
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality**	FOR IN PART

Draft recommendations	Comments
principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
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Draft recommendations	Comments
special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	Eliminating filing fees would encourage parties to comply with notification requirements and help to streamline the filing process. However, filing fees may be appropriate in circumstances where they are needed to contribute to the cost of administering the system particularly in jurisdictions with relatively new merger control regimes.
"Negative experience" reports	N/A

Brazil

Paola Pugliese, Partner, Lefosse

Milena Mundim, Partner, Lefosse

1 Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

The Brazilian Competition Commission ("CADE") has published Resolutions which clarify some of the reportable situations, but not all of them. There is still a level of uncertainty in relation to a number of matters, as described below.

- Pursuant to Article 90 of Law 12,529/2011 (the "Brazilian Competition Law"), the reportable transactions are the following:

  I - 2 (two) or more formerly independent companies merge;

  II - 1 (one) or more companies acquire, directly or indirectly, by purchase or exchange of shares, quotas, stocks or securities convertible into shares, or assets, tangible or intangible, by contract or by any other means or form, the control or portions of one or more other companies;

  III - 1 (one) or more companies incorporate one or more other companies; or

  IV - 2 (two) or more companies enter into an associative contract, consortium or joint venture (except if created for the purposes of a given tender process launched by the public administration).

- CADE's Resolution 2/2012 further clarified in its Articles 9 and 10 that acquisitions of share participation referred to in Article 90, item II are of mandatory filing when they result in:

  (i) acquisition of control (sole or joint control)

  (ii) acquisition of minority stakes in the following situations:

  - acquisitions of 5% or more of the stakes of a competitor or a vertically-related entity must be notified and subsequent acquisitions of stakes of the target must also be notified when they result in holdings of multiples of 5%;

- for all other situations involving non-competitors or vertically-related entities, the minimum threshold is 20% of the shares and, for subsequent acquisitions, multiples of 20%.

Resolution 2/2012 also established one exemption for the rules above: the filing obligation does not apply to stakes acquired by the controlling shareholder already exercising sole control over the target.

- Article 11 of Resolution 02/2012 also regulated the acquisition of convertible securities, establishing that the acquisition of any securities which are convertible into shares will be of mandatory notification when (i) the future conversion falls under any of the criteria set by Articles 9 ad 10 (acquisition of control or minority stakes following the rules described above) and (ii) when the title of the convertible securities grant the rights to appoint board / management members or voting / veto rights over competitively sensitive matters (that go beyond protection rights set forth by the law).

- Finally, Resolution 17/2016, defined what an "associative agreement" is for the purpose of Art. 90, item IV. Associative agreements are defined as agreements between competitors, which term is equal to or longer than two years and that sets a common undertaking for the exploitation of a business activity and which involve the sharing of risks or results.

Subjects that would benefit from further clarifications:

- **JVs:** Neither the Competition Law nor the regulation differentiate full-function and non-full-function JVs (based on the case law, both are equally reportable).

- **Definition of control:** The concept of control and joint control are also set by precedents, although there is no objective criteria.

2 How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

- Filings in Brazil are mandatory if all the elements of a three prong test are satisfied:

  - **Effects test**: the transaction or agreement has effects or potential effects in Brazil.

- **Revenues thresholds**: at least one of the groups involved in the transaction or agreement has registered gross revenues in Brazil in excess of BRL750 million, and at least one of the other groups involved registered gross revenues in Brazil in excess of BRL 75 million, in the year preceding the transaction.

- **Concentration test**: the transaction or agreement amounts to a concentration under Brazil's competition law. The definition of "concentration" in Brazil covers: (i) acquisition of control; (ii) acquisition of certain minority stakes or assets; (iii) joint ventures and (iv) certain collaborative/cooperative agreements, and consortia, except if created for the purposes of a given tender process launched by the public administration.

- There are no guidelines for revenue calculation. The case law has already clarified some questions that were raised on a case by case basis, but objectively, there is to rule to be followed.

- Brazil does not use "asset value" or "market share" as filing thresholds.

- The market share threshold was adopted in Brazil until 2012. It used to cause a significant level of uncertainty, because market shares are necessarily linked to market definition, which is not an objective concept. Moreover, a reliable source for market calculation is not always available. Hence, the jurisdictional assessments had to be conducted on the basis of assumptions. Our view is that **encouraging objective criteria for merger control thresholds (which means excluding market share as a filing criterion)** is also a manner of fostering legal certainty for stakeholders subject to merger control rules.

3 Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

No, except for the regulation on the "concentration test" (reportable transactions), described in question (a) above, there are no guidelines for calculation of revenues or to establish local effects. Guidelines with objective criteria would certainly be much appreciated and are highly advisable.

4 Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?

Local nexus requirement

As mentioned in item (a), local effects is one of the three criteria that need to be satisfied for a mandatory file in Brazil. Therefore, any transaction or agreement needs to has effects or potential effects in Brazil.

Generally, a given transaction has effects in Brazil if (i) it takes place in Brazil, or (ii) even though the transaction takes place abroad, the target or the joint venture has or will have direct and/or indirect presence in Brazil (direct presence is typically achieved through a local subsidiary, distributor, sales representative etc., while indirect presence refers to export sales into the country. These and other clarification are, however, provided by the case law and not but the law or regulation.

Guidelines with objective criteria to establish local effects would certainly be much appreciated and highly advisable.

Simplified procedure/short form

Transactions involving 'potential effects' (when local nexus is established, but is remote) are generally eligible for the fast track procedure, applicable when (i) there is no overlaps or vertical links or (ii) when overlaps result in combined market share below 20% and/or vertical links with market shares below 30%.

In fast track cases, parties submit the filing based on a short form and the deal is cleared in up to 30 days.

5 Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

- Yes, (as indicated in questions (a) above) the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target can be of mandatory notification. The law establishes the following thresholds for the acquisitions of minority stakes:

  i. acquisitions of 5% or more of the stakes of a competitor or a vertically-related entity must be notified and subsequent acquisitions of stakes of the target must also be notified when they result in holdings of multiples of 5%;

ii. for all other situations involving non-competitors or vertically-related entities, the minimum threshold is 20% of the shares and, for subsequent acquisitions, multiples of 20%.

Any acquisition of equity interest carried out by who holds sole control of the Target is exempted .

- Yes, there have already been transactions involving the acquisition of minority interest that were wither subject to remedies or were even blocked by CADE, although this is in fact less common.

    - Example: In 2012, CADE blocked the acquisition by Votorantim (the largest Brazilian cement company) of 21,2% of share capital of Cimpor (a competitor in the market). Cade assessed minority acquisitions following all steps of the horizontal merger guidelines, *i.e.* the assessment is the same conducted for a merger situation.

6 Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

- The notification of a merger case to CADE requires the payment of a fixed filing fee in the amount of BRL85,000.00 (approx. €13,85414.325 / £11,8852.427), applicable to both fast-track and regular proceedings.

- The funds raised through the payment of filing fees are used by CADE to pay their most relevant expenses, including investments on the qualification of their staff. It is unlikely that CADE would agree to no filing fee, irrespective of the practice in other jurisdictions.

7 Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes)?

- CADE's notification form does require the provision of market share information whenever the transaction results in horizontal overlaps and/or vertical integration. For fast-track cases (*i.e.* when combined market shares stay below 20% or below 30% when vertical links are involved), the applicants must provide the information for the past year, while for transactions eligible for the regular proceeding, it is necessary to provide market share

information for the past five years.

- As concentration levels are employed to establish the review procedure and to determine how the merger review will develop, our view is that it is important for the antitrust assessment. As this has always been CADE's main criteria to evaluate the effects of the transaction and establish potential concerns, we believe that CADE would not be open for a model where no market share is provided, as a general rule.

  Having said that, some flexibility for specific sectors (in particular digital markets), in which revenues and market shares might be challenging metrics, might be more acceptable.

8 What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

- Gun-jumping penalties - which are equally applicable when companies (i) fail to notify or (ii) when they close the transaction (partially or in full) before a final and definitive clearance decision is rendered by CADE, are:

  - The closing acts may be declared null and void
  - Fines can range from BRL60,000 to BRL60,000,000

- CADE may also launching of an administrative proceeding to investigate any other violation involved (particularly if closing was harmful to competition).

- Pursuant to CADE's Gun umping Guidelines, the following practices may be interpreted as premature closing of the transaction:

  a. transfer and/or use of assets in general (including securities with voting rights);
  b. exercise of voting rights or relevant influence over the activities of the counterparty (such as submitting decisions on pricing, customers, policy commercial/sales, planning, marketing strategies, interruption of investments, discontinuation of products and others);
  c. receipt of profits or other payments linked to the performance of the counterparty;
  d. development of joint sales or marketing strategies for products that configure management unification;
  e. integration of the sales force between the parties;
  f. licensing the use of intellectual property exclusively to the counterparty;
  g. joint development of products; and
  h. appointment of members in a decision-making body;

- **Relevant Precedents**

  CADE has been increasingly strict in enforcing its gun-jumping regulations and has been employing all tools at its disposal to enforce its pre-merger control regime:

  - In December/2019, CADE negotiated a record fine of BRL57,000,000 in the Merger Review No. 08700.001908/2019-73 (*IBM/Red Hat*), when the parties implemented the estimated BRL132,000,000,000 reais transaction worldwide while CADE's review was still ongoing.

  - In June/2017, in the Merger Review No. 08700.007553/2016-83 (*Mataboi Alimentos/JBJ Agropecuária*), after negotiating a pecuniary fine of BRL664,983.32, CADE blocked a transaction that had already been implemented, based on its effects, and determined that the unwinding of the deal.

  - In August/2016, in Merger Review No. 08700.002655/2016-11 (*Blue Cycle/Shimano Inc*), CADE imposed a fine of BRL1.5,000,000 and determined the nullity of the distribution agreement between Blue Cycle and Shimano – this was the first time that the nullity sanction was imposed.

  - In January/2016,CADE negotiated a fine of BRL30,000,000 in Merger Review No. 08700.009018/2015-86 (*Cisco/Technicolor*) after the parties recognised that they closed the transaction during CADE's analysis and made a carveout of the Brazilian portion of the target.

• Although convergence amongst agencies in relation to how they will approach gun jumping cases is certainly welcome to the merging parties, a reduction of disparity in gun jumping fines brings the inevitable risk of encouraging authorities to harmonize fines at the highest levels. A convergence exercise must be followed by strong advocacy to make sure that authorities do not over-sanction multijurisdictional transactions by imposing individual penalties without taking the whole sanctioning scenario into account.

9 "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

N/A

10 Other countries: are there any other country that should be included in our report? Please explain why.

N/A

Position on recommendations from ICC

While the Brazilian Taskforce supports most of the Merger Taskforce's draft recommendations, we consider certain proposals are not necessarily suitable for all jurisdictions and in all circumstances. We have set our comments on these aspects below.

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We support this recommendation in the interests of international convergence.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We support this recommendation, however, we expect that there may be strong pushback from regulators that actively review minority acquisitions. That includes CADE, which has chosen to establish objective thresholds for minority acquisitions (20% and in transactions between competitors or vertically related companies the threshold is lower, *i.e.* 5%).

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR IN PRINCIPLE. We understand the rationale for the non-reportability of non-full function JVs, but the 'full functionality' in relation to JVs is not a concept that CADE is very familiar with. We would expect a pushback from CADE, because the Brazilian authority do not have the practical experience to allow them to conclude that non full function JVs do not raise any competition concerns, e.g. CADE did not have the chance to assess the 'full functionality argument' in enough real life cases to produce their own conclusions, by experience.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR: we agree that market share thresholds do not allow for a sufficient level of legal certainty. Brazil abolished market share thresholds in 2012.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We agree that turnover-based thresholds are preferable to asset-value thresholds, as asset values can be difficult to ascertain, do not necessarily reflect economic activity in a jurisdiction and can create uncertainty. Brazil never had asset value thresholds.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We are in favour of a local nexus requirement in all cases.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.

FOR. We support simplified notification forms where the parties activities do not overlap *and* are not vertically related, or where the parties combined market share is below a certain threshold.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC

stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR IN PART. We partly support this recommendation. (i) The funds raised through the payment of filing fees are used by several regulators (including CADE) to pay their most relevant expenses, including investments on the qualification of their staff. Our view is that it is unlikely that CADE would agree to no filing fee, irrespective of the practice in other jurisdictions. (ii) We agree however with more proportionate filing fees. In Brazil, over 90% of the cases are assessed under the fast-track and they bear the exact same cost of the more complex ones.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We support both the publishing of relevant guidelines and the issuance of translations of guidelines into English to ensure that they are available to the global antitrust community. CADE already has part of the legislation and regulations translated into English.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR IN PRINCIPLE. (i) the Brazilian law already sets forth the possibility of a waiver request in exceptional situations; (ii) while we support the recommendation, we expect CADE to push back on the suggestion to carve out the business(es) that is (are) under review for merger control process in order to speed up the implementation of the transaction, as CADE has a firm and strong position that carve-outs will not be accepted.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR IN PRINCIPLE. We support objective criteria for the calculation of gun jumping fines, but would expect the authorities to want to take other criteria into account (such as timing, *i.e.* how long the parties took to submit the transaction for clearance after closing; if closing resulted in anticompetitive effects in the market etc.), as CADE does. We support removing the option to annul a transaction when there is gun-jumping conduct only and to retaining it when the transaction clearly raises potential competition concerns.

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Draft recommendations	Comments
administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	
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Chile

Benjamín Grebe, Prieto

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1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   Our competition authority, Fiscalía Nacional Económica (**FNE**) established in June 2017, Jurisdiction Guidelines (**Jurisdiction Guidelines**), in addition to the Practical Guidelines for the Calculation of Thresholds for the Notification of Concentration Operations (**Calculation Guidelines**), published in August 2019. Recently, in May 2021, the FNE also published a new version of the Horizontal Merger Guidelines (**Horizontal Merger Guidelines**), document that provides guidance for the analysis of all horizontal concentrations.

   Chilean Competition Law (**DL 211**) requires some transactions with effect in Chile to be mandatory reviewed ex ante by the FNE, in general "concentration operations": (i) Mergers; (ii) Acquisitions of rights that allows to exercise "decisive influence" over a competitor; (iii) Joint Ventures; and (iv) Acquisitions of assets.

   The FNE explain in its Jurisdiction Guidelines that not every transaction classifies as a concentration, and that not every concentration must be notified before the FNE to obtain a ex ante approval. FNE's Jurisdiction Guidelines explain concepts as "control" and "decisive influence", understanding them widely, as the possibility, de jure or *de facto*, of determining -or vetoing- the adoption of decisions on the strategy and competitive behaviour of an economic agent. Generally, it is mandatory to submit a concentration operation through a merger review filing before the FNE when "the sales in Chile of the economic agents that concentrate", exceed specific thresholds.

   According to FNE's Jurisdiction Guidelines, the concept of control implies, among others, the composition of the agent management, voting rights, strategic or business decisions, or, in general, influencing its own competitive development. Moreover, FNE's Jurisdiction Guidelines explain that a change of control (or even from co-control by two agents, to 100% control of one of them) could trigger a mandatory merger review filing if sales thresholds are met.

According to DL 211, a mandatorily notifiable association is triggered, when the thresholds are exceeded. These thresholds are also applicable regarding associations where two or more economic agents create a new agent different to them, who performs independently and permanently (broad concept of joint venture or JV, since it can take form of a company agreement, or a different organisational structure, with or without legal personality, such as co-ownerships, associations, de facto companies, joint partnership accounts, among others). According to the Jurisdiction Guidelines, a JV qualifies as a concentration operation when: a) creates a "new economic agent"; b) "functionally autonomous" (independence and operational autonomy from a normative and an economic dimension); and c) "durable" (this concept depends on the market structure). The concepts of "economic agent" and "economic group" are broad. When two or more economics agents share the same controller and/or a common entity have decisive influence over them, they may be considered as members of the same economic group.

Also, the FNE published in May 2021 a Guidance on Pre-notifications of concentration, allowing the undertakings that are contemplating a concentration, prior to notify it before the authority, to put forth any queries. The aim of this Guidance is to enable a more timely and complete notification, and avoid errors and or omissions on the notification.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Through the amendment introduced in 2016 -effective since 2017- by Law No 20,945, DL 211 incorporated a mandatory *ex ante* merger review conducted by the FNE of "concentration operations" between undertakings with effects in Chile.

An concentration operation in Chile shall be mandatorily notified if two thresholds are met, which are based on "sales in Chile" in the year prior to the filing of each agent and/or business group involved in the operation. The threshold refers to individual sales of each agent and the combined sales of the agents that intend to concentrate. The current thresholds were established by the FNE in March 2019.

In our jurisdiction no asset-based or market share thresholds are included, therefore no "asset value" or "market share" definitions are provided in this regard.

Regarding the "turnover" notion, the FNE Jurisdiction Guidelines includes some references to definitions, indicating that turnover is relevant on determining the thresholds set forth by the FNE to mandatory notification, and determines which sales should be included in the threshold's calculation.

According to FNE's Jurisdiction Guidelines "turnover" or amount of sales, refers to the sums resulting from the sale of products and/or the rendering of services in Chile during the year prior to the filing. Contracts signed in Chile to supply products or provide services to customers located outside the country should not be considered. On the contrary, those contracts signed to supply products or provide services to clients located in Chile, must be considered to determine sales amounts.

The following concepts should be excluded from sales calculation: (i) taxes directly related to sales volume; (ii) amounts deducted from the sales price, for example, due to offers or volume discounts; (iii) sales and transactions with other entities of the same business group; (iv) incomes that does not originate from the operation of the usual line of business of the economic agents that plan to merge or their related companies.

Also, the FNE Jurisdiction Guidelines provides a definition of "decisive influence" or "control". These concepts are provided for the analysis if the operation classifies as a "concentration" according to DL 211. If the operation classifies as a concentration and both sales thresholds are met, the M&A or JV shall be notified to the FNE triggering a preventive merger control procedure.

Regarding the second part of the question: Yes, in our opinion and as a general rule, thresholds like the ones based on sales existing in Chile, provide more legal predictability and certainty to determine whether a merger it is mandatorily notifiable or not. Notwithstanding the above, in practice, asset-based thresholds or the amount of the transaction could be useful for example in digital platforms merger reviews when the target's sales are not typically relevant in the development period, to exceed any sales thresholds.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

Yes, Calculation Guidelines were published by the FNE in June 2017 and provide guidance on how to calculate the sales thresholds and develops concepts referred in answer to question number 2.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

   The local nexus in the Chilean system is given by the thresholds of sales in Chile during the year prior to the filing of each agent. On the other hand, the Competition Law requires that the operation must have effects in Chile, as explained in the first answer. Also, Jurisdiction Guidelines state that the qualification as an undertaking for the concentration operation purposes is regardless its nationality (Chilean or foreign).

   In our legislation there is no special procedure for internationals joint ventures.

   Regarding the last question, given the increase of cross-border operations, it could be positive to encourage other countries to also adopt local nexus guidelines, however we are not familiar with the Swiss guidelines.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

   Notwithstanding to the below, the Chilean merger control system does not require an *ex-ante* notification of a minority shareholdings acquisition if it does not grant control or decisive influence. FNE's guidelines explains the meanings and kind of decisive influence and control, expressly states that the FNE understands the concept of decisive influence and control included in DL 211 as synonymous. It also states that an acquisition of a minority share can also allow the exercise of decisively influence, when, for example, such participation grants a veto right regarding strategic decisions, or there is a shareholders' agreement related to such strategic decisions.

   Chilean competition system requires the notification of cross-shareholdings in competitors (over 10% of shares), when the sales of both agents in Chile exceed particular sales thresholds (different to the merger review ones), in a special procedure, different than the merger review one. This special procedure consists of a simple notification before the FNE, after completion of the transaction, with the filling of a very simple form. It does not require any FNE approval, it is only a notification, but FNE could initiate an investigation.

   Regarding the last question, in our opinion the acquisition of cross-shareholdings and its notification before the FNE -even as a voluntary one- could be justified in some cases since it allows the FNE to be aware of the cross-shareholding between competitors that might otherwise go unnoticed by the authority.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

   In Chile is not required the payment of any filing fees in the merger control procedure. In our opinion it would be positive that more jurisdictions decide to adopt the same criteria.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

   Yes, market share information is required for the filing.

   In our opinion U.S. HSR form simplicity could serve as an example for other jurisdictions. For competition agencies with limited resources and/or when facing short terms to issue a decision, the market share information that is provided by the parties in more detailed filings can be very valuable.

8. **What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?**

   The sanctions for gun jumping in our legislation could include fines, according to the general regime, up to US$49,000,000 approx., special fines of US$16,000,000 approx. for each day of delay in notifying since the operation was perfected, dissolution of the company, modification or termination of the acts, contracts or agreements of the operation, between other preventive, corrective or prohibition measures that may be applied to the condemned parties by the Competition Court.

   It should be noted that none of these sanctions have been applied since the implementation of the Chilean ex-ante merger review procedure in force since 2017. In 2018 the FNE filed a lawsuit against two different companies for having infringed the legal prohibition of closing an operation notified to the FNE before obtaining its approval. The case was settled by a conciliatory agreement in which both companies assumed the obligation of paying the unique amount of US$1,000,000 approx.

   If confirmed, convergence regarding penalties and fines amounts would be very valuable.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   We do not have any negative experiences to inform.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    The more countries that can be included in the ICC report, the better.

China

ZHU Fan, Partner, Tian Yuan Law Firm

GAO Chang, Partner, Tian Yuan Law Firm

MIAO Roujia, Associate, Tian Yuan Law Firm

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   Pursuant to Article 25 of the *Anti-Monopoly Law of the People's Republic of China* (the "***AML***"), available on the State Administration for Market Regulation's ("**SAMR**") website in Chinese, a transaction constitutes a concentration where one or more undertaking(s) obtain(s) control or decisive influence on the target, by merger, by purchase of shares or assets, by contract or otherwise.

   The concept of "control or decisive influence" is further clarified in the *Provisions on the Review of Concentrations of Undertakings* (the "***Merger Review Provisions***"), available on the SAMR's website in Chinese, and the *Guiding Opinion for the Notification of Concentration of Undertakings* (the "***Guiding Opinion***"), available on the SAMR's website in Chinese. The regulations and guidelines stipulate that "control" here could be sole control or joint control, and control or decisive influence depends on a number of legal and factual factors, including the transaction purpose and plan, the shareholding structure and voting mechanism of shareholders' meeting, the composition and voting mechanism of the board of directors, rights on senior management, existence of any material business relationship or cooperation agreement, and etc.

   Specific to the formation of joint ventures, the *Guiding Opinion* clarifies that newly established joint venture under the joint control of two or more undertakings constitutes a concentration.

   However, whether a concentration is reportable is further subject to the turnover threshold test (see reply to Q2).

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal**

predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

(1) The jurisdictional thresholds in China are turnover based.

The notion of turnover is defined in the *Merger Review Provisions* and the *Guiding Opinion*, which specifies that the turnover shall comprise the incomes from the sale of products and the provision of services in the preceding fiscal year, net of relevant taxes and surcharges and the turnover of an undertaking concerned refers to the consolidated turnover of its ultimate controller.

(2) Yes. It will greatly help practitioners quickly narrow down the roster of potential jurisdictions where a notification shall be made.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

Yes. Pursuant to Article 3 of the *Provisions of the State Council on the Thresholds for Notification of Concentration of Undertakings*, available on the SAMR's website in Chinese, where one concentration reaches any of the following thresholds, it shall be notified:

a. During the preceding fiscal year, the total worldwide turnover of all the undertakings concerned exceeds CNY10 billion, AND at least two of these undertakings each achieves a China-wide turnover exceeding CNY400 million; OR

b. During the preceding fiscal year, the total China-wide turnover of all the undertakings concerned exceeds CNY2 billion, AND at least two of these undertakings each achieves a China-wide turnover exceeding CNY400 million.

The *Guiding Opinion* also clarifies that "China-wide turnover" mean the buyers of products or services of an undertaking are within the territory of China, including their exports to China from other nations or regions, but excluding the products or services exported from China to other nations or regions.

In addition, the special rules for calculating the turnover of the financial sector are stipulated in the *Measures for the Calculation of Turnover for Notification of the Concentration of Undertakings in the Financial Sector*, available on the SAMR's website in Chinese.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

(1) No. China's merger control system does not provide for a local nexus requirement. Thus, even for foreign-to-foreign transactions, so long as it constitutes a concentration (see reply to question1) and satisfies the thresholds requirement (see reply to question 2 & question 3), it should be notified.

(2) Yes. China's merger control system provides simplified procedure/short form treatment with respect to (i) establishing foreign joint ventures without any business in China, and (ii) purchasing shares or assets of foreign targets without any business in China.

(3) We should at least encourage the jurisdictions to provide simplified procedure/short form treatment for transactions without any local nexus, so as to avoid redundant review of foreign-to-foreign transactions with little impact on the local market competition.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

(1) No. Only transactions constituting concentrations (acquiring control or decisive influence) are reportable in China (see reply to question 1), which means that if there is no change of control (or decisive influence), no notification is required.

In addition, there is no statutory minimum shareholding threshold in deciding the issue of control. In previous gun-jumping penalty decisions, shareholding as low as 3.23% conferred joint control of a joint venture to one of the two shareholders[41] in one case and the acquirer's acquisition of 6.67% shares in the target resulted in control over the target[42] in another.

(2) No.

(3) Merger review of acquisition of non-controlling minority shareholdings may in theory have some economic sense. For example, competitors may reduce their incentives to compete with

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41 Administrative Penalty Decision of the SAMR, Guo Shi Jian Chu [2021] No. 51. See SAMR website, https://www.samr.gov.cn/fldj/tzgg/xzcf/202107/t20210706_332344.html.

42 Administrative Penalty Decision of the SAMR, Guo Shi Jian Chu [2021] No. 33. See SAMR website, http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210430_328418.html.

such structural link. However, our observations indicate that a small fraction of acquisitions of non-controlling minority shareholdings actually raise competition concerns in various jurisdictions. Therefore, it warrants deeper discussion on whether the administrative burden imposed on businesses by such notifications is proportionate to the potential competition risks. Consequently, we propose that while the mandatory notification of acquisition of non-controlling minority shareholdings may not be necessary, it would be beneficial for the authority to retain the power to initiate investigations or call in such transactions if specific competition concerns emerge.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

(1) No. There is no payment of any filing fees in China.

(2) Yes. We would favour a convergence where no filing fees would be required anywhere, while we understand it is more of an administrative law issue about which different countries/jurisdictions have very different policy considerations.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

(1) Yes. The notification form in China requires the provision of market share information.

(2) We opine that requiring market share information would still be necessary, because merger review is to assess the envisaged transaction's potential impact on the market competition and market share information is a significant factor to be considered in such assessment.

While we opine that the US HSR method of requiring turnover broken down according to statistical codes may be plausible to serve as raw data collection method for calculating market share as each statistical code would be a relevant market and the authority would have its own database to calculate the market share with coherent relevant market definition and consistent data sources.

However, since in each transaction, meaningful relevant market definition may vary and turnover may not always be the most meaningful indicator of market power due to different

industry features, we opine market share information provided case-by-case are still needed to accurately assess the market competition relevant to that particular transaction.

8. **What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?**

(1) Pursuant to Article 58 of the *AML*, if the concentration is deemed as having NO anti-competitive effect, a fine of no more than CNY5,000,000 would be imposed; while if the concentration is deemed as having anti-competitive effects, the fine may increase up to 10% of the turnover in the preceding year, and other remedies may be requested to restore the competition to prior state, e.g., to unwind the concentration, to dispose of shares or assets within a stipulated period, and to transfer the business within a stipulated period.

There have been no penalty decisions published since August 1, 2022, the effective date of the revised *AML*. Before that, there are more than 200 penalty decisions against gun-jumping up to now in China. All except one were deemed as anti-competitive and were imposed a mere fine of no more than CNY500,000. The only case was the penalty on the gun-jumping of Tencent's merger with China Music Corporation (Case No.: Guo Shi Jian Chu [2021] No.67). In that case, the penalties include both a fine of CNY500,000 and the remedies to restore the competition to prior state.

(2) If penalties for gun-jumping are with great disparity worldwide, a convergence is encouraged especially for non-monetary penalties, so as to create more predictability for the business.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

(1) The merger filing requirement and reportability of Joint Venture in Japan is not very clear. We have had much difficulty in finding the relevant rules and the rules are rather difficult to understand.

(2) In Indonesia, it is post-closing merger filing requirement. We had a relatively simple merger case with little competition concern in Indonesia filed in July 2020, while it took rather long to get clearance, *i.e.* in April 2021.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

We think Switzerland should be included if it has not been already, because the Swiss competition authority adopted local nexus guidelines which could be interesting and helpful to learn from as we think local nexus is a factor that is reasonable to be considered in the reportability issue or at least for simplified procedure.

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We support this recommendation. China's current merger control regulations align with this recommendation. Instituting a universal standard for triggering events could enhance predictability for transaction parties, fostering a more transparent and globally harmonious merger control rules.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We agree with this recommendation. Our observations indicate that a small fraction of acquisitions of non-controlling minority shareholdings actually raise competition concerns in various jurisdictions. Therefore, it warrants deeper discussion on whether the administrative burden imposed on businesses by such notifications is proportionate to the potential competition risks. Consequently, we propose that while the mandatory notification of acquisition of non-controlling minority shareholdings may not be necessary, it would be beneficial for the authority to retain the power to initiate investigations or call in such transactions if specific competition concerns emerge.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree with Recommendation 3. The primary focus of the merger control regime should indeed be on significant structural changes in the market. For a joint venture to effect such changes, it must fully engage in market activities – in other words, it must be fully functional. Therefore, the "full-functionality" criteria is an appropriate threshold for determining when joint ventures should be reportable to antitrust agencies.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We support Recommendation 4. It will greatly help practitioners quickly narrow down the roster of potential jurisdictions where a notification shall be made.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We support Recommendation 5. It will greatly help practitioners quickly narrow down the roster of potential jurisdictions where a notification shall be made.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree with Recommendation 6. We believe there should indeed be a local nexus threshold for any acquisition of control. Alternatively, we advocate for jurisdictions to at least adopt a simplified procedure or short-form treatment, as China does, for transactions lacking a local nexus. This approach could prevent unnecessary reviews of foreign-to-foreign transactions that have minimal impact on local market competition, thereby increasing efficiency and conserving regulatory resources.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR. We are in favour of Recommendation 7. China's merger control regulations are largely consistent with this proposal, offering a simplified procedure when the combined market shares of the parties are below a 15% threshold and their individual market shares are less than 25% in any vertically-related or otherwise related market. Such a provision not only aligns with the global move towards streamlined merger control procedures but also significantly reduces the burden on transaction parties in terms of preparing notification documents and materials.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in

connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR. We would favour a convergence where no filing fees would be required anywhere, while we understand it is more of an administrative law issue about which different countries/jurisdictions have very different policy considerations.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We agree with Recommendation 9. In light of the increasing numbers of cross-jurisdictional notifications, the availability of English versions of local merger control rules and regulations could significantly aid practitioners and transaction parties. This would enable a preliminary evaluation of key issues such as the reportability of a transaction, the legal risks associated with 'gun-jumping', and other relevant considerations.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR. We agree with Recommendation 10. It would enhance the predictability and flexibility of the merger control process.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules,

when the transaction is a killer acquisition, i.e. the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR. We support Recommendation 11. China has recently introduced a new punitive measure for gun jumping where fines are calculated based on a percentage of the turnover of the undertakings that obtain control in a transaction, in the case that the transaction has potential to negatively impact competition. This new measure would allow regulators to levy a significant penalty even in 'killer acquisition' scenarios, where the target may have little or no turnover.

Summary Table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds,	FOR

Draft recommendations	Comments
which are much easier to assess and to implement.	
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical**	FOR

Draft recommendations	Comments
implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	
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Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from	FOR

Draft recommendations	Comments
introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	There is no applicable filing fee for a merger control filings before the SAMR.
"Negative experience" reports	(1) The merger filing requirement and reportability of Joint Venture in Japan is not very clear. We have had much difficulty in finding the relevant rules and the rules are rather difficult to understand. (2) In Indonesia, it is post-closing merger filing requirement. We had a relatively simple merger case with little competition concern in Indonesia filed in July 2020, while it took rather long to get clearance, i.e., in April 2021.

Czech Republic

Robert Neruda, HAVEL & PARTNERS

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   The Czech Competition Authority ("**CCA**")'s guidelines "*Oznámení o konceptu spojení soutěžitelů ve smyslu zákona o ochraně hospodářské soutěže*" (the "**Guidelines**"), available on the CCA's website in the Czech and English languages provide guidance on the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

   The Guidelines clarify that under Article 17 of the Act on Protection of Competition ("**Competition Act**"), the notion of concentration includes any operation that brings about a lasting change of control in the undertakings concerned, resulting in (i) a merger between two or more undertakings previously independent; (ii) the acquisition of direct or indirect control of the whole or parts of an undertaking; or (iii) a full-function joint venture.

   Under Czech competition law the notion of control arises when party is enabled to confer a decisive influence based on legal or factual circumstances, over the activities of another undertaking or part thereof, in particular based on ownership of undertaking's assets or part of the controlled undertaking, or rights or other legal facts which confer decisive influence on the composition, voting of decision-making bodies.

   In order to provide further clear guidance for merging parties, the CCA has also issued Guidelines on main issues arising during merger process:

   i. The CCA's Guidelines on the pre-notification contacts with merging parties (the "***Pre-notification Guidelines***"), available on the CCA's website in Czech and English.

   ii. The CCA's Guidelines on Calculation of Turnover for the Purpose of the Control of Concentrations between Undertakings ("***Turnover Guidelines***"), available on the CCA's website in Czech and English, explaining the calculation method of turnover thresholds.

   iii. The CCA´s Guidelines on the Application of the Failing Firm Defence Concept in the Assessment of Concentrations of Undertakings (***"Failing firm defence Guidelines"***), available on available on the CCA's website in Czech and English.

   iv. The CCA´s Notion on prohibition of implementation of concentrations prior to the approval and exemptions thereof (***"Gun-jumping"***), available on the CCA's website in Czech and English.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

   According to the Competition Act, Czech jurisdictional thresholds are defined by reference to turnover, contrary to the previous regulation (valid until mid 2001), in which the criterion for establishing whether a concentration of undertakings required approval on the part of CCA was based on reaching a 30% share of the relevant market.

   For the sake of completeness, the merger has to be notified to the CCA if any of the following turnover thresholds is exceeded:

   (a) the total net turnover of all the undertakings concerned in the Czech Republic for the last financial year is more than CZK1.5 billion (around €60 million) and at least two of the undertakings concerned each had a net turnover of more than CZK250 million (around €10 million) in the Czech Republic for the last financial year; or
   (b) the total net turnover in the Czech Republic of one of the merging parties, an undertaking over whom the control is being acquired or one of the parties establishing a new joint venture exceeds CZK1.5 billion (€60 million) and at the same time the worldwide net turnover achieved in the last financial year by the other undertaking concerned exceeds CZK1.5 billion.

   In practice, the notion of turnover under Czech law does not differ from the concept of turnover under EU law.

   According to Competition Act, the net turnover of undertakings concerned which is crucial to the rise of notification obligations is the net turnover achieved by individual undertakings only through their "ordinary activities". Thus, it is the turnover achieved through the sale of goods, products and services made in the last complete financial year. "Financial income" or "extraordinary income" in the company's accounts are generally excluded, as such income is derived from the sale of businesses or fixed assets. But a case by case assessment may be necessary.

   The detailed rules are set in the Turnover Guidelines (see answer under 1).

   Based on our experience we believe, the ICC Competition Commission should encourage countries using asset-based or market share thresholds to consider amending their respective merger control thresholds.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

   CCA published Turnover guidelines, available on the CCA's website in Czech and English, explaining the calculation method of turnover thresholds. The guidelines contain both general rules for the calculation of turnover, such as the definition of the accounting period and the data sources. It also includes specification of the method for calculating turnover of groups of undertakings. The net turnover includes not only the turnover achieved directly by a company concerned, but also turnover achieved by groups to which the company concerned belong (undertaking).

   Notification turnover criteria are classified as turnover achieved in the area of the Czech Republic, or worldwide. Calculation of worldwide turnover is unproblematic as it is the general accounting expression of aggregated business activities of the undertakings concerned, regardless of geographical allocation. However, in some cases, calculation of turnover which was achieved by the undertakings concerned within the area of the Czech Republic may be complicated. When determining the geographical location where the turnover was achieved, the CCA does not make a distinction between the sale of products, goods, or services. In both cases, as a general rule, turnover is attributed to the place where the customer is located because that is, in most circumstances, where a deal was made, where the turnover for the supplier in question was generated and where competition with alternative suppliers took place. But geographical allocation is more complex and may require a case by case assessment in specific cases.

   The Guidelines also set out how the turnover of the undertakings concerned is converted into national currency.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

   With regard to acquisition of control (over the company and/or assets), the Czech competition law requires the local nexus to be present, as the relevant turnover in Czechia needs to be achieved by the target. However, in regard to international joint ventures, it is sufficient if the local turnover is achieved by a parent company and the concentration is reportable even in case the JV is not supposed to be active in Czechia.

   The Czech merger control system provides for a simplified procedure where

(a) none of the undertakings concerned is operating in the same relevant market, or their combined share in such market does not exceed 15%, and at the same time none of the undertakings concerned is operating in the market vertically connected to the relevant market in which another undertaking concerned operates, or their share in every such market does not exceed 25%; or
(b) the undertaking acquires sole control over another undertaking or part thereof, in which it has participated in joint control so far.

In the past, the CCA already had to deal with international joint ventures that had no impact on the Czech market whatsoever. We believe that adopting local nexus rule is desirable. This concept effectively reduces the administrative burden on both parties and respective competition authority as only entities which have a significant local turnover are caught by the merger control scrutiny.

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Czech competition law does not require the notification of the acquisition of minority shareholding where such acquisition does not result in the acquirer gaining sole or joint control over the target. However, a merger may be subject to notification where the acquisition of a minority shareholding confers the possibility to exercise a decisive influence over the target either on a *de iure* or *de facto* basis. Such cases were observed on numerous occasions in the past.

A *de iure* decisive influence may be acquired by the acquirer by acquiring preferential shares which confer the majority of voting rights or the power to determine the strategic commercial behaviour of the target undertaking upon such acquirer. A *de facto* decisive influence may be acquired by the minority shareholder typically in a situation where the remaining voting rights are dispersed among a vast number of other shareholders not normally attending the general meeting.

We believe the current system is sufficient and that non-controlling minority shareholdings should remain out of scope of the merger control system.

6. Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

According to the Notice of the Requirements for Concentration Notifications, available in Czech and English, the undertaking or undertakings who intend to implement a concentration are required to pay a filing fee which is set at CZK100,000 (approx. €4,000).

In our experience, the filing fee in the Czech Republic is set relatively low when compared to the value of transactions that are subject to merger control scrutiny. For that reason, we believe that the assessment of filing fees is irrelevant.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

   The notification form does require the undertakings concerned to provide market share information, such as an estimate of the market shares in terms of turnover value and documents to confirm calculations of these market shares. This information is required not only for all undertakings concerned, including all persons directly or indirectly controlling the undertakings concerned, but also to importers, for the last three years prior to concentration. The notifying parties are required to provide the best estimate as to the market shares of their major competitors, too.

   The adoption of a notification form which does not require the submission of market share information would lead to a decrease of the administrative burden. In general, the Czech notification questionnaire is quite robust and rigid. Any simplification of notification questionnaire would be, in general, welcome. If the notifying party has such information, it can provide it to the authority on a voluntary basis.

8. **What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?**

   In Czech competition law, in case that an undertaking fails to notify a concentration, the CCA may impose a fine of up to CZK10,000,000 (approx. €400,000) or 10 % of net turnover achieved by the undertakings in the last accounting period (the higher ceiling applies). This stems from Article 22a, paragraph 3 of Competition Act, available in Czech and English.

   There have indeed been such cases before the CCA, for example *CSG Industry* (S0491/2020/KS).

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be**

made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

N/A

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    N/A

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We agree with this recommendation. It is necessary that certain level of clarity and predictability is provided to undertakings concerned in order for them to know with certainty which transactions are subject to merger control scrutiny. The concept of control as a possibility of conferring decisive influence has long been applied in EU merger regulation and reflects actual business practice.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We agree with this recommendation. Minority interest acquisitions should only be subject to notification to the respective competition authority if such acquisition results in the acquirer gaining sole or joint control over the target.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree with this recommendation. The national authorities primarily focus on and dedicate their resources to transactions which have or may have an impact on market structure and its functioning. For that reason, joint-ventures should be subject to notification in case they not only reach respective thresholds but also fulfil the criteria of "full-functionality". According to CCA´s Guidelines only full-function joint ventures that are able to operate on the market as a independent unit fall under the scope of merger control.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We support this recommendation. Market share-based thresholds put a major administrative burden and also significantly increase legal certainty (especially as concerns the final definition of the relevant market by the competition authority). These thresholds may also fail to reflect the undertakings' actual position in markets due to a number of factors, namely the ever increasing dynamism.

Instead, notification thresholds should be based on information that is readily available to the undertakings in the ordinary course of business. While market share-based thresholds often very

disproportionately require the undertakings to gather market data to process them just to assess the reportability of a transaction, producing turnover data is significantly easier due to its international accounting standardization.

Accordingly, the Czech competition law has shifted its approach and replaced the previous market share-based thresholds requirement with a more predictable system of turnover thresholds which provides greater legal certainty.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We agree with this recommendation. Notification thresholds should be based on information that is readily available to the undertakings. First, turnover thresholds provide undertaking with much greater predictability and legal certainty compared to the self-assessment of asset-value thresholds. In most cases, it is easier for an undertaking to keep track of its sales rather than asset value. Moreover, asset value thresholds may not necessarily reflect economic activity in a jurisdiction. Last but not least, there may be disputes as to the method of calculating the value of assets.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree with this recommendation. As has been stated above, Czech competition law does not provide for a "local nexus" on the JV part. The reviewing jurisdiction should not require the party to notify transactions with little to no material nexus to it.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR. We agree with this recommendation. Simplified notification forms for transactions should be available for transactions which are not likely to impact competition where the parties' activities do not overlap horizontally and / or are not vertically related or do not meet the *de minimis* threshold. In case of such transactions, there is arguably no need to require parties to gather and process detailed information on market shares. This may present an unnecessary burden.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in

those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR IN PRINCIPLE. We agree that filing fees should be strictly proportionate, if at all applicable. In the Czech jurisdiction filing fee of CZK100,000 does not constitute a major impediment or a major transaction cost.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We agree with this recommendation. Issuing of guidelines on crucial aspects of notification procedure or determining whether the transaction falls within the scope of merger control such as those mentioned above would definitely further streamline the process. The availability of such guidelines in both a local language as well as in English would have a positive impact on understanding of respective merger control rules. The CCA follows this approach and has several guidelines available on its website. W also recommend a regular review of the respective guidelines so that they keep reflecting the decisional practice.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR IN PRINCIPLE. We agree with this recommendation. The merger control scrutiny should include a wider scope of assessment by taking into account pressing circumstances, such as economic turmoil or financial jeopardy. Such approach should, however, not be a standard mechanism and should remain and exception, fulfilling of which has to be adequately justified, in order to ensure consistency and legal certainty. We also believe that adoption of the 10 % rule is unrealistic in the respective jurisdictions.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR. We agree with the position of ICC.

Summary Table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR

Draft recommendations	Comments
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR IN PRINCIPLE

Draft recommendations	Comments
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR IN PRINCIPLE
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Draft recommendations	Comments
such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	There is a filing fee for a merger control filings of CZK100,000 before the Czech Competition Authority.
Negative experience" reports	N/A

European Union

Veronica Pinotti, Partner, White & Case

Patrizia Pedretti, Associate, White & Case

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1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

The Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "**EU Merger Regulation**"), available on the European Union law portal EUR-Lex in English as well as in 22 other official languages of the EU[43], clarifies the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

The notion is further explained by the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "**Consolidated Jurisdictional Notice**"), adopted on 10 July 2007 and available in English as well as 21 other official languages of the EU.[44]

The EU Merger Regulation specifies that provisions therein apply to *concentrations* that have an *EU dimension*[45] (see Question 2 and 3 for details on the concept of *EU dimension*).

A *concentration* arises from:

i. a lasting change in control resulting from the **merger** of two or more previously independent undertakings or parts of undertakings; or
ii. the **acquisition** of direct or indirect control of the whole or parts of one or more other undertaking; or

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[43] Apart from Irish, the EC Merger Regulation is also available in: Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

[44] The Consolidated Jurisdictional Notice is not available in Croatian and Irish.

[45] EU Merger Regulation, Article 1.

iii. the creation of a **joint venture** performing on a lasting basis all the functions of an autonomous economic entity.

The Consolidated Jurisdictional Notice defines "*undertaking*" as "*a business with market presence, to which turnover can be clearly attributed*".[46]

The notion of control referred to under (i) and (ii) is defined as the ability of exercising decisive influence on an undertaking, in particular through the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking; or the ownership or right to use all or part of its assets.[47]

As a result, the notion of control does not depend on specific shareholding thresholds (a minority stake may still confer "*decisive influence*"). Thus, assessing whether a transaction involves a change or acquisition of control requires a case-by-case factual analysis.

Concentrations that do not confer control are not reportable under the EU Merger Regulation. Even so, these may still be subject to merger control rules applicable in single Member States.

As for concentrations referred to under (iii), a joint venture is considered capable of performing on a lasting basis all the functions of an autonomous economic entity ("*full-function joint venture*") if:

i. the joint venture has sufficient resources to operate autonomously in the market similarly to other companies operating in the same market, (e.g., its own management and access to resources such as staff, assets and finance);
ii. there is a lasting change in the structure of the undertaking.[48]

Joint ventures that are not full-function are not reportable under the EU Merger Regulation. Yet these may still be subject to merger control rules applicable in single Member States.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

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46 Consolidated Jurisdictional Notice, point 24.
47 EU Merger Regulation, Article 3(2).
48 Consolidated Jurisdictional Notice, points 91-109.

The European Union jurisdictional thresholds are based exclusively on turnover. Concentrations meeting the thresholds are deemed to have an *EU dimension*.[49] The parties' assets or market shares are irrelevant in this regard.

Similarly, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (*i.e.* the rules establishing an EU merger control regime for the first time), which was replaced by the current EU Merger Regulation, linked jurisdictional thresholds to turnover. As a result, the European Union has never referred to assets or market shares to establish jurisdictional thresholds.

The EU Merger Regulation and the Consolidated Jurisdictional Notice provide guidance on the notion of turnover and the calculation methodology, along with provisions on geographical allocation and specific rules of certain types of undertakings. These are detailed in Question 3.

In our view, ICC should encourage the few countries which still rely on asset-based or market share thresholds to shift towards turnover-based thresholds. Turnover figures are objectively quantifiable and relatively easy to retrieve for undertakings, making turnover-based thresholds more reliable and less burdensome than market share or asset-based thresholds.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

Yes. As explained in Question 2, the EU Merger Regulation states that it is necessary to calculate the *aggregate turnover* of all *undertakings concerned* to assess whether merger control thresholds are met and a transaction is thus notifiable.

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[49] In particular, Article 1(2) of the EU Merger Regulation provides that a concentration has a EU dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million.

The concentration does not have an EU dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

Additionally, Article 1(3) provides that a concentration that does not meet the thresholds laid down in paragraph 2 has an EU dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

The concentration does not have an EU dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

The Consolidated Jurisdictional Notice provides additional clarification on the concept of *aggregate turnover* and *undertaking concerned*.

Undertakings concerned are described as "*those participating in a concentration*".[50] This changes according to the type of concentration considered. A list of undertaking concerned in the most common type of concentrations follows below:

- In a **merger**, the concerned undertakings are the merging companies.
- As for **acquisition of sole control of an entire company**, the undertakings concerned are the acquiring company and the target company.
- As for **acquisition of sole control of part of company**, the undertakings concerned are the acquiring company and the acquired parts of the target company.[51]
- In case of **acquisition of sole control through a subsidiary of a group**, the undertakings concerned are the target company and the acquiring subsidiary. However, all the companies belonging to the acquirer's group are considered part of the same entity whose turnover must be taken into account.
- In case of **acquisition of joint control of a newly established company**, the undertakings concerned are each of the companies acquiring control of the new joint venture.
- In case of **acquisition of joint control of a pre-existing company**, the undertakings concerned are each of the companies acquiring joint control and the existing company being acquired.[52]
- In case of **acquisition by an existing, full function joint venture**, the undertakings concerned are the joint venture and the target company.
- In case of **acquisition by a newly created joint venture**, set up as a mere vehicle to purchase the target company, the undertakings concerned are the parent companies and the target companies.

Once the undertaking concerned has been identified, the turnover to consider is that of the undertaking's group. According to the Consolidated Jurisdictional Notice, this helps capturing the exact perimeter of the economic resources that are being combined through the transaction.[53] It also prevents undertakings from carrying out transactions through subsidiaries with lower turnover to help make the operation non-reportable.

The EU Merger Regulation lays out the rules for the calculation of the turnover of the undertakings concerned.[54] The Consolidated Jurisdictional Notice provides further guidance in

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50 Consolidated Jurisdictional Notice, point 129-153.

51 In case the acquisition of sole control of part of a company follows a previous non-reportable acquisition involving the same parties, the undertaking concerned are the acquiring company, the acquired parts of the target company and the acquired parts of the target company in the previous non-reportable acquisition.

52 If the company to be acquired is under the sole control of a company, which will acquire joint control along with another company following the acquisition, the undertakings concerned are each of the companies acquiring control.

53 Consolidated Jurisdictional Notice, point 175.

54 EU Merger Regulation, Article 5.

relation to calculation, the geographical allocation of turnover and the specific rules applicable to financial institutions and insurance undertakings.[55]

More specifically, turnover must be calculated on the basis of the total amount derived from the sales of goods and services. Special rules may apply for specific types of services. For example, the turnover of intermediary agencies selling vacation packages must be limited to the commission paid to the agency.

The EU Merger Regulation provides that the turnover to be considered is the net turnover, i.e., the amount derived from sales of good and services after deducting sales rebates and value added tax and other taxes directly related to turnover. The Consolidated Jurisdictional Notice clarifies that "*sales rebates*" are rebates and discounts offered to customers and have an influence on the amount of sales.

As for taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. The Consolidated Jurisdictional Notice specifies that the concept of 'taxes directly related to turnover' refers to indirect taxation linked to turnover, such as taxes on alcoholic beverages or cigarettes.

According to the EU Merger Regulation, the calculation of turnover should also exclude internal turnover. The Consolidated Jurisdictional Notice clarifies that internal turnover refers to the sale of goods and products between undertakings belonging to the same group. This allows merger control thresholds to take into account only the real economic weight of the undertakings concerned.

To identify where geographically the turnover was generated (and thus if the merger control thresholds are met), the Consolidated Jurisdictional Notice specifies that turnover should be allocated to the place where the customer is located. In some cases, geographically allocating turnover is more complicated. If the Consolidated Jurisdictional Notice does not provide any guidance, the European Commission will perform a case-by-case analysis.

Finally, the EU Merger Regulation lays out specific rules for the calculation and the geographical allocation of turnover of credit and other financial institutions and insurance undertakings.

The Consolidated Jurisdictional Notice provides guidance on the definition of such institutions. In particular, the Consolidated Jurisdictional Notice defines credit institutions by reference to the First Banking Directive, which provides that a credit institution is "*an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account*".

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[55] Consolidated Jurisdictional Notice, points paras. 157-220.

Similarly, the Consolidated Jurisdictional Notice defines financial institutions by reference to the Second Banking Directive, according to which a financial institution is "*an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU*".

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

   The EU merger control system does not provide for an explicit local nexus requirement. Concentrations between undertakings whose turnover meet the relevant thresholds must be notified to the European Commission and obtain clearance before closing the transaction. Whether parties are incorporated under the law of a Member State or have legal entities in a Member State is not relevant.

   However, the merger control thresholds set out by the EU Merger Regulation require undertakings concerned to reach some sales in the EU. In each of the two alternative turnover-base thresholds, at least two of the undertakings concerned must achieve sales in the EU. For example, as part of the requirements to meet merger control thresholds, Article 1(2) of the Merger Regulation states that the aggregate EU-wide turnover of at least two of the undertakings concerned must be more than €250 million.

   As a result, EU merger control rules implicitly provide for a local nexus requirement, as transactions carried out by undertakings generating no turnover in the EU are not captured.

   Yet the same does not apply to joint ventures, as joint ventures located outside the EU and with no turnover generated in the EU may still be reportable if the parents' turnover meet the EU merger control thresholds. According to point 5(a) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, this type of transaction is eligible for a simplified procedure.

   However, because such operations do not have any effect in the EU, the obligation to file and assess such transactions leads to inefficient use of public resources and an unnecessary economic burden on the private parties. In our view, we should encourage the EU to apply an exemption from filing obligation in case of lack of EU nexus.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

No, the EU merger control system does not require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

We can confirm that the EU jurisdiction does not provide for the payment of any filing fees. We agree that we should favour convergence where no filing fee would be required anywhere.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

Yes, the notification form used in the EU ("**Form CO**" and "**Short Form Co**") requires parties to provide market share information. In particular, while section 6 requires the parties to identify relevant product and geographic markets along with affected markets (markets where parties overlap or have vertical links), section 7 requires the parties to provide detailed information on the affected markets identified in section 6, including market shares information.

In our view, simplifying the Form CO and Short Form CO by removing the requirement of providing market share information would make filing obligations less burdensome for the parties. On the other hand, this might prolong the time needed for assessment by the Authority. The European Commission has argued that market shares are crucial to assess the position in the market of the parties and their competitors.[56] Therefore, the competitive analysis of concentrations cannot exclude examination of market shares. Whether the burden of providing them rests on the parties or on the Authority will be the regulator's choice. In our view, however, parties are best placed for providing information on the markets they operate in.

8. **What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?**

In the EU, failure to notify a reportable concentration can lead the European Commission to impose a fine on the undertakings concerned of up to 10% of their aggregate turnover. It is

[56] Twenty-first report on Competition Policy.

irrelevant whether the transaction is later found to be admissible from a competition standpoint.

Similarly, the European Commission can impose a fine of up to 10% of the concerned undertakings' aggregate turnover if the concentration is implemented before obtaining clearance ("*gun-jumping*").[57]

In setting the amount of a fine, the European Commission takes into account the gravity and duration of the infringement, along with mitigating and aggravating factors.

In *Altice/PT Portugal*[58], the European Commission imposed on Dutch company Altice a €124.5 million fine for closing the transaction before antitrust approval. The authority found that Altice had the possibility of exercising decisive influence over PT, the Target Company, and actually exercised decisive influence over some aspects of PT's business. The General Court confirmed the European Commission's findings. Currently (July 2022), the decision is under appeal before the European Court of Justice.

In *Canon/TMSC*[59], the European Commission issued two fines of €14 million each to Canon for failing to notify its acquisition of Toshiba Medical Systems Corp and for partially implementing the deal before obtaining clearance. The European Commission found that the companies had designed a two-step transaction structure where an interim buyer purchased TMSC while awaiting antitrust approval. The General Court upheld the authority's decision.

In *Marine Harvest/Morpol*[60], the European Commission fined the Norwegian company Marine Harvest for implementing its acquisition of Morpol eight months before notifying the concentration to the authority. The authority found that the infringement was serious given the competition concerns raised by the concentration. Yet it also considered the fact that Marine Harvest did not exercise its voting rights in Morpol to be a mitigating circumstance. In light of these facts, the European Commission imposed €20 million fine.

In our view, a convergence on the amount of penalties is not necessary and bears the risk of increasing fines where these are currently set low. An aspect jurisdictions may align on is the consideration of aggravating and mitigating circumstances, along with the gravity of the infringement when setting the amount of fine for failure to notify.

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57 EU Merger Regulation, Article 14.
58 Case COMP/M.7993, Commission Decision of 24 April 2018.
59 Case COMP/M.8179, Commission Decision of 27 June 2019.
60 Case COMP/M.7184, Commission Decision of 23 July 2014.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   We would like to report a recent issue with the Nigerian Federal Competition and Consumer Protection Commission ("**FCCPC**"). In particular, the methodology for calculating the filing fees yields to exorbitant amounts, which deter the parties from filing.

   The FCCPC calculates filing fees as a percentage of whichever is higher between (i) the consideration for the transaction or (ii) the combined annual turnover of the parties in Nigeria. In the case of a foreign-to-foreign transaction with a local component (*i.e.* presence of subsidiary in Nigeria) the filing fee is calculated based on whichever is the highest between (i) turnover or (ii) the value attributable to the business or local component(s) in Nigeria which are the subject of the merger. The law does not provide for a cap on the resulting amount.

   The above outlined methodology can result in a disproportionately high sum to be paid.

Furthermore, using the total value of consideration is an illogical parameter as it bears no relationship at all with the amount of work that the FCCPC will have to carry out and it gives rise to incredible uncertainty.

Considering that the purpose of the filing fee is not to create a source of revenue for the government, but to ensure the independence of competition authorities, the FCCPC should take a more business-oriented approach and act in their capacity to ensure that transactions are notified and do not create impediments to competition. We have learned that parties often prefer avoid filing and incur in the risk of being sanctioned for gun-jumping, because the fees are unreasonable.

We note also that similar situations arise also in other jurisdictions in the reason, such as in CEMAC, which, despite introducing a cap on fees of approx. US$1.5 million, remains an incredibly burdensome weight for the parties.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**
    N/A

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. Having a clear and common triggering event for merger filings enhances transparency and provides legal certainty to businesses. Companies engaging in mergers and acquisitions can better understand their obligations and responsibilities when there is a uniform criterion for determining whether a filing is required. This clarity enables businesses to plan and execute their transactions in a more efficient manner, reducing the risk of non-compliance and associated penalties.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. Requiring merger filings for every minority acquisition would place a significant burden on competition authorities in terms of workload and resource allocation. Authorities would need to review and evaluate a large number of transactions that do not have a substantial impact on competition. This would divert resources from scrutinizing transactions with potentially greater competitive concerns, thereby reducing the efficiency and effectiveness of merger control systems.

Imposing merger filing requirements on minority acquisitions could potentially deter investment and minority investments, particularly by foreign investors. Increased regulatory burdens and uncertainty may discourage investment in jurisdictions with strict merger filing requirements, leading to missed opportunities for economic growth and development.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree with Recommendation 3, as the competition authorities prioritize their resources and efforts on transactions that have the potential to harm competition. Requiring reporting of only full-functionality joint-ventures ensures that agencies concentrate on ventures that operate as independent economic entities and may have a significant impact on market competition.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR IN PRINCIPLE. Implementing a mandatory notification system based on market shares presents significant challenges and costs that outweigh the potential benefits. Parties involved in transactions typically lack access to this information and struggle to accurately define markets, resulting in added costs and burdens for all transactions, regardless of whether they are problematic or require notification. Moreover, this system introduces substantial uncertainty and the risk of significant delays.

Furthermore, market shares are not clear and objective criteria for determining whether notification is necessary. International recommendations suggest that analysing market shares is more appropriate at later stages of the merger control process. For instance, it can be utilized to assess the amount of information required in the parties' notification and aid in evaluating the overall legality of the transaction.

While turnover thresholds offer advantages, it is worth noting that market share thresholds may still be used in conjunction with turnover thresholds in some jurisdictions, particularly in highly concentrated markets or specific sectors where market concentration is a key factor in assessing competition. In such cases, market share thresholds can complement turnover thresholds to provide a more comprehensive analysis of potential competitive effects.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR IN PRINCIPLE. We support Recommendation 5 as we believe that turnover-based thresholds offer several advantages over asset-based thresholds. They provide companies with greater predictability and legal certainty when assessing the need for notification, as turnover is a more reliable indicator of the potential competitive impact of transactions. In contrast, asset-based thresholds may not accurately reflect the potential effects on competition and can be less indicative of the transaction's significance. Therefore, we advocate for the use of turnover-based thresholds as they enable companies to assess the notifiability of transactions more effectively. We do however agree that market share thresholds may work well to capture mergers in certain regimes.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. A local nexus threshold helps safeguard local markets by ensuring that transactions with significant effects on the local economy and competition are subject to regulatory scrutiny. By requiring a substantial local turnover, the threshold ensures that only transactions of sufficient magnitude and impact on the local market are subject to merger control regulations.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR. By providing simplified notification forms for transactions that meet the specified criteria, regulatory authorities can focus their resources on transactions that are more likely to have significant competition concerns while promoting efficiency and reducing unnecessary burdens for businesses.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR. Filing fees can create a financial burden, particularly for smaller businesses and startups. By abolishing these fees, jurisdictions can help level the playing field and remove a potential barrier to entry, encouraging competition and fostering entrepreneurship.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information

requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. Publishing guidelines in both the local language(s) and English promotes clarity and consistency in the interpretation and application of merger control rules. It enables a broader audience to comprehend the requirements and expectations of the antitrust agencies, reducing misunderstandings and potential compliance errors. Consistent interpretation and application of the guidelines across different languages contribute to the predictability and uniformity of the merger control process.

Transparent and accessible guidelines in multiple languages contribute to the legal certainty and due process of the merger control process. Merging parties can have a better understanding of the authorities' requirements, expectations, and procedures, enabling them to prepare their submissions and engage in the process more effectively. This fosters a fair and efficient review process while safeguarding the parties' rights to information and legal remedies.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR. Granting such waivers allows parties to proceed with the transaction promptly while addressing urgent financial or operational needs.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

AGAINST. The severity of the sanction should be proportionate to the nature and impact of the gun jumping violation. Revenue-based fine directly reflects the scale of the violation. It is important for the sanctions to serve as an effective deterrent against gun jumping while also considering the potential impact on the merging parties and the broader goals of the merger control regime. Further, we do not consider that fines should be imposed on acquirers only. Article 4.2 EUMR establishes that in case of merger or acquisition of joint control, the concentration should be notified jointly by the parties. As the responsibility for notification is shared, same should be the responsibility for the breach of an obligation, otherwise there will be an unfair additional burden on one of the parties.

Summary table

Draft recommendations	Comments
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Filing fees: summary description of existing competition rules, if any	
"Negative experience" reports	N/A

France

Charlotte Breuvart, Partner, Jones Day
Dan Roskis, Partner, Evershed Sutherlands

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

The French Competition Authority ("**FCA**")'s guidelines "*Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations*", published on July 20, 2020, replacing the previous ones dated July 4, 2013, (the "**Guidelines**"), available on the FCA's website in the French and English languages provide guidance on the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

The Guidelines clarify that under Article L. 430-1 of the French Commercial code ("**FCC**"), the notion of concentration includes any operation that brings about a lasting change of control in the undertakings concerned, resulting in (i) a merger between two or more undertakings previously independent; (ii) the acquisition of direct or indirect control of the whole or parts of an undertaking; or (iii) a full-function joint venture.

The notion of control under French competition law arises from rights, contracts or any other means that enable the party to exercise a decisive influence on the activity of an undertaking, be it on an individual or joint basis, and having regard to the factual and legal circumstances, such as ownership rights and possession of all or part of the assets of an undertaking and rights or contracts that confer a decisive influence on the composition or the resolutions of the decision-making bodies of an undertaking.

With respect to the concept of reportable joint venture, the Guidelines provides that the creation of a full-function joint venture constitutes a concentration. A concentration also occurs when a joint venture that was not initially full-function becomes fully fledged.

A joint venture shall be deemed to be full-function and reportable where:

(a) It is jointly controlled by at least two independent undertakings; and

(b) It operates on a lasting basis. In that respect, a joint-venture set up for a fixed period of short duration and intended to be dissolved at the end of that project, is not a merger within the meaning of Article L. 430-1 FCC; and

(c) It performs all the functions of an autonomous economic entity. In order to qualify as a full-function joint venture, the undertaking must operate in a market, performing all the functions normally carried out by other undertakings in that market. In that sense, the joint-venture:

- shall have sufficient resources to operate independently in a market and in particular all the structural elements necessary for the operation of autonomous companies (human resources, budget, business responsibility); and

- must have an activity going beyond a specific function for the parent companies (*i.e.*it must have its own access to or presence on the market); and

- shall not be totally dependent on its parent companies for either sales or purchases. However, in the case where the parent companies account for a significant proportion of the joint venture's sales or purchases, it does not preclude classification as a full function joint-venture, provided that the joint venture deals commercially with its parent companies in the same way as with third parties and maintains commercial relations with them at market conditions.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

The French jurisdictional thresholds are defined by reference to turnover.[61] French law has dropped all references to market share thresholds since 2001.[62] Since then, the French jurisdictional thresholds have not involved any other metrics than turnover. The FCA stated that "*the reportability of a concentration is assessed only in relation to thresholds based on the turnover of the undertakings*", irrespective of the impact of the transaction on competition, market shares and the position of the parties on affected markets.[63]

In practice, the notion of turnover under French law is identical to the concept of turnover under EU law. French law defines the concept of turnover by reference to the EU Merger Regulation and, by extension, the Commission's Consolidated Jurisdictional Notice.[64]

Specifically, turnover means the total amount of sales made in the last complete financial year.[65] The concept of turnover refers to gross revenue, excluding taxes relating to the generation of turnover as well as rebates.[66] Turnover corresponding to the "ordinary activities" of the undertaking should be used in determining whether the thresholds are met. "Financial income" or "extraordinary income" in the company's accounts are generally excluded, as such income is derived from the sale of businesses or of fixed assets.[67] The qualification of items in the company's accounts may need to be adapted on a case-by-case basis for the purposes of assessing the reportability of a given transaction.

In 2015, ICC recommended that merger notification thresholds be based exclusively on objectively quantifiable criteria in the form of bright-line tests, such as measurable turnover or assets levels.[68] ICC called on governments to eliminate the use of market share thresholds.

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[61] For the sake of completeness, a concentration must be notified before the FCA if one of the following three alternative turnover-based thresholds is met (Art. L. 430-2 FCC):

- For all sectors, (i) the combined worldwide turnover of the undertakings involved exceeds €150 million and (ii) each of at least two of the undertakings involved has French turnover exceeding €50 million.
- For the retail sector only, *i.e.*where two or more parties operate retail premises for the sale of goods to consumers for domestic use, (i) the combined worldwide turnover of the undertakings involved exceeds €75 million and (ii) each of at least two of the undertakings involved has French turnover exceeding €15 million.
- In the French overseas territories only, *i.e.*where two or more parties have sales in any of the five French overseas departments (French Guiana, Guadeloupe, Martinique, Mayotte and Réunion) or four overseas collectivities (Saint Barthélémy, Saint Martin, Saint Pierre et Miquelon, and Wallis and Futuna), (i) the combined worldwide turnover of the undertakings involved exceeds €75 million and (ii) each of at least two undertakings must have turnover exceeding €15 million or €5 million in the retail sector in any single overseas territory.

[62] Law N° 2001-420 of 15 May 2001 (the "**New Economic Regulations**" Law) modified the wording of Articles L. 430-1 FCC which used to provide for a 25% market share threshold.

[63] FCA, Decision n° 13-D-22 of 20 December 2013 relating to the situation of the Castel Group with respect to Article L. 430-8, I° FCC, para. 24.

[64] Article L. 430-2, V° FCC refers to Article 5 of the EU Merger Regulation. Para. 110 of the Guidelines of 23 July 2020 also refer to paras. 157-220 of the Consolidated Jurisdictional Notice.

[65] Consolidated Jurisdictional Notice, paras. 157-158.

[66] *Ibid.*, paras. 164-166.

[67] *Ibid.*, para. 161.

[68] ICC Recommendations on Pre-Merger Notifications Regimes, March 2015, section II.B.

Despite the fact that asset levels can be objectively measured thanks to international accounting standards, it would be more easily administrable and less burdensome for companies to self-assess the reportability of their transactions on a worldwide scale based on a unique metric such as turnover. In our view, ICC should therefore adjust this recommendation and encourage the few countries which still use asset-based or market share thresholds to consider amending their thresholds.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

Yes, the FCA updated its merger control Guidelines in 2020. The FCA also released an English version of these Guidelines, which provides increased legal certainty to the non-French speaking business community.[69] These Guidelines provide clarification on the operation of the thresholds in practice. This is especially so for the two sets of above-mentioned lower thresholds.

The first sector-specific threshold concerns the retail sector. Lower thresholds apply to concentrations involving undertakings in the retail sector, *i.e.* where two or more parties to a concentration operate retail premises. While the first threshold of €75 million applies to all worldwide activities of the undertakings concerned, the second threshold of €15 million only concerns the retail activities in France of the undertakings concerned.[70]

Retail stores are defined as selling goods or services for domestic use for more than half of their turnover.[71] The concept of retail trade always excludes intangible services (e.g. banking, insurance and travel agencies), as well as equipment-hire establishments (e.g. laundromats, gyms, restaurants). The concept of retail trade also excludes undertakings that carry out all their sales online or by direct delivery to consumers. Such turnover is not taken into account for the purposes of the €15 million threshold.[72]

The second set of lower thresholds applies to concentrations involving undertakings operating in French overseas departments and French overseas communities. For this set of thresholds to apply, at least one party to a concentration must be active in one or more French overseas departments (French Guiana, Guadeloupe, Martinique, Mayotte and Réunion) or overseas communities (Saint-Pierre-et-Miquelon, Saint-Martin, Saint-Barthélemy and Wallis-and-Futuna).

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69 https://www.autoritedelaconcurrence.fr/fr/textes-de-reference

70 Guidelines of 23 July 2020, para. 102.

71 *Ibid.*, para. 103.

72 *Ibid.*, paras. 105-106.

While the first threshold of €75 million concerns all worldwide activities, the second threshold of €15 million (or €5 million in the retail trade sector) applies to at least one French overseas department or community: for each of at least two undertakings, the €15 million (or €5 million) threshold must be assessed at the level of one overseas department or community.[73]

Additionally, the Guidelines provide explanations, in line with EU merger control law, on the calculation of turnover in practice. They also provide further clarification – as well as concrete examples from the FCA's decision-making practice – on the concepts of (i) undertaking concerned, (ii) the treatment of intra-group sales, (iii) turnover adjustments, (iv) the geographic allocation of turnover, (v) the specificities of certain economic sectors (such as the financial sector, intermediary services, and certain distribution networks), and (vi) transactions involving State-owned undertakings.[74]

First, the relevant turnover to take into account for the purposes of determining whether the French jurisdictional thresholds are triggered is that of the "undertakings concerned". Such undertakings concerned include the merging parties (in the case of a merger), the acquirer and the target (in the case of an acquisition of sole control), the joint venture parents (in the case of the creation of a joint venture), and the controlling parents and the target (in the case of the acquisition of joint control over an existing company).[75] The turnover of any party which controls, or is controlled by, the above parties should be included in the turnover of that party.[76] In the case of an acquisition of control, only the turnover attributable to the target business or assets is relevant, regardless of the turnover of the whole seller group.[77]

Second, intra-group sales are in principle excluded from the calculation of turnover in order to avoid double counting.[78] By way of exception, internal turnover between the target business and the seller should be taken into account to reflect the economic weight of the transaction where only part of an economic entity is sold or where certain internal activities are being outsourced.[79] Turnover of part-owned, jointly controlled subsidiaries should be equally distributed among the controlling shareholders.[80]

Third, turnover must in principle be valued at the date of the last complete financial year based on latest available audited accounts. Turnover data can be corrected to take into account

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73 *Ibid.*, para. 109.

74 *Ibid.*, paras. 110-140.

75 Guidelines of 23 July 2020, para. 116. In case the existing target was under the sole control of one company and one or more new shareholders acquire joint control together with the original parent, the undertakings concerned are each of the controlling undertakings exercising joint control (including the original shareholder). The existing target company is not an undertaking concerned because its turnover is part of that of the original parent company.

76 Art. 5(4) EU Merger Regulation and Guidelines of 23 July 2020, para. 120.

77 Guidelines of 23 July 2020, para. 119.

78 Art. 5(1) EU Merger Regulation and Guidelines of 23 July 2020, para. 123.

79 Guidelines of 23 July 2020, paras. 124 and 126.

80 *Ibid.*, para. 127.

structural changes to the undertakings concerned, such as a previous acquisition or termination of certain activities.[81]

Fourth, as regards the geographic allocation of turnover, turnover must be allocated to the country where competition takes place. As a general rule, turnover is allocated to the country where the customer is located.[82] In practice, in case of the sale of goods, the place where the contract was concluded and the place of delivery take precedence over the customer's billing address. In the case of services, the place of the provision of services determines the country where turnover is allocated.

Fifth, the principles governing the calculation of turnover must be adapted to certain economic sectors. For financial institutions, turnover is the sum of interest income, income from securities, commissions, net profit on financial operations, and other operating income (excluding deposits or funds transferred by the institution acting as an intermediary).[83] For insurance companies, turnover is gross premium income.[84] For sales through intermediaries, turnover is solely the amount of the commission. For tour operators, turnover is the entire amount paid by the final customer. For publishers selling advertising space, turnover is only the amounts received from advertisers, without the commission paid to intermediaries.[85] For independent distributors among a network (franchisees, retailers in cooperatives, etc.), turnover consists of sales made by the head office to distributors, excluding sales made by distributors to final consumers.[86]

Sixth, the calculation of the turnover of State-owned undertakings includes those undertakings which belong to the same economic unit.[87] In other words, two public undertakings do not belong to the same economic unit – and only the turnover of one of them has to be taken into consideration – if they have independent decision-making powers from each other and if they are independent from the State. The independent nature of the decision-making power of a public undertaking is determined based on governance rules, shareholders' agreements, interlocking directors, the State's management, the communication of information and strategic documents, findings on the past competitive behaviour of the undertakings concerned, etc. A public undertaking will generally be considered as independent from the State if the latter's powers of control are limited to the protection of interests similar to those of a minority shareholder.[88]

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81 *Ibid.*, para. 128.
82 *Ibid.*, para. 131.
83 *Ibid.*, para. 133.
84 *Ibid.*, para. 134.
85 *Ibid.*, para. 135.
86 *Ibid.*, para. 136.
87 *Ibid.*, para. 138.
88 *Ibid.*, para. 139.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

In principle, there is no "local nexus" test as such in France. Where the relevant turnover thresholds are met, foreign-to-foreign transactions, including full-function joint ventures, must be notified to the FCA and obtain clearance prior to completion. The fact that the parties are incorporated under French law or have legal entities in France is irrelevant.

However, even though there is thus no "local effects" test as such under the French merger control rules, the jurisdictional thresholds imply that each of at least two undertakings reach, in practice, a minimum level of local sales in France. Indeed, in each of the three alternative turnover-based thresholds, there is a requirement for at least two undertakings to have French turnover. For example, as part of the main set of thresholds which is generally applicable, at least two undertakings must have French turnover above €50 million. In the other two thresholds, which are sector-specific, at least two undertakings must have French turnover above €5 or €15 million in the retail sector and/or in overseas territories.

Consequently, transactions involving undertakings which do not generate turnover in France will not need to be notified before the FCA. This means that transactions caught by the French jurisdictional thresholds should in principle have a form of local nexus. This does not hold true however for the creation of joint ventures abroad, without any activity in France, where the thresholds are triggered simply by the parents' French turnover. Such cases of international (full-function) joint ventures without any local nexus to France are eligible for the simplified procedure.[89]

In our view, it would be necessary to encourage jurisdictions such as France and the EU to adopt a local nexus requirement. As French and EU merger control laws currently stand, international joint ventures without any local nexus must be notified and obtain clearance prior to completion. Although such cases are eligible for the simplified procedure,[90] we believe that the obligation to notify such cases is excessively burdensome for companies and leads to over-regulation by submitting to merger control review cases which have no chilling effects on competition in France or the EU.

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[89] *Ibid.*, para. 230.

[90] In the EU, this is for example the case where foreign-to-foreign joint ventures have no, or negligible, actual or foreseen activities in the EEA, *i.e.* where at the time of the notification (i) the turnover of the joint venture and/or of the contributed activities is below €100 million in the EEA territory, and (ii) the total value of assets contributed to the joint venture is below €100 million in the EEA territory (Commission Notice on the simplified procedure, para. 5(a)).

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

   No, in light of Article L. 430-1 FCC and the Guidelines, the acquisition of minority shareholdings that do not allow the acquirer to exercise either *de jure* nor *de facto* control over the target does not fall within the definition of a notifiable transaction.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

   We can confirm that the French jurisdiction does not provide for the payment of any filing fees. We would favour convergence where no filing fee is required to encourage more companies to notify.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

   In principle, the notification form in France requires the provision of market shares for all markets on which the concentration will have an influence, either directly or indirectly (the "markets concerned").[91] This information is required not only for all undertakings concerned and their control group but also for competitors (including in the form of best estimates). The parties are encouraged to consider all possible market segmentations envisaged or adopted by the competition authorities in their previous decision-making practice. Therefore, the FCA invites the parties to provide market shares according to the narrowest segmentations possible, even if they disagree with them, and to specify all the sources, steps and methodology used for their calculations.[92]

[91] FCC, Annex 4-3, section 3.

[92] Guidelines of 23 July 2020, paras. 225, 227 and 228.

In addition, lower market shares are one of the factors triggering the availability of the simplified procedure.[93] Consequently, the parties are required to provide market share information even in simplified cases, even if only to determine whether a case is eligible for the simplified procedure.

The Guidelines provides for a simplified notification form, for the following transactions, which deemed unlikely to affect competition[94]:

- where the combined market share of the undertakings concerned is less than 25% in markets consistently defined by past decisions;
- in the case of an overlap in the economic activities of the parties, where the combined market share of the undertakings concerned is less than 50% and the addition of market shares resulting from the transaction is less than 2% in markets consistently defined by past decisions;
- in the case of presence on vertically related markets, where the combined market share of the undertakings concerned in those markets is less than 30% in markets consistently defined by past decisions;
- in the case of presence in related markets, where the market shares of the undertakings concerned in the related markets are below 30% in markets consistently defined by past decisions;
- in the case of acquisitions of sole control of undertakings, where the acquirer exercised joint control of the target prior to the transaction;
- where the transaction concerns the creation of a full-function joint venture whose economic activity is only outside France;
- where the transaction concerns the acquisition of joint control of a real estate asset for sale in a future state of completion.

The FCA explained that market share data is the most common type of missing information leading it to declare notifications as incomplete.[95] Any amendment which would make it easier for the parties to prepare their notification would be welcome. In this respect, the adoption of a notification form which does not require the submission of market share information (but only turnover broken down according to statistical codes) in the same manner as the US HSR form might be a welcome improvement. However, making the provision of market share information optional should not be offset by additional burdensome information requests on the merging parties (e.g. the provision of internal documents on the markets). In the end, even if it the submission of market share information is not perfect, it is far from being insurmountable for companies in practice and it is an efficient way of reviewing the competitive impact of transactions.

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93 *Ibid.*, para. 230.

94 Guidelines of 23 July 2020, para. 230.

95 *Ibid.*, para. 220.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

The failure to notify a reportable concentration is subject to a fine up to 5% of the undertaking's turnover made in France over the last financial year (for legal entities) or up to €1.5 million (for individuals).[96] The responsible party for the failure to notify is the undertaking ultimately acquiring control over the target business.[97] The fact that the failure to notify is negligent is irrelevant.[98]

In order to determine the penalty, the FCA takes into account the gravity of the facts, having regard to the circumstances of the case and the individual situation of the undertakings concerned. The failure to notify constitutes in itself a serious breach, insofar as it deprives the authority of any possibility of reviewing a merger prior to its implementation, regardless of its effects on competition.[99] The authority takes into account the following circumstances on a case-by-case basis: (i) the complexity of the assessment of reportability of the transaction, (ii) the size and resources of the undertaking concerned, (iii) the fact that the undertaking brought its failure to notify to the attention of the authority, (iv) the intention to circumvent the obligation to notify, particularly if the transaction is likely to cause a substantial adverse effect on competition, and (v) the extent of cooperation from the undertaking.[100]

Since 2009, the FCA has imposed a fine in several cases relating to a failure to notify.

In *Colruyt*, the acquirer admitted that it had failed to notify three transactions. Although these transactions were notified after completion, and cleared by the FCA, the three clearance decisions did not retroactively remedy the breaches of the obligation to notify. The FCA considered that the assessment of reportability of the transactions was straightforward and the fact that the transactions should have been notified was predictable (as evidenced by the insertion of a condition precedent relating to French merger control clearance in the letter of intent).[101] Additionally, even though it did not have its own in-house lawyers, the acquirer could have resorted to the legal department and the resources of its mother company.[102] The

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96 Art. L. 430-8, I FCC.

97 FCA, Decision n° 12-D-12 of 11 May 2012 relating to the situation of the Colruyt group with respect to Article L. 430-8, I FCC, para. 47; confirmed by the Judgment of the Council of State of 15 April 2016, *Copagef/Castel Frères*, No. 375658, para. 7.

98 Guidelines of 23 July 2020, para. 165.

99 *Ibid*., para. 172; FCA, Decision n° 13-D-22 of 20 December 2013 relating to the situation of the Castel Group with respect to Article L. 430-8, I° FCC, para. 33.

100 *Ibid*., para. 173.

101 FCA, Decision n° 12-D-12 of 11 May 2012 relating to the situation of the Colruyt group with respect to Article L. 430-8, I FCC, para. 55.

102 *Ibid*., para. 56.

authority also took into account the cooperative approach from the acquirer. In the end, the Colruyt Group was fined €390,000.

In *Réunica/Arpège*, the acquirer notified the transaction after completion. The FCA considered that the acquirer ought to have known that the transaction was notifiable, because it had notified two other concentrations over the previous 5 years.[103] In addition, although the acquirer spontaneously drew attention to its own failure to notify, it did not fully cooperate and failed to respond to some questions on time.[104] The authority also took into account the short period of time between the implementation of the concentration and the first contacts with the authority (4 months). The Réunica Group was fined €400,000.

In *Castel*, a third party reported the existence of the acquisition by Castel of Patriarche in a later transaction. Although the merger was eventually notified and cleared, the FCA considered that the sole purpose of the acquirer's failure to notify was the rapid completion of the merger.[105] The fact that the concentration was reportable was obvious and did not raise any legal difficulties.[106] The acquisition was subject to a condition precedent relating to merger control approval.[107] The Castel Group deliberately avoided to assess whether the merger was reportable, even if this obligation was stated in the transaction documents. Further, the Castel group was in a position to carry out such assessment. The Castel Group had the means to seek external legal advice and had recently notified a concentration before the European Commission. While the existence of potential effects of the transaction on competition constitute an aggravating circumstance, the lack thereof is no mitigating circumstance.[108] The authority set the amount of the fine so as to give it a deterrent effect.[109] The fine was reduced from €4 million to €3 million on appeal, as the authority did not sufficiently take into account the extent of cooperation from the acquirer in notifying the concentration shortly after the first request from the authority.[110]

In *Cofepp*, the acquirer acknowledged that it had already had access to commercially sensitive information relating to the commercial behaviour of the target before submitting a filing to the FCA.[111] Before the filing, the acquirer also played a key role in the appointment of the new Managing Director of the target,[112] as well as intervened in the day-to-day operations of the

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103 FCA, Decision n° 13-D-01 of 31 January 2013 relating to the situation of the Réunica and Arpège groups with respect to Article L. 430-8, I FCC, paras. 57-59.

104 *Ibid.*, para. 60.

105 FCA, Decision n° 12-D-12 of 11 May 2012 relating to the situation of the Colruyt group with respect to Article L. 430-8, I FCC, paras. 37-38.

106 *Ibid.*, para. 35.

107 *Ibid.*, para. 36.

108 *Ibid.*, para. 45.

109 *Ibid.*, para. 51.

110 Judgment of the Council of State of 15 April 2016, *Copagef/Castel Frères*, No. 375658, para. 8.

111 FCA, Decision n° 22-D-10 of 12 April 2022 concerning the situation of Compagnie Financière Européenne de Prises de Participation with regard to Article L. 430-8 of the Commercial Code, paras. 53-58 and 67-69.

112 *Ibid.*, paras. 64-65.

target, for example by providing advice on the use of a new type of packaging.[113] During the review period, employees of the acquirer and the target exchanged information outside of clean team agreements, trying to identify synergies between both groups before clearance took place. As a result, the FCA considered that this behaviour infringed both the notification and standstill obligations.[114] The FAC imposed a €7 million fine on the acquirer, taking into account the fact that it had acknowledged the facts in the context of a settlement procedure.[115]

Convergence between countries regarding the level of penalties for failure to notify does not appear necessary (nor even desirable since it could significantly increase the risk of exposure for companies). However, an important factor of convergence could be the need for competition authorities to adopt proportionate and individualised sanctions against the failure to notify.

Besides the failure to notify, the early implementation of a concentration before clearance constitutes a separate infringement to the standstill obligation.[116]

Pursuant to Article L. 430-8 FCC, in the case where a notified merger has been carried out before clearance (*i.e.*gun-jumping), the FCA may impose on the notifying parties a financial penalty. Its amount may not exceed, for legal entities, 5% of the turnover excluding taxes generated in France during the last financial year ended, increased, where applicable, by the turnover generated in France during the same period by the acquired party, and, for individuals, €1.5 million.

However, in accordance with Article L. 430-4 FCC, in the event of a duly justified special need, the notifying parties may ask the FCA for an exemption allowing them to carry out all or part of the merger without waiting for the clearance decision. The grant of such an exemption is quite exceptional. Takeover bids for undertakings in liquidation or receivership are among the cases that may lead to such an exemption.

The notifying party, when submitting the notification file, must specify the reasons for the exemption request. In particular, this written request, separate from the notification file, must specify the context of the transaction, the procedures under way and their timetable. In addition to the question of the viability of the undertaking concerned, the urgency of the matter necessitating the granting of the exemption must also be duly justified[117].

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113 *Ibid*., paras. 71.
114 *Ibid*., para. 78.
115 *Ibid*., para. 99.
116 Art. L. 430-8, II FCC.
117 Guidelines of 23 July 2020, para. 149.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   We had a negative experience with the Moroccan Competition Council. In one transaction, the acquirer had no activities in Morocco while the acquired Moroccan assets only generated limited intra-group sales of intermediary products from Morocco to other sister companies abroad within the seller group. The Competition Council insisted that the parties produce market share data specifically in relation to the Moroccan turnover derived from the sale of such intermediary products. The Competition Council dismissed all arguments that the production of such market shares (i) did not make economic sense in relation to intra-group sales, (ii) concerned worldwide markets beyond the local remit of Morocco, and (iii) was in any event impossible due to the lack of robust data. In the end, in the absence of more reliable data, the parties had to submit market shares based on their own headcount estimates (*i.e.*a rough approximation of the number of workers employed in the factories of the seller and its competitors). Such a formalistic approach to merger control review delayed the overall notification process and undermines the confidence of economic operators in the authorities of certain jurisdictions in particular, and in merger control in general.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    N/A

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We support this recommendation. It is necessary for companies to know with certainty which transactions should be subject to merger control scrutiny. The criterion of 'change of control' has a proven track record of certainty in key jurisdictions such as the EU. Only operations which lead to a change of control should as such be subject to merger review, whereas internal group restructurings for example have no bearing on the market structure.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We agree with this recommendation. It is more difficult for companies to assess the reportability of a transaction in jurisdictions where the triggering event is merely the acquisition of a non-controlling influence over the target. Where a merger control filing is required in the case of the acquisition of a non-controlling minority stake (such as Germany and Austria), companies are subject to an additional administrative burden which, in most cases, translates into a mere formalistic collection of data as opposed to a sensible and complete review of the impact of the transaction on the markets. In addition, in exceptional cases where the acquisition of a minority stake may raise competition issues, competition agencies can still apply antitrust rules to the acquisition of a non-controlling stake and intervene *ex post*.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree with Recommendation 3. It is necessary to narrowly define the scope of reportable joint ventures in order to avoid the submission of filings in jurisdictions where the joint venture has no impact on market structure. For example, companies are very often under the obligation to file the creation of joint ventures in Poland and China, not only because of these jurisdictions' notification thresholds, but also because they catch all types of joint ventures, irrespective of their full-functionality. While the assessment of full-functionality potentially adds a layer of complexity, this can be mitigated in practice by clear guidelines on jurisdiction and well-established decision-making practice.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We agree with this recommendation. Notification thresholds should be based on financial information readily available to the parties in the ordinary course of business. As a matter of legal certainty and predictability, it is disproportionately burdensome to expect companies to compile market data and produce reliable market shares, simply to assess whether a transaction is reportable in a given country. It is much easier to produce turnover data, which companies routinely record in accordance with international accounting standards, especially in sectors where the relevant markets have not been precisely defined (yet) by competition authorities.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We support this recommendation. Notification thresholds should be based on financial information readily available to the parties in the ordinary course of business, which may be disclosed and reviewed at an early stage of processes leading to a transaction. It is usually easier for a company to keep track of sales than asset value: the valuation of assets is subject to fluctuations and can sometimes prove difficult to determine. As a matter of legal certainty and predictability, it is easier for companies to produce turnover data.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree with Recommendation 6. It is essential for the reviewing jurisdiction to capture only those transactions which have a material nexus to it, for example in the form of significant local turnover. Therefore, notification thresholds should only be triggered where the entities combined in the transaction (and especially the target company) generate significant local sales in the jurisdiction. In this respect, the sales of the seller group which are not transferred to the acquirer group should be excluded for the purposes of assessing whether the notification thresholds are met. Taking the sales of the seller group into account would otherwise involve significant costs and delays before companies can close a transaction and would also imply a more significant workload for competition authorities to review concentrations having no actual competition effects.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or

(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.

FOR IN PRINCIPLE. We agree with this recommendation in principle. Simplified notification forms should indeed be available for transactions which are presumed unlikely to impact competition (*i.e.* the parties' activities do not overlap and / or are not vertically related; or the parties' market shares are below a *de minimis* threshold). However, for consistency purposes, the *de minimis* threshold may well be defined with reference to the EU merger control regime, in particular the market share threshold below which the European Commission considers that a concentration will not affect the internal market. Insofar as the 20% threshold for horizontal relationships appears too low, we could apply the 30% threshold (usually reserved for vertical relationships) to all types of transactions. The introduction of simplified notification forms will make the notification procedure faster, thus improving the attractiveness of countries where simplified notification forms are still not implemented.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR. We agree with this recommendation. In the view of the French ICC Task Force on Merger Control, it is absolutely necessary to abolish filing fees, among others, for the sake of equal treatment between companies with regards to merger control, provided that companies do not have the same financial capacity to bear filing fees. In any way, a filing fee system does not improve the attractiveness of certain countries for business.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We support this recommendation. As a matter of legal certainty and predictability of merger control procedure, it is essential for competition agencies to make available guidelines on the issues described above. This would make it easier for companies to assess whether their acquisition project is reportable in a given country, thus significantly mitigating the risk of "gun-jumping". The availability of such guidelines both in their local language(s) and in English will definitely contribute to a better dissemination and understanding of the local merger control rules. In that sense, the French competition authority (FCA) published guidelines in 2020 both in French and English, and so did to some extent the Australian and German competition agencies.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR. We agree with Recommendation 10. The merger control process should include a broader scope of assessment by taking into account economic constraints and other circumstances in well-identified cases (e.g. social problems due to an economic crisis for instance). While this should remain exceptional in systems providing for a suspensive effect or standstill obligations during the merger review, competition authorities may on balance be able to provide guidelines and conditions for such exceptions to apply.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR. We agree with this recommendation. It is relevant to (i) limit the fine for gun jumping to a share of the concerned undertakings ' turnover in the jurisdiction concerned to limit to total amount of fines in case of gun-jumping in several countries and also, at the same time, in order to ensure that the sanction is dissuasive enough, (ii) allow the regulators to adopt a fining regime/policy addressing the specific case of killer acquisitions through a minimum penalty amount/threshold or any other relevant criterion. . On point (i), Countries could follow the example of France where the FCA can impose on the notifying parties a financial penalty amount the amount of which may not exceed 5% of the turnover excluding taxes generated in France during the last financial year.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds,	FOR

Draft recommendations	Comments
which are much easier to assess and to implement.	
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR IN PRINCIPLE
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical**	FOR

Draft recommendations	Comments
implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from	FOR

Draft recommendations	Comments
introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	There is no applicable filing fee for a merger control filings before the French Competition Authority.
"Negative experience" reports	N/A

Germany

Johannes Wiehe, White & Case LLP[118]

Georg Boettcher, Siemens AG

Hubertus Kleene, EY Law

1. Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

The German Federal Cartel Office ("**FCO**") did not publish a general guideline on the concept of reportable concentrations but on merger control in general (available on the FCO's website in German). This, however, is not critical from a German lawyer perspective, because (i) the regulation itself is rather detailed and therefore gives a good general picture (ii) there are plenty of secondary sources that are very well structured, and (iii) the EU guidelines can give hints as to how the FCO would deal with certain questions. Nonetheless guidelines by the FCO on particular individual cases would be well appreciated. From a foreign lawyer perspective, the German system can be challenging, because the (i) regulation is in German, (ii) the secondary sources are not only German but also mainly not accessible free of charge and registration, and (iii) there are still many substantial differences between the European and the German concept.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset- based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

The German system in general has turnover defined jurisdictional thresholds. These thresholds are rather straightforward. There are no guidelines by the FCO on the turnovers, however the FCO stated that the calculation of turnover in essence is similar to the German system.

[118] Views expressed here are strictly personal and should not be attributed to his law firm, its affiliates or clients.

For special cases (intended mainly for addressing "killer acquisitions") there is a threshold that is based on the value of the consideration. This threshold does not require any particular turnover of the target in Germany. Instead, it is triggered if the consideration for the acquisition of the target is above €400 million and the target has relevant domestic operations.

Since this threshold is fairly new, there is not enough data to evaluate the effect of this threshold yet. Nevertheless, we endorse such initiative against killer acquisitions as a measure to foster the development of innovative undertakings and ensure competition in particular in digital markets.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

The FCO (in cooperation with the Austrian antitrust authority) has published guidelines only with regards to the special threshold that accounts for the high consideration for the acquisition of the target in German (available on the FCO's website in German and English). These guidelines were published because the value of consideration which raises several questions as regards the calculation of such value and how different kinds of considerations are taken into account. In addition, this threshold requires relevant domestic operations of the target within Germany. This prerequisite is newly developed and unprecedented within the German system. The general local nexus requirements of the German competition law referred to "local effects" instead of "domestic operations".

Apart from that, there are no guidelines by the FCO.

4. Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?

The German system provides for two domestic turnover thresholds plus a local nexus test and is still a very effective regime.

The German local nexus test applies not only to international joint ventures but to the applicability of the German (not EU) merger regulation as a whole (although the majority of cases will in fact deal with international joint ventures). Pursuant to section 185 (2) of the German Act against Restraints of Competition ("***ARC***"), the merger regulation – including the

gun-jumping rules – applies to concentrations that have a local effect in Germany even if they are initiated outside Germany.

The term local effect is to be interpreted according to the purpose of merger control, which is to review whether transactions that lead to a change in the market structure would significantly impede effective competition before they are implemented. The starting point for assessing local effects is therefore the merger transaction and its relationship to markets that are located in Germany or that encompass Germany in whole or in part.

The possible influence on market conditions must reach a certain minimum intensity, *i.e.*it must be perceptible. In principle, all structural factors which would be considered in the substantive examination of the concentration are relevant for this assessment. It is not necessary that competitive conditions deteriorate or that it appears possible that the intervention threshold will be reached. These questions are only the subject of the substantive examination.

If the target company exceeds at least the 2nd domestic turnover threshold, there are always sufficient local effects, because in this case the target company is active in Germany to a sufficient extent. With the domestic turnover thresholds, the legislator has concretized the characteristic of local effects for a subarea of merger control.

If there are more than two parties to a merger, there are not sufficient local effects in all cases in which the turnover thresholds are exceeded. In these cases, local effects can be clearly excluded if the following (cumulative) conditions are met: (i) the target is a pure foreign joint venture, and (ii) the parent companies are not (potential) competitors on the relevant product market of the joint venture (or on upstream or downstream markets). In the case of start-ups, this applies to the intended activity of the joint venture.

In cases which do not meet the criteria above, it depends on the circumstances of the individual case whether sufficient local effects are to be expected. As an example, if a joint venture is only marginally active on markets that include the domestic market in whole or in part, this is usually not sufficient to establish appreciable local effects. On the other hand, it is sufficient if the market share of the joint venture exceeds the threshold of five percent on a market that includes the domestic market in whole or in part. In case of newly established joint ventures that have not yet generated any turnover, the turnover to be expected in Germany in the forecast period can be an indication of whether there is only marginal activity in Germany. If the joint venture is only marginally active on domestic markets, appreciable local effects may result from possible spillover effects between the parent companies. Such negative effects on the competitive relationship between the parent companies must also be examined if the joint venture is not active at all on a market that includes the domestic market in whole or in part and is also not a potential competitor on such a market.

With regards to a local nexus through spillover effects the German regime must be considered as too wide, because an effect on the German market merely through spillover effects seems not only unlikely but can hardly be measured or proven.

This uncertainty leads to additional costs for mergers that are uncritical from the perspective of the German economy. Apart from that, the German local nexus test could be a good example for other jurisdictions.

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

The German merger control system requires the notification of the acquisition of minority shareholdings and influence below the threshold of control. Specifically, relevant concentrations include the acquisition of shares or voting rights resulting in a 25% (or more) minority share in the capital or voting rights of an undertaking as well as the acquisition of so called competitively significant influence. The latter is a rather loose prerequisite that is not clearly defined. It demands for the establishment of a corporate link (in general a shareholding/ voting rights below 25%) and some additional factors (so called plus factors) that provide for a certain level of steering.

6. Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

As already stated in the question, the German system provides for the payment of filing fees. The amount of the fees is determined by the personnel and material costs incurred by the FCO, taking into the economic significance of the merger. The fee may not exceed €50,000; it may be doubled in exceptional cases.

Of course, from the perspective of the merging parties, in general not being obliged to pay a filing fee would be an advantage. This alternative, however, would only be preferable if it is ensured, that the quality of the merger control does not suffer. The review should not be delayed due to fewer resources because in many cases costs of a delay of the antitrust approval are higher than the filing fees.

7. Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down

according to statistical codes);

For a German filing market shares, including the basis for their calculation or estimation, only need to be provided if for the parties to the concentration the combined market shares reach at least 20 percent in Germany or in a significant part thereof. This seems rather straight forward, because in these cases it is likely that the FCO would ask for market shares in any case.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

The FCO may impose a fine for the early implementation of a concentration which for undertakings (not persons) could amount to 10% of the turnovers of the year preceding the year of the decision by the FCO. In our view the issue is not with the amount or calculation of the fine. Instead, there is a great uncertainty as regards the question where permitted preparation of an implementation ends and where early implementation begins. Therefore, convergent rules on gun jumping that are defined in detail would be helpful to ensure compliance.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

No, we would not like to report any experience of that kind.

10. Other countries: are there any other country that should be included in our report? Please explain why.

N/A

Position on recommendations from ICC: Summary table

Draft recommendations	Comments
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Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR. Clearance sometimes is helpful even for non-full-functionality joint ventures.
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR

Draft recommendations	Comments
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Draft recommendations	Comments
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Draft recommendations	Comments
such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	See above
“Negative experience” reports	N/A

India

Simran Dhir, Head of Competition Law Practice, S&R Associates

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/ concentrations and/ or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

There are no specific guidelines published by the Indian competition authority ("**Competition Commission of India/ CCI**") to clarify the concept of reportable mergers/ concentrations and/ or the concept of reportable joint ventures.

According to the Competition Act, 2002 ("**Act**"), an acquisition of one or more enterprises, or a merger or amalgamation of enterprises will need to be reported to the CCI in line with the merger control provisions, if certain prescribed asset or turnover thresholds are exceeded ("**Jurisdictional Thresholds**") by the parties to a transaction or their 'group'.

There are also certain exemptions from the requirement to notify the CCI specified under the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

Further, the Government of India, through the Ministry of Corporate Affairs, has issued a notification[119], which provides that a transaction which exceeds the Jurisdictional Thresholds (a "**Combination**") does not require the approval of the CCI if the assets or the turnover of the target in India is below certain prescribed thresholds ("**Target Exemption**"). Such notification also clarifies that in the event a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, only such value of assets of the said portion or division or business and or attributable to it, should be considered for the purposes of applying the Target Exemption thresholds.

The value of the said portion or division or business is determined by taking the book value of the assets as shown in the audited books of accounts of the enterprise, as reduced by any depreciation. The terms "assets" and "turnover" have also been separately defined under the Act and the Combination Regulations:

i) "Assets" mean the book value of total gross assets (e.g., fixed assets, investments, current assets and deferred tax assets), less any depreciation, as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the

[119] Notification, available here.

financial year in which the proposed transaction falls and should include the value of any intangibles (e.g., intellectual property rights, brands, permitted use or other commercial rights) reflected in the audited financial statements.

ii) "Turnover" is defined as "value of sale of goods or services". The CCI has clarified that for the purpose of computing the turnover, (i) the value of goods and services to be included is the 'net turnover', *i.e.*, gross turnover minus indirect taxes, and (ii) 'other income', which is not connected to the operations of the company (*i.e.* is not derived from sale, supply or distribution of goods or on account of services rendered), shall be excluded from the turnover computation.

With respect to joint-venture(s) ("**JVs**"), there are no specific references in the Act or Combination Regulations. Typically, creating a greenfield joint venture does not require merger control approval from the CCI since there is no revenue generated in the preceding financial year. In case of a brownfield joint venture *i.e.* where the joint venture partners are investing in an existing business, a notification with the CCI may be required. While assessing the requirement to notify such JVs, the value of the assets and turnover of the business being transferred/ contributed/ invested into by the joint venture partners is generally considered for the purpose of the thresholds.

Clear guidelines to identify the 'group' for the purposes of the Jurisdictional Thresholds, and clarity on the applicability of various exemptions provided under the Combination Regulations would be useful.

The CCI does offer the facility for conducting a pre-filing consultation with the merger division. However, the information required to be submitted to the division in advance of a pre-merger consultation could be fairly detailed, and any guidance provided in a pre-merger consultation is not binding on the CCI.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/ or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

The Jurisdictional Thresholds (see response to question 1) include asset and turnover-based thresholds, and not market share-based thresholds. The terms "turnover" and "assets" have been defined as described above in detail.

There is no definition of "market share" provided in the Act, or in the Combination Regulations. The CCI considers market shares to be relevant in relation to the substantive assessment of a transaction (including to determine the form of notification *i.e.* short or long, and to assess whether a combination will cause or is likely to cause an appreciable adverse effect on competition) but

not for the purpose of determining the requirement to notify itself. That is only based on objective criteria.

In May 2023, the Competition Amendment Act, 2023 (which seeks to amend certain provisions of the Act) proposed certain changes to the provisions relating to regulations of combinations in the Act, including a new notification criteria, the deal-value threshold ("**DVT**"), for mergers and acquisitions where (a) the value of the transaction exceeds INR 2000 crore (~US$ 240 million), and (b) the enterprises being acquired/ taken control of/ merged or amalgamated have substantial business operations in India. Transactions which breach the DVT will be required to be approved by the CCI prior to completion. The DVT related provisions of the Competition Amendment Act, 2023 have not yet been notified and therefore are not yet in force in India.

One of the criteria proposed for determining whether an enterprise being acquired/ taken control of/ merged or amalgamated has substantial business operations in India (see point (b) above) is whether such enterprise's "turnover during the preceding financial year, in India, is 10% or more of its total global turnover derived from all the products and services".

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable**

The CCI has not published any guidelines to clarify its Jurisdictional Thresholds (the CCI has published certain Frequently Asked Questions[120] on its website to assist the notifying parties, however such information is of a general nature and is not exhaustive).

As previously stated in the response to query 2, clear guidelines to identify the 'group' for the purposes of the Jurisdictional Thresholds, and clarity on the applicability of various exemptions provided under the Combination Regulations would be useful.

In addition, the Indian merger control regime includes the concept of "inter-connected" transactions (i.e., transactions which are inter-connected with notifiable combinations) which are also required to be notified to the CCI. Clarity on inter-connected transactions (including clarity on exclusion of internal reorganizations from such transactions) would be particularly useful.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/ short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/ jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

[120] Available here.

Local Nexus Requirement

Yes, the Indian merger control system provides for a local nexus requirement. The Jurisdictional Thresholds (referred to in response to query 1) provide asset and turnover thresholds which the parties to the combination, either individually (*i.e.* target enterprise/ merging parties and acquirer), or as a group (*i.e.* acquirer group/ the group to which merged entity would belong), are required to satisfy.

Each of such assets and turnover thresholds have a local nexus requirement, *i.e.* the parties either individually, or as a group should breach the prescribed assets and turnover thresholds 'in India' to qualify as a Combination and notify the CCI. Further, the Target Exemption also provides a local nexus requirement.

International Joint Ventures

JVs or particularly, international JVs, are not specifically dealt with under the Act from a merger control perspective. The provisions applicable to Combinations (including (a) the requirement that the Combination has an appreciable adverse effect on competition ("**AAEC")** in India and (b) the India-specific asset/ turnover criterion in the Jurisdictional Thresholds) are applicable to international JVs as well. Further, there are no specific, simplified or short processes for international JVs or foreign-to-foreign transactions.

Need for Establishing Local Nexus

Requiring notification of transactions that are unlikely to result in appreciable competitive effects within a jurisdiction imposes unnecessary transaction costs on parties and consumes agency resources. It may be helpful for the agency to provide guidance on a case-by-case basis to parties involved in foreign-to-foreign transactions and if satisfied, allow the transaction to be filed in a simplified/ short form for an expedited clearance.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

All forms of (domestic and international) acquisitions, mergers or amalgamations that exceed the jurisdictional thresholds and do not benefit from any exemption must be notified to, and obtain, the approval of the CCI before the transaction can be completed.

The term "acquisition" is defined to include the direct or indirect acquisition of any shares, voting rights or assets of any enterprise, or the control over the management or assets of an enterprise.

Minority Acquisitions

The Combination Regulations exempt acquirers from notifying an acquisition if the following three elements are met cumulatively (i) does not entitle the acquirer to hold 25% or more of the total shares or voting rights of the target company; and (ii) is made 'solely as an investment' or in the

'ordinary course of business'; and (iii) does not lead to the acquisition of control over the target company.

Definition of Control

Under the Act, "control" includes controlling the affairs or management by – (a) one or more enterprises, either jointly or singly, over another enterprise or group; (b) one or more groups, either jointly or singly, over another group or enterprise.

When interpreting control, the CCI has now concluded a lower standard of control, which encompasses *de-facto* control, *de-jure* control as well as "material influence" over the affairs of a company.

The CCI considers shareholders to have acquired "material influence" over the affairs and management of a company and consequently to have acquired "control" (for example, through special rights/ veto rights, status and expertise of an enterprise or person, board representation, structural/ financial arrangements and so on). Material influence may be acquired even with the acquisition of a right to appoint a single director on the board of directors of the target enterprise. (for example, in Ultratech JAL, Combination Registration No. C-2015/02/246, the acquirer was said to have acquired material influence over the target with the appointment of a single director on the board, as the nominee director had significant industry expertise which the CCI assumed would lead to his advice being followed by the remaining board members). In the past, the CCI has considered a host of rights to be control conferring for the Acquirer.[121]

Therefore, while the merger control regime in India does not require notification of acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target, certain minority acquisitions with few rights have been previously considered notifiable before the CCI.

Prohibition Decisions and Remedies

The CCI has not yet issued an order prohibiting a transaction.

The CCI has issued the following orders in transactions involving acquisition of minority shareholdings:

(a) Google's investment of approximately 1.28% of the equity share capital of Bharti Airtel Limited ("**BAL**"): In addition to the proposed investment, Google and BAL also agreed to enter into certain collaborations, *i.e.* (i) a Co-Marketing Agreement, and the Cloud Agreement; and (ii) certain Future Commercial Arrangements. Google also had a minority, non-controlling stake in Jio Platforms Ltd. ("**JPL**") - which was also active in similar businesses as BAL.

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121 The right to nominate a director on the board; The power of veto in relation to: (a) changes to the entity's constitutional documents; (b) changes to the entity's capital structure; (c) changes to the entity's incentive structure; (d) changes to the entity's appointment of senior management; (e) reorganisation in the nature of the current business or launch of any other businesses; (f) the appointment or removal of any nominee director; (g) changes to the dividend policy; and (h) the appointment or change of auditors; "negative control" rights such as ability to block special resolutions of an entity.

The CCI raised concerns regarding: (i) the possibility of flow of competitively sensitive information between BAL and JPL; and (ii) certain clauses of the Co-Marketing Agreement. In response, Google offered (i) that it will maintain an appropriate firewall to prevent the flow of competitively sensitive information between BAL and JPL that Google may have access to on account of its proposed investment; and (ii) an undertaking to amend certain clause(s) of the Co-Marketing Agreement, and (iii) that under the Co-Marketing Agreement, Google and BAL will not share any customer or user-specific data.

(b) General Atlantic's ("**GA**") acquisition of 4.04% shareholding of Acko Tech: GA already held 15.54% of the equity share capital of Acko Tech and had certain affirmative voting rights, information rights and right of representation on the board of directors of Acko Tech. As a result of the transaction, GA would obtain additional rights such as the right to appoint an additional director on the board of Acko Tech, have its representation in certain committees, and to appoint an observer on the board of directors of any of Acko Tech's subsidiaries.

Acko Tech held 2.95% of the shares of Vivish, along with a right to appoint an observer to the board of Vivish. On the other hand, GA held 32.4% of the shares of NoBroker, which was engaged in a business similar to that of Vivish and both NoBroker and Vivish were significant players in society/ gated community management solutions.

The CCI observed that "*common interest and, direct or indirect, influence, if any, of the acquirer group in the two prominent players for society/ gated community management solutions, may raise the risk of softening of competition between the two prominent players*". GA offered that it will not directly or indirectly participate in, associate with or exert influence on any matter or affair related to Vivish or investment of Acko Tech in Vivish.

(c) Hyundai Motor Company ("**HMC**") and Kia Motors Corporation ("**KMC**") minority acquisition of shares in ANI technologies Pvt. Ltd. ("**OLA**"): In addition to the acquisition of minority shareholding, the proposed acquisition involved certain strategic co-operation between HMC and OLA (a ride-sharing company) in relation to fleet operation, connected car-platform, mobility solutions, development of electronic vehicles, and e-mobility business in India.

The CCI noted that if OLA were to prefer drivers owning HMC or KMC vehicles, as a result of the proposed transaction, such preference might place other drivers/ cabs registered in OLA marketplace at a disadvantage. Accordingly, without prejudice, the acquirers offered that (i) the strategic collaboration between them would be on a non-exclusive basis, (ii) the algorithm/ programme of the marketplace of OLA would not: (a) give preference to the driver solely based on the brand of the passenger vehicles manufactured by the acquirers;

or (b) discriminate against any driver based solely on the brand of the passenger vehicles manufactured by any other automobile manufacturer.

(d) ChrysCapital's additional 3% investment in Intas Pharmaceuticals ("**Intas**"): ChrysCapital already held approximately 3% and proposed to acquire an additional approximately 3% of the shares of Intas, as part of the proposed transaction, along with a right to appoint a director in Intas (and right to veto certain corporate actions).

ChrysCapital already held minority investments in certain enterprises competing with Intas (along with board representation, and a right to veto certain corporate actions). The CCI considered ChrysCapital's existing rights in such competing entities to enable ChrysCapital to "materially influence their strategic affairs". ChrysCapital undertook to remove its nominee director and gave an undertaking that it will not exercise any veto rights over certain strategic corporate actions in one of the competing enterprises.

Minority acquisitions may not always result in an appreciable adverse effect on competition in India. It may be helpful for the agency to provide guidance on a case-by-case basis to parties involving minority acquisitions so that only transactions where there is at least some *prima facie* evidence of an effect in India require notification to the CCI.

6. Please confirm that your country/ jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

The merger control regime in India requires the payment of filing fees as a pre-requisite requirement for filing a notification of the transactions before the CCI. The requisite filing fee, based on the Combination Regulations, is INR 2 million (about US$23,991) for Form I and INR6.5 million (about US$77,972) for Form II. In an acquisition, the responsibility to notify, and therefore, the obligation to furnish the filing fee, lies with the acquirer. In a merger/amalgamation, it is the joint responsibility of the parties to pay the filing fees.

India could adopt the system currently employed by the Federal Cartel Office in Germany where the level of the filing fee depends on the economic importance of the transaction and the review efforts and costs of the authority.

7. Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes).

Relevance of Market Share to Assessment of Notification Requirements

In India, notification and approval requirements for an acquisition or merger under the Act are based solely on the value of assets and turnover of the parties to the transaction. Accordingly, the market share of the parties to a combination is not relevant to assess whether such transaction requires the approval of the CCI.

Requirement to provide market share data in notifications to the CCI

However, under the Combination Regulations, the form of notification used by the parties depends upon the market share of the parties. Parties are ordinarily required to file a notification in the short-form (Form I), however, the Combination Regulations state that a long-form notification (Form II) is preferred where:

i) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market; or

ii) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25% in the relevant market.

Further, parties may also file notifications under the 'green channel' ("**Green Channel Notification**") where, considering all plausible alternate market definitions, the parties to the combination (including their respective group entities and/ or any entity in which they, directly or indirectly, hold shares and/ or control), do not have any horizontal, vertical or complementary overlaps in their activities.

While the Green Channel Notification does not require provision of market size, share or competitor information, the other notification forms (*i.e.* the Form I and the Form II) require the provision of market share data.

A table comparing the market share data requirements for the various notification forms is set out below.

S. No.	Form I	Form II	Green Channel Filing
	The total size of the market for last three years, in terms of value of sales (in rupees) and volume (units);	The total size of the market for last five years, in terms of value of sales (in rupees) and volume (units);	No market share data needed where the parties to the combination do not have horizontal, vertical or complementary overlaps.
	Sales in value (in rupees) and volume (units) along with an estimate of the market share(s) of each of the parties to the combination (including their relevant group entities), for the last three years; and	Sales in value (in rupees) and volume (units) along with an estimate of the market share(s) of each of the parties to the combination (including their relevant group entities), for the last five years; and	
	Market shares for the last three years of the five largest competitors.	Market shares for the last five years of the five largest competitors.	
	It is important to note that the combined market share of the parties to the combination is less than 10%, the market share data referred to above is required to be specified only for a period of [one] year.[122]	An estimate of HHI (Herfindahl - Hirschman Index), along with change in the index post-combination.	
		Details of legal and regulatory framework including by way of relevant regulations/ laws/ rules/ procedures	
		Details of Research and Development, ease of entry and exit in the relevant market, and details of imports and exports.	

Views on simplification of Notification Forms in respect of provision of market share data

[122] The market share for competitors should be provided based on reports available in public domain and/ or prepared by independent third parties; in the event such reports are not available, they may be provided based on in-house market intelligence.

It is relevant to note that the factors set out in Section 20(4) of the Act which the CCI may consider examining whether a proposed combination causes, or is likely to cause, an AAEC, include "market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination".

As stated above, currently in India, all combinations, other than combinations where parties do not overlap at all (in any horizontal, vertical or complementary markets), require the parties to collate and submit market share and size information, together with information on market shares of competitors.

Often, such collation of information is cumbersome, increases transaction costs for the parties, and serves little purpose where the market share of parties is low. Further, the analysis and consideration of such information by the CCI is also time-consuming and has little to recommend by way of benefits where market shares of the parties are low. In addition, this causes delays to completion of transactions, particularly where a market does not have sufficient publicly available data and is forced to expend time and finances on estimation exercises.

With more than one decade of the enforcement of the merger control provisions, the CCI's notification thresholds should now reflect its experience and confidence. Certain markets where there can be no competition law concerns, should be allowed to be notified under the Green Channel Notification or any other similar expedited process.

Competition Law in the United Kingdom specifies a *de-minimis* share-of-supply threshold (i.e., 25%) below which transactions are not required to be notified to the relevant authority[123]. Similar provisions are applicable in the jurisdictions of Spain[124], Saudi Arabia[125], Australia[126], [Slovenia[127],

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123 See Section 23 of the [United Kingdom] Enterprise Act, 2002. See also, Mergers: Guidance on the CMA's Jurisdiction and Procedure (available here at page 15).

124 Article 8 of the [Spanish] Competition Act 15/2007 states that "The control procedure set out in this Act shall apply to economic concentrations when at least one of the two following circumstances occurs: a) That as a consequence of the concentration, a share equal or higher than 30 percent of the relevant product or service market at a national level or in a geographical market defined within the same, is acquired or increased…" (available here at page 10).

125 See Article 7(a) of the Implementing Regulation of the Competition Law (2004) which states that "Any entity intending to realize Economic Concentration in order to dominate 40% (forty percent) of a commodity's total supply in the 6 market shall submit a written application with the following attachments:" (available here)

126 See Notification Threshold for the Merger Guidelines of the Australian Competition and Consumer Commission which states that "merger parties are encouraged to notify the ACCC well in advance of completing a merger where both of the following apply: (i) the products of the merger parties are either substitutes or complements; (ii) the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s" (available here at pages 10 and 11).

127 See Notification of the Concentration to the Public Agency of the Republic of Slovenia for the Protection of Competition which states that "In the event that the Agency invites undertakings to notify a concentration which does not meet the annual turnover thresholds but which, together with the other undertakings in the group, have a market share of more than 60 % on the market of the Republic of Slovenia, the concentration must be notified to the Agency no later than 30 days from the date of notification of the notice to the undertaking which must notify the concentration" (available here).

Portugal[128]] and Singapore[129]. The CCI could also consider following similar thresholds.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

Under the Indian merger control regime, a combination must be notified to the CCI if it breaches the prescribed asset and turnover thresholds and does not qualify for any statutory exemptions. The requirement to notify CCI is mandatory and such combinations are subject to a standstill or suspensory obligation, until approved by CCI.

Section 43A of the Act prescribes a penalty for completion of a notifiable transaction before the CCI grants approval ("**Gun-Jumping**"), and states as follows: *"If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination."*

The penalty for Gun-Jumping is imposed upon the acquirer in case of an acquisition, and upon all parties in case of a merger. Further, the CCI's decisional practice indicates that the penalty is calculated based on the global assets or turnover of the parties (whichever is higher), as reflected in their audited books of accounts, and is not limited to their Indian assets or turnover.[130]

Previous Gun-Jumping penalties imposed by the CCI have ranged from nominal amounts of INR 1 lakh[131] (approximately USD 1,202) to INR 200 crore (approximately USD 240,421,60)[132], which is the highest Gun-Jumping penalty imposed by the CCI so far.

The CCI also considers mitigating factors while imposing a penalty depending on the facts and circumstances of the case. The mitigating factors considered by the CCI in previous cases include:

i) Voluntary disclosure of information by the parties;

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128 See Merger Control Guidelines of the Portuguese Competition Authority which states that "Legally, all concentration operations that meet one of the following criteria are legally subject to prior notification to the Competition Authority: (i)Market share equal or superior to 50%;(ii) Market share equal or superior to 30% and less than 50% provided that the turnover carried out individually by at least two of the companies exceeds 5 million euros…" (available here).

129 Under the [Singapore] Competition Act, the Competition and Consumer Commission of Singapore is likely to give further consideration to a merger if (i) the merged entity will have a market share of 40% or more, or (ii) the merged entity will have a market share of between 20% and 40%, and the post-merger combined market share of the three largest firms on the market is 70% or more (available here).

130 *Diasys/ Piramal*, Combination Registration No. C-2015/09/313 (available here at para 18 on page 9).

131 *Claridges Hospitality/ Akira Marketing*, Combination Registration No. C-2017/05/508 (available here at para 10 on page 6); *Gurgaon Gramin Bank/ Haryana Gramin Bank*, Combination Registration No. C-2015/12/344 (available here at para 12 on page 7); *Marudhara Gramin Bank/ Mewar Anchalik Bank*, Combination Registration No. C-2016/02/377 (available here at para 12 on page 5); *Clariant Chemical/ Laxness India*, Combination Registration No. C-2016/02/373 (available here at para 9 on page 6).

132 *Amazon.com NV Investment Holdings LLC/ Future Coupons Private Limited*, Combination Registration No. C-2019/09/688 (available here at para 83 on page 56)

ii) Co-operation by the parties;
iii) Quality of information provided during Gun-Jumping proceedings;
iv) Small consideration/ value of the transaction;
v) Lack of *mala fide* intention of the parties;
vi) The combination not resulting in the creation of any horizontal overlaps or any vertical relationships; and
vii) No previous instance of violation of the Act by the parties.

In our view, given the globalised environment that corporate transactions take place within, it would be helpful to harmonise certain aspects of the penalties imposed by competition regulators, to avoid prohibitive effects of penalties on economic transactions.

In particular, in our view, it would be helpful for competition regulators to harmonise, to the extent possible, the mitigating factors that apply to transactions. We recognize that such factors may not apply to all jurisdictions equally, and could vary based on the level of development and other economic and social factors in each such jurisdiction.

However, competition regulators could be urged to consider a set of certain basic factors and include them in their analysis when imposing penalties, for example voluntary disclosure of an omission[133], negligence, intent, or duration of infringement[134], whether the concentration results in competition problems, etc.

Finally, in order to increase certainty in this sphere, it may also be worth considering a recommendation to all regulators to clarify their approach to penalties by assigning specific mitigation percentage values to mitigating factors.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/ or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

We have no such negative experiences to report.

10. Other countries: are there any other country that should be included in our report? Please explain why?

N/A

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133 Suspensory Effects of Merger Notifications and Gun Jumping, OECD DAF/COMP (2018)11 (available here at page 25).

134 Summary of discussion of the roundtable on Suspensory Effects of Merger Notifications and Gun Jumping, OECD DAF/COMP/M (2018)2/ANN4/FINAL (available here at pages 10-11).

Position on recommendations from ICC: Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR IN PRINCIPLE. We agree that turnover based thresholds may be easier to assess and implement rather than asset-based thresholds. In India, asset values have been clearly defined as those reflected in the books of account of the relevant party, and therefore there is some degree of certainty on how to determine the value assets.

Draft recommendations	Comments
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing**	FOR IN PART. While we recognise that regulators in countries such as India benefit from filings fees to cover administrative costs, we support Recommendation 8 to the extent that filing fees should be proportionate to the actual administrative costs of resourcing the regulator and should not include any tax element.

Draft recommendations	Comments
to have such discussions. More transparency on this critical issue should be a priority.	
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company	FOR

Draft recommendations	Comments
achieving little or no turnover to eliminate such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	The filing fee is INR2 million (about US$23,991) for Form I (short-form notifications) and INR6.5 million (about US$77,972) for (long form notifications)
“Negative experience” reports	N/A

Italy

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1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   The Italian Competition Authority ("**ICA**")'s communication "*Modalità per la comunicazione di un'operazione di concentrazione fra imprese*", published on July 1, 1996 and updated on September 6, 2017, (the "**Guidelines**"), which is available on ICA's website, provides guidance on, among other things, the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

   The Guidelines clarify that under Article 5 of Law No. 287 of October 10, 1990, as amended (the "**Italian Competition Law**"), the notion of concentration includes any operations that bring about a structural change of control in the undertakings concerned as a result of: (a) a merger between previously independent undertakings; (b) the acquisition of control of the whole or parts of an undertaking; or (c) the creation of a joint venture. The Guidelines (p. 4) specifically describe each of the abovementioned types of operations. The Guidelines also identify (pp. 5-6) the operations that, on the contrary, do not constitute a reportable concentration. These include: (a) the acquisition of a financial interest for a short-term period, with a view to reselling it and without exercising voting rights; (b) intragroup transactions; and (c) transactions concerning companies that do not carry out an economic activity.

   With regard to the notion of concentration, the Italian Competition Law and the Guidelines are broadly aligned with EU competition law principles and the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "**Consolidated Jurisdictional Notice**"). An exception was represented by reportable joint ventures, as the Italian merger control system still provides for a distinction between concentrative and cooperative joint ventures. However, article 5 of the

Italian Competition Law was amended effective August 27, 2022[135], expanding the notion of reportable joint ventures so as to cover any joint venture that performs on a lasting basis all the functions of an autonomous economic entity (*i.e.*, full-function joint venture), thus aligning the national legislation with EU law[136].

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Under the Italian merger control regime, jurisdictional thresholds are not based on assets and/or market shares, but refer only to turnover.

The thresholds are adjusted annually to take into account increases in the GDP deflator index. In this regard, the last update occurred with the ICA's Resolution No. 30507 of March 27, 2023. Accordingly, transactions are subject to prior notification when both of the following conditions are met: (i) the aggregate turnover in Italy of all undertakings concerned exceeds €532 million; and (ii) the individual aggregate turnover in Italy of at least two of the parties of the transaction exceeds €32 million.

The definition of turnover is provided in the ICA's Guidelines. The relevant turnover is defined as the aggregate turnover of the entire corporate group of each undertaking. Specifically, total turnover achieved at national level means the amounts derived from the sale of products and the provision of services, achieved in the last financial year on the Italian market, net of any returns and discounts, as well as any taxes directly related to the sale of products and the provision of services. In the case of companies established outside Italy, amounts in foreign currency shall be converted into euro at the average exchange rate for the financial year to which those amounts are attributed.

Moreover, special criteria are established to calculate the turnover in specific circumstances. In particular, following an amendment to the Italian Competition Law entered into force on August 27, 2022 in line with the EU merger control regime, the turnover of banking and financial institutions (*i.e.* firms active in securities investment, asset management, consumer credit or leasing), according to Article 16(2) of the Italian Competition Law, is calculated taking into account a list of specific income items (interest income and similar income; income from

[135] See Article 32(1)(c) of Law No. 118 of August 5, 2022 (2021 Annual Law for the Market and Competition).

[136] Since the Guidelines are updated as to September 6, 2017, they still state that cooperative joint ventures do not constitute a reportable concentration.

securities; commissions receivable; net profit on financial operations; other operating income) after deduction of value added tax and other taxes directly related to those items, where appropriate. According to the previously applicable criteria, the turnover of banking and financial institutions was calculated on the basis of the value of one tenth of their total assets, excluding memorandum accounts: this was the only case where assets, rather than turnover, were relevant for establishing ICA's jurisdiction. For insurance companies, turnover is equal to the value of premiums collected.

For the target, only the turnover relating to the undertakings or parts of undertakings which are the subject of the transaction is taken into account. The ICA generally follows the principles contained in the Consolidated Jurisdictional Notice.

Following the amendments to the Italian Competition Law introduced by Law n. 118 of August 5, 2022, the new rules (entered into force on August 27, 2022) also grant the ICA the power, to be exercised within six months of closing, to request companies to notify transactions meeting only one of the two cumulative merger control thresholds, or where the total worldwide turnover of the parties to the concentration exceeds €5 billion, if concrete risks for competition in the domestic market or a substantial part thereof are deemed to exist.

We recommend a convergence towards turnover-based thresholds, being the only ones conferring predictability to companies on transactions reporting. In particular, market shares criteria can be burdensome for companies, as in many cases it is extremely difficult for companies finding the necessary data for the calculation of market shares; this circumstance is even more true when referred to all those activities with innovative nature and considering the fast evolution of markets.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

The Guidelines refer (in Section B) to the statutory merger control thresholds set forth in Article 16 (1) of the Italian Competition Law and discussed in the response to question 2 above.

By communication of August 5, 2013, the ICA provided further guidance as regards the calculation of the turnover of the acquired undertaking (second threshold) in case of joint ventures or mergers. The turnover of a newly-established joint venture includes the turnover generated by the assets conferred to it by the acquiring undertakings, which, as a result, will be deducted from the acquiring undertakings' turnover. Contributions deferred over time, which are individually below the threshold, will be considered as a single transaction if made within two years of the establishment of the joint venture. As regards mergers by incorporation, the turnover of the incorporated company will be taken into account; in the case of mergers *stricto sensu*, the turnover of the merging companies will be taken into account.

On December 13, 2022, the ICA issued a communication concerning the recently-introduced power to review below-the-threshold concentrations, discussed in the response to Question 2 above. The communication provides guidance on (i) the substantive criteria, in particular the notion of concrete risks for competition in the domestic market or a substantial part thereof, which trigger the ICA's power to review below-the-threshold concentrations, as well as (ii) on certain procedural aspects, including the possibility that the parties spontaneously communicate below-the-threshold concentrations to the ICA on a voluntary basis.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Article 16(1) of the Italian Competition Law requires prior notification of all mergers and acquisitions where both the thresholds illustrated above are fulfilled.

Foreign-to-foreign transactions, including international joint ventures, must be notified if the turnover thresholds are met.

The presence of assets or subsidiaries in Italy is not a relevant factor for the purpose of determining the existence of a notification obligation and the jurisdictional nexus with Italy is established on the basis of local sales alone.

There is no specific simplified procedure/short form treatment for international joint ventures lacking local nexus with the Italian market. However, a joint venture may be subject to the short form treatment if the relevant requirements are met, as further explained under Question 7 below.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

No, according to the Italian Competition Law, the acquisition of minority shareholdings that do not allow the acquirer to exercise control over the target do not fall within the definition of a notifiable transaction.

We agree with ICC Recommendation 2 and recommend to implement the Italian model also in jurisdictions where the triggering event is merely the acquisition of a non-controlling influence over the target. Where a merger control filing is required in the case of the acquisition of a non-

controlling minority stake, companies are subject to an additional administrative burden which, in most cases, translates into a mere formalistic collection of data as opposed to a sensible and complete review of the impact of the transaction on the markets.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

Yes. It is confirmed that, since its abolishment in 2013, there is no filing fee to notify a transaction under Italian merger control law.

However, under Article 10 of the Italian Competition Law, the burden deriving from the functioning of the ICA shall be borne by companies that are registered in the Italian Chambers of Commerce's company registers and whose total revenues exceed €50 million, through the payment of an annual contribution. This contribution is calculated as a percentage of the turnover resulting from the last balance sheet approved at the date of adoption of the ICA's annual resolution (the latest being ICA resolution n. 30499 of March 7, 2023., which set the said percentage at 0.058‰). Under Article 16 of the Italian Competition Law, the contribution rate shall be applied for insurance companies to the value of premiums collected, with reference to the latest financial statements approved on the date of the ICA's resolution.

Furthermore, the annual contribution due by groups of companies, whose entities are subject to the payment as they individually exceed the €50 million revenue threshold, is subject to a ceiling (currently set at €290,000) equalling 100 times the minimum amount due. The contribution needs to be paid directly to the ICA by 31 July of each year.[137]

Considering that the maximum amount of the contribution covers the entire group, it is deemed that, in the event of several merger operations being notified to the ICA during a financial year, there is likely to be a saving for large companies. In any case, convergence in terms of merger control legislations may be desirable, so that a filing fee is not required at least in any country in which companies are already obliged to pay an annual contribution to the NCA's operating costs.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of**

[137] For 2023, the deadline to pay the contribution was extended to 20 November 2023 for companies based in the areas of centre-north Italy, which were affected by severe flooding in May 2023 (Emilia-Romagna, Marche and Tuscany) (ICA resolution n. 30654 of June 6, 2023).

market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);

Yes, the notification form requires the provision of market share information both in the long-form and in the short-form version. The long-form version shall be used where:

(a) two or more parties to the merger operate simultaneously on an affected market and will hold, after the transaction, a market share of not less than 25%; and/or

(b) one party to the merger will hold, after the transaction, a market share of not less than 40%, when at least one other party operates in a market upstream or downstream of that market.

In any event, the long-form version is not required if the market share of the company being acquired or merged is less than 1%.

Concerning the possible adoption of a notification form that would be similar to the US HSR form, we believe there would be pros and cons. Preparing an *ex-ante* notification through a form which includes detailed market share information, such as in Italy or in the EU, can be burdensome for notifying parties, but has the benefit of allowing a detailed assessment of the transaction within a short period of time based on detailed information primarily selected directly by the companies. The US HSR form is certainly more straightforward and does not require the submission of market share information. However, US merger control relies heavily on the collection and analysis of internal documents, which can also prove to be a burdensome process for companies and to a certain extent less under the control of the parties.

Having said the above, in recent years also the European Commission has been increasingly relying on internal documents in EU merger control proceedings, particularly in complex cases, thereby placing a significant burden on the notifying parties. For example, in the merger between Dow Chemical and DuPont, announced at the end of 2015, the Commission requested more than 400,000 documents.

In principle, we agree with ICC Recommendation 7 and that simplified notification forms should indeed be available for transactions which are presumed unlikely to impact competition so as to have a faster procedure.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

Under Article 19(2) of the Italian Competition Law, the ICA may impose fines for failure to comply with the obligation to notify a concentration prior to closing, not exceeding 1% of the undertakings' turnover in the year preceding the ICA's objections.

Such fines may be imposed within a period of five years, starting from the date of implementation of the concentration.

In light of the general principles governing administrative sanctions in the Italian legal system, in fixing the amount of the fine the ICA takes into account: (i) the nature and gravity of the infringement; (ii) the party's conduct; and (iii) its economic conditions. The ICA may impose fines where the party fails to notify a concentration either intentionally or negligently. Other elements that the ICA has taken into account in its past decisional practice for the purpose of determining the amount of the fine include: (i) the party's spontaneous late notification; (ii) the degree of collaboration provided by the party in the proceedings; (iii) the time elapsed between the failure to notify and the late notification (if any), that is, the duration of the non-compliance; and (iv) whether the non-notified operation had anticompetitive effects, on the ground that a failure to notify harmless concentrations is deemed less serious. In addition, the state of insolvency of the non-compliant company may justify a lower fine.

Following the recent amendment of the Italian Competition Law[138], the fines provided for by Article 19(2) of the Italian Competition Law may be imposed on also a party that fails to comply with the request from the ICA to notify a below-the-threshold concentration.

While harmonisation of legal systems is often a welcome development to the extent that it may promote equal treatment and legal certainty globally, harmonisation of penalties could result in an upwards convergence of their current levels in the jurisdictions with lower fines, to the detriment of companies that would be exposed to more severe sanctions.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

Although Romania is not covered by the Report, we want to flag an issue that may be incurred when notifying a transaction in Romania. Merger control legislation in that country includes powers available to the national government to intervene in transactions for reasons of public interest, national security or media plurality.

Specifically, when an economic concentration may have an impact on national security in Romania, the Competition Council informs the Supreme Council of National Defence ("**SCND**"), which may oppose such transactions. The SCND is an autonomous administrative entity and is responsible for the unitary organisation and coordination of activities in the area of country defence and national security. The list of sectors that may be relevant from a national security

[138] See Article. 32(1)(b) of the 2021 Annual Law for the Market and Competition.

perspective is regulated in Decision No. 73/2012 of the SCND and includes the security of financial, banking and insurance activities.

In such cases, the SCND makes a request to the Romanian government to prohibit the economic operation concerned, through a decision. Given that the Competition Council will not issue any decision until it has received input from the SCND regarding a specific merger, it is obvious that this process can lengthen the time it takes to approve a transaction. A change in Romanian merger control law would be desirable, in order to provide certainty to companies about the timing of clearances.

10. **Other countries: are there any other country that should be included in our report? Please explain why.**

The report could be expanded to include Indonesia, Saudi Arabia and Turkey so as to cover all G20 countries; and to COMESA, so as to include one African merger control system.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR

Draft recommendations	Comments
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR

Draft recommendations	Comments
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
Filing fees: summary description of existing competition rules, if any	There is no applicable filing fee for merger control filings before the Italian Competition Authority.
"Negative experience" reports	N.A.

Japan

Akihiro Kurosawa, Head of Legal, Mitsubishi Corporation

Yusuke Nakano, Partner, Anderson Mori & Tomotsune

Shinobu Obata, Senior Vice President and Chief Legal & Compliance Officer, NEC Corporation

1. Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

The 1947 Antimonopoly Act of Japan ("**AMA**") may be unique in that (i) different notification thresholds are set for each of five types of M&A transactions, namely, (a) share acquisitions, (b) mergers (or amalgamations), (c) joint share transfers, (d) business or asset transfers and (e) corporate splits (or demergers) and (ii) M&A transactions whose schemes involve more than one of these transactions (e.g. reverse triangular mergers that involve a merger between a target and a subsidiary of an acquirer and an acquisition by the acquirer of shares in the target) are separately analysed at each step of the transaction and may require separate filings for each of the various transactional steps.

Unlike in some jurisdictions like the European Union, the Japan Fair Trade Commission ("**JFTC**") has the jurisdiction to review transactions that do not meet the reporting thresholds under the AMA, and has in recent times been increasingly interested in reviewing such non-reportable transactions.

As to the five types of M&A transactions mentioned above, the AMA and its subordinate ordinances are (at least relatively) clear. In addition, the FAQ page in the JFTC's website[139] provides greater clarity as to various practical/technical issues regarding reportability.

When it comes to joint ventures, we have to work on an exercise that is outlined in the first paragraph hereof. One has to analyse each of the transaction steps chronologically, and apply the reportability test to each of the transaction steps. Of the five types of M&A transactions, share acquisitions, business or asset transfers and corporate splits (or demergers) are frequently at issue compared to the other two.

[139] https://www.jftc.go.jp/dk/kiketsu/kigyoketsugo/qa/index.html (available in Japanese only)

The overall reportability tests in Japan are generally welcomed by practitioners in Japan since (i) numerical thresholds are easier to handle than the concept of control and (ii) local nexus is always required given that with regard to each type of M&A transaction, "domestic turnover" exceeding at least JPY 3 billion is required. However, (i) the uniqueness of Japanese legislation (see the first two paragraphs hereof), (ii) the lack of FAQ webpages in English, and (iii) the existence of some "unwritten rules" (that are not clarified in FAQ webpages of the JFTC) may create an impression that Japanese merger control is onerous or weird in the eyes of foreign practitioners.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Since different reportability tests are applied to five types of M&A transactions, we set forth below the test for share acquisitions, which is the most typical type of M&A transactions conducted by foreign companies.

For share acquisitions, the thresholds are based on both "domestic turnover" and the level of shareholding in the target. Firstly, the aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed JPY 20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed JPY 5 billion to meet the filing requirement. Secondly, such acquisition must result in the acquirer holding more than 20% or 50% of the total voting rights of all of the shareholders of the target (*i.e.* an acquisition that increases a shareholding from 19% to 21% is subject to a filing, while an acquisition that increases a shareholding from 21% to 49% does not require one). A minority ownership of over 20% will be caught regardless of whether the acquirer will take control of the target company.

Neither asset-based nor market share thresholds are currently used. However, until 2009, asset-based thresholds were primarily used.

Domestic turnover, which is a critical concept for the purpose of Japanese merger control, is defined under the Rules on Applications for Approval, Reporting, Notification, etc., pursuant to Articles 9 to 16 of the AMA (as amended) as follows:

A) the sales amount derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business);

B) the sales amount derived from the sale of goods (including services) supplied in Japan to business entities or individuals that are transacting business (excluding sales of goods sold to individuals for personal consumption and sales of goods where it is known that such goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and

C) the sales amount derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that such goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature or characteristics.

We agree that the use of asset-based thresholds should be minimized, since the amount of total assets is far less likely to properly reflect the competitiveness of relevant market players compared to domestic turnover. The use of market share thresholds should also be minimized since it is difficult to determine market shares, given the general difficulty of defining markets and knowing the output volumes of third parties.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

As we mentioned above, the FAQ page in the JFTC's website written in Japanese[140] provides greater clarity as to various practical/technical issues regarding reportability. Since the FAQ consists of a series of short questions and answers, it is difficult to create a summary. Examples of some sets of questions and answers are:

Example 1:

"Q: How should airlines calculate domestic turnover?"

"A: Airlines should count turnover arising from domestic services and international services to/from Japan."

Example 2:

"Q: When determining the entities whose domestic turnover should be aggregated, as of when should we analyse the parent-subsidiary relationship with the acquiring entity?"

"A: Immediately before the relevant M&A transaction at issue."

[140] See footnote 1.

That said, we still believe that even greater clarity is recommended as to "unwritten rules". One example of such unwritten (general) rules is if more than one steps of the transactions occur simultaneously (such as Step 2-1 and Step 2-2), for the purpose of reportability analysis of Step 2-1, Step 2-2 is deemed to have already occurred, and for the purpose of reportability analysis of Step 2-2, Step 2-1 is deemed to have already occurred.

Also, the JFTC's website does not enable one to come to a clear conclusion as to difficult issues involving domestic turnover, such as (i) whether or not / when a contract was entered into, or (ii) how to deal with a situation where a contract was entered into a long time ago and the seller thereafter came to know that the destination of the goods was in Japan.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Reportability of international joint ventures are usually analysed as (i) acquisition of shares in the joint venture by the parents, (ii) business or asset transfers to the joint venture, (iii) corporate splits (or demergers) to which the joint venture is a party to receive business, and/or (iv) combinations thereof. Given the definition of domestic turnover explained above, domestic turnover automatically plays a role that is essentially the same as the explicit "local nexus" test.

Please note that the JFTC is increasingly interested in reviewing non-reportable transactions, and indeed has the jurisdiction to review greenfield joint venture projects and M&A transactions where the relevant entity's domestic turnover is much smaller than the statutory reportability threshold. That said, we understand that the real issue here is the uselessness of requiring parties to joint ventures to report a concern-free or nexus-free merger, and that such situation is unlikely to materialize in Japan.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

Yes. Share acquisitions as a result of which the shareholding ratio of the acquirer's corporate group in the target (assessed based on the ratio of voting rights; hereinafter the same) newly exceeds 20% or 50% are reportable. Therefore, acquisitions of 21% of the total shares, which usually fall short of control, may be reportable.

In the Oji Holdings ("**Oji**") and Chetsu Pulp & Paper ("**Chuetsu**") case (FY2014), where Oji filed a notification for acquisition of 20.9% of the shares in Chuetsu, the parties proposed remedies involving six paper products, after which the JFTC cleared the transaction.

Although our answer is yes and as such we are not required to answer the third sentence, our additional comments are as follows.

- We understand that this notification requirement makes sense at least from the regulators' perspective. Under the AMA, an increase in shareholding ratio from 21% to 50% is not reportable. While the JFTC always reserves the authority to review any additional acquisition of shares by the filer of a notification based upon the 20% threshold, in practice, the JFTC takes into consideration the possibility of (i) an increase in shareholding ratio of up to 50% (which may confer *de facto* control to the shareholder), and/or (ii) entering into of a shareholders' agreement, which is not reportable and may not be noticed by the JFTC.

- In terms of economic sense, we refer to "Antitrust Law Developments (Ninth)" ("**ALD9**") authored by Antitrust Law Section of American Bar Association at page 390[141], which reads as follows. We have good reasons to believe that the JFTC reviews partial acquisitions for the same reason.

  "Depending on the structure and size of the transaction, a partial acquisition may lessen competition by: (1) creating (or enhancing) the ability of the acquiring firm to raise prices or decrease output due to its control or influence over the second firm; (2) altering the incentive of the acquiring firm to compete with the second firm due to its economic interest in the second firm; or (3) giving either of the firms access to the other firm's nonpublic, competitively sensitive information."

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

   No filing fee is payable in Japan. We would welcome such recommendation.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

[141] Page 862 et seq. of the article at the link below further clarifies the part quoted from ALD9.
https://portal.research.lu.se/portal/files/35744346/SSRN_id2637005.pdf

Yes, to the extent that the relevant (horizontal, vertical, conglomerate) market exists. Convergence towards the US HSR style would simplify merger filing procedures particularly for easier cases. However, from a Japanese law point of view, we make the following observations:

- If the parties do not define any market (even if there is some overlap), the JFTC will define such market anyway, and the result may not be favourable to the parties or based on the realities of competition on the battleground. Therefore, the parties may want to define the market first and try to persuade the JFTC to accept such definition.
- While the suggestion appears to reduce the burden of drafting filing forms, it may not be extremely difficult to fill in the market share-related part of the notification form in Japan. In addition, the JFTC rarely rejects filing forms for the reason that market definitions made by the parties are not acceptable, particularly where the parties have a good basis for such definitions.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

A natural person who fails to comply with mandatory filing rules shall be punished by a criminal fine of not more than JPY2 million. The corporation to which such natural person belongs as an officer or employee shall be punished by a criminal fine of not more than JPY2 million. We are not aware of any case where such criminal fine was actually imposed on a natural person or a corporation since the current merger control system was brought into effect as of 1 January 2010. In Canon Inc.'s acquisition of shares in Toshiba Medical Systems Corporation (2016), where a so-called "warehousing" two-step transaction structure involving an interim buyer was used[142], the JFTC cautioned Canon not to conduct such actions in the future and has also urged Toshiba, who engaged in the implementation of the structure above, which may be interpreted as a circumvention of reporting obligations, not to engage in activity in the future that may be inconsistent with the purpose of the advance notification system.

We understand that the JFTC generally has cold feet in asking the Prosecutors' Office to invoke a criminal penalty. For the purpose of convergence, the imposition of a "civil penalty" or "minor administrative fine" may be a better alternative.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life

[142] See 27 June 2019 press release issued by the European Commission available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_3429

examples will help support/substantiate the specific points where changes would be most needed.

- In certain jurisdictions, seller's turnover is taken into consideration in terms reportability analysis, which oftentimes results in unequitable conclusion as to reportability. Examples include Brazil (in general) and South Korea (limited to asset / business transfers).
- In certain jurisdictions, entities into which the parties have minority shareholding are taken into consideration in terms of reportability analysis. In India, considerably minor shareholding is taken into consideration in terms of reportability analysis and filling out notification form. Even an approximately 5% shareholding coming with proportionate minority protection rights results in (at least) close scrutiny and burdensome exercise. It is generally quite difficult to obtain detailed information on such a company.
- In certain jurisdictions, formation of a joint venture oftentimes results in a conclusion that such a formation is reportable, even though nexus of such joint venture is (at most) quite limited or non-existent. Examples include European Commission, China, and Turkey. This is particularly burdensome for R&D type of joint ventures.
- We hope that filing fee be abolished. Examples of jurisdictions that require filing fees are the United States and Brazil. We are disappointed with the Merger Filing Fee Modernization Act of 2022, which generally increased the amounts of the filing fees for larger deals in 2023.
- In certain jurisdictions, market share plays a significant role in the course of reportability analysis. However, it is generally difficult to obtain information on "denominator" (size of the market) or production volume of other market players, not to mention define markets. Examples include Vietnam and Taiwan. Further, it is typical for those "market share"-based jurisdictions to require filings for mergers whose post-merger market share is high but whose effect on competition is quite limited or does not exist. (Our point is that pre-merger market shares or HHI may be high, but that does not warrant close scrutiny or filing if there is no causal sequence between the proposed merger and post-merger oligopoly.) Examples include Vietnam and Taiwan. While we do not have any real experience, similar risk exists in Thailand where post-merger oligopolistic situation is characterized as important factor that may trigger pre-merger filing obligations.
- In Serbia, a turnover threshold for target is extremely low and there is a case where a zero turnover of the target results in an unequitable conclusion of positive reportability.

The following items may not be directly responsive, but still may be worth noting.

- In certain jurisdictions, it is very cumbersome to meet authentication/validation requirements for documents to be submitted for the purpose of merger filings. Examples include Vietnam, Thailand, India, Indonesia, and China.
- Similarly but separately, in Japan, authorization of a person who has general authority to represent the filing company (such as CEO or President) is required and in this regard Company Secretary or Head of Legal Division often encounter a problem in terms of proof of his/her authority to represent the company in terms of the relevant filing.

- In Mexico, a “completion report” is required to be filed, and failure to file one results in an eye-opening high amount of fine. This should be rectified immediately as the requirement is rarely seen in other jurisdictions and the penalty is disproportionately high.
- In some jurisdictions, acceptance of filing is not confirmed by the competition authority for a relatively long period of time as it insists that a preliminary review takes time. Examples include Taiwan and Mainland China (limited to ordinary filings).

10. Other countries: are there any other country that should be included in our report? Please explain why?

N/A

Position on recommendations from ICC

Japan Taskforce's comments on the ICC draft recommendations

While the position of the Japan Taskforce is "for" for most of the Merger Taskforce's draft recommendations, some proposals may not necessarily fit all jurisdictions. We provide brief comments on each of the eleven recommendations below.

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

AGAINST. While we fully understand the background to this recommendation from the viewpoint of international convergence, this recommendation will likely encounter resistance from the JFTC and Japanese companies. This is because (i) the AMA does require merger filings in minority share acquisition cases resulting in the voting rights ratio slightly exceeding 20% and every interested party has been accustomed to this system, and (ii) the voting rights ratio is a clearer standard than "sole control" / "joint control".

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. While our position may look inconsistent with our position in terms of Recommendation 1, we believe that the burden of filing in minority acquisition cases is not always justifiable. Therefore, we are hoping that an amendment to the AMA exempting minority share acquisitions that do not result in the acquisition of sole or joint control will be introduced in the near future.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR IN PRINCIPLE. We generally agree that only JVs with a significant market presence should be reportable and that greenfield JVs should be exempt from filing requirements. However, the "full functionality" requirement in relation to JVs is a European concept that is difficult to transplant to the merger control system in Japan. Moreover, in Japan, the acquisition of shares in greenfield JVs is not generally reportable because the target rarely meets the JPY 5 billion test. Therefore, it does not seem very necessary to add the "full-functionality" requirement in Japan.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. From a practical viewpoint, it is generally quite difficult (or at least quite challenging) to obtain market share information in a given jurisdiction (or a group of countries). When market share thresholds are combined with a mandatory regime, parties to a transaction will have a difficult time in deciding between (i) spending a large amount of resources and time to define markets and investigate market shares and (ii) running the risk of receiving penalty decisions (which may have ramifications for not only the company but also individuals).

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We agree that turnover-based thresholds are much preferred than asset-value thresholds. Calculation of asset value is often difficult and ambiguity in reportability creates unjustifiable uncertainty. Furthermore, asset value is unlikely to be a better indicator of the market power of a party than turnover.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR IN PRINCIPLE. This is a tricky item from the viewpoint of Japan. When it comes to reportability, turnover thresholds work as a safeguard against unnecessary mandatory filing. However, when it comes to the reservation of substantive review authority by the JFTC, given the recent "killer acquisition" cases, the JFTC will highly likely desire to be free from the local nexus test (or only be bound by a nominal or very low local nexus test), because typically, in IT or platform matters, the acquisition of a nascent competitor whose turnover in Japan is minimal by a global giant could affect competition in the Japanese market in the future in a significant or considerable manner.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR. Simplified notification forms have been introduced in a growing number of jurisdictions and this is a welcome development. While merger notification forms in Japan are relatively short, some requirements in the notification forms are difficult for foreign or small or medium companies to deal with in a short period of time. Therefore, lessening the burden in that regard at least in transactions that are unlikely to produce negative effects is justified.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR. Filing fees are simply overly burdensome.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We genuinely support this.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR IN PRINCIPLE. Now that a large number of jurisdictions have merger control regimes, it is not justifiable for a very small number of jurisdictions to prevent parties that have obtained clearance in many/major jurisdictions from closing the transaction. (We note that we cannot recall a case

where the closing of a transaction was delayed as a result of the JFTC delaying the clearance or its decision.)

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR IN PRINCIPLE. Under the AMA, the amount of the fine in terms of gun jumping (closing the transaction before obtaining clearance or the expiry of the waiting period) is very small and has never been enforced, and therefore few (if any) companies would seriously request such an amendment.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	AGAINST
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR IN PRINCIPLE
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the	FOR IN PRINCIPLE

Draft recommendations	Comments
target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR

Draft recommendations	Comments
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR IN PRINCIPLE
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	FOR IN PRINCIPLE
Filing fees: summary description of existing competition rules, if any	No filing fee is payable in Japan.
"Negative experience" reports	N/A

Poland

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1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

There are two such documents published by the Polish Office for Competition and Consumer Protection. The first one is the *2015 Guidelines on the Criteria and Procedure for Notifying the OCCP President of the Intent to Concentrate* (the "**Procedural Guidelines**").[143] It is a relatively long document consisting of 79 pages. It discusses the criteria for notifying the intent to concentrate to the President of the Office for Competition and Consumer Protection (the Polish Competition Authority, "**PCA**") and the notification procedure, and also contains a detailed discussion of the notification proceedings before the PCA and how to complete the notification of the intent to concentrate. In its final part, the document outlines the sanctions for failing to notify the PCA of an intended concentration and for violating other regulations related to corporate concentrations. The purpose of the Procedural Guidelines is to increase legal certainty of entrepreneurs, both with respect to determining the existence of the obligation to notify the intent to concentrate and with respect to anti-trust proceedings in concentration cases.

The other document is the *Guidelines on Assessment of Notified Concentrations*[144] dated 2012 (the "**Assessment Guidelines**"). The document outlines on its 67 pages the approach of the PCA to assessing whether a notified concentration may lead to a significant restriction of competition. The Assessment Guidelines focus on issues concerning the understanding of the notion of relevant market (including issues such as defining product and geographic markets) and the impact of a concentration on competition (discussing notions of horizontal and vertical

[143] https://uokik.gov.pl/download.php?id=1269, Polish only.
[144] https://uokik.gov.pl/download.php?plik=11899, Polish only.

impact and resulting uncoordinated and coordinated effects, as well as conglomerate effects and contractual restrictions of competition accompanying a concentration).

The existence of these two documents is undoubtedly a positive occurrence. However, due to the lack of updates, their practical value is decreasing. The documents are already eight and 10 years old, respectively. Thus, the parties to concentration must continuously verify the information provided in these documents in the context of new decision-making practices presented in the rulings of the PCA, which is very active[145].

Furthermore, it is unclear to what extent the PCA is bound by its guidelines, which decreases legal predictability and in practice diminishes internal constraints of the PCA. The new or updated version of the guidelines should expressly indicate that the PCA will consider itself bound by the currently published guidelines.

The above results in a critical assessment of the quality of information provided in the Guidelines. In addition, the Guidelines often fail to provide added value. They mostly describe respective provisions of the Polish Competition Act (the "**Act**")[146] with limited explanation based on PCA and European Commission case law and documents. For example, Procedural Guidelines' clarifications as to the topic of asset deals are limited to express quotation of the Polish Civil Code's provisions defining an enterprise or its part and brief, evident, statements regarding calculation of turnover generated by the assets. Obviously, the Procedural Guidelines are insufficient in this scope and too general.

Moreover, the guidelines are available in Polish only. This excludes a self-assessment of a concentration by foreign individuals/entities.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

[145] The PCA is very active in the field of merger control proceedings. Annually, the PCA issues more than 200 decisions (in 2021 and in 2022 over 300), thus throughout this time the PCA has indeed gathered a lot of expertise that should result in significantly updating Procedural Guidelines and Assessment Guidelines.

[146] Competition and Consumer Protection Act of 16 February 2007 (unified text: Journal of Laws of 2023, item 1689, as amended).

The Polish jurisdictional thresholds are based on the turnover generated by the respective parties (for share deals) and assets (for asset deals).[147] Polish law used to refer to certain asset-based jurisdictional thresholds, but they were dropped in 2001.[148]

In practice, the notion of turnover under Polish law is very similar to the concept of turnover under EU law, even though it is a self-standing institution, not defined by reference to the EU Merger Regulation. Please see answer to Question 3 below for a detailed description of the definition of turnover under Polish law.

Turnover is defined as the aggregated revenues from the sale of products, as well as the sale of goods and materials constituting the operational business activity of an entity, minus: (i) any discounts and any other deductions; and (ii) value added tax and any other taxes assessed on turnover (if these were not deducted previously) that are provided in the profit and loss accounts prepared in accordance with the relevant accountancy laws.[149] Special rules for calculating turnover refer to banks, insurance companies, investment funds, pension funds, brokerage houses, individuals (physical persons) and local government units.[150]

In cases of acquisition of control or acquisition of assets, the relevant turnover is the aggregate (group) turnover of the acquirer(s) on one hand, and the turnover generated by the target companies (including their subsidiaries) or assets on the other hand.[151] The relevant turnovers include parts of turnovers of (a) entities jointly controlled by the respective capital group and (b) entities jointly controlling the respective capital group, in both cases calculated pro rata to the number of jointly controlling entities.[152] In the case of multiple acquisitions between the same capital groups within two years, the partial acquisitions are viewed jointly as one and the turnovers of all targets/assets must be aggregated for the purpose of jurisdictional thresholds assessment.[153]

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[147] According to Articles 13 and 14 of the Act a concentration is subject to merger control in Poland if in the previous financial year:

a) the combined aggregate worldwide turnover of all parties (capital groups) exceeded €1 billion; or

b) the combined aggregate turnover generated in Poland by all parties (capital groups) exceeds €50 million;

unless:

- the target company's turnover in Poland did not exceed €10 million in each of the two preceding financial years (share deal); or
- the turnover generated by these assets in Poland did not exceed €10 million in each of the two preceding financial years (asset deal), or
- the turnover of none of the merging parties / JV parents (capital groups) in Poland did not exceed €10 million in each of the two preceding financial years (merger / establishment of the JV).

[148] The Act on Counteracting Monopolistic Practices and Protecting Consumer Interests of 24 February 1990 that provided for asset-based thresholds in cases of asset deals and concentrations in the banking sector was repealed on 1 April 2001.

[149] Regulation on the Calculation on the Turnover of the Undertakings Involved in the Concentration of 23 December 2014 (Journal of laws of 2015, item 79; the **"Regulation"**), para. 2; *cf.* Article 14(1) of the Act.

[150] *Ibid.*, paras. 3-9.

[151] Articles 14(2) and 14(4) of the Act.

[152] Articles 14(3) and 14(4) of the Act.

[153] Article 14(5) of the Act.

In our view, ICC should encourage the countries which use asset-based or market share thresholds to consider switching to turnover thresholds exclusively. Market share thresholds contribute to decreased legal predictability, as they make results of jurisdictional analysis, which generally should be a technical exercise, uncertain or unreliable. Asset value thresholds, while predictable and measurable, are in our experience much more problematic than turnover thresholds, as asset value data tend to be less readily available, in particular in case of large capital groups.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

As mentioned in the answer to Question 1 above, the PCA published the Procedural Guidelines in 2015.[154] While the document is helpful in many aspects, we believe it should be updated to envisage the progress of law and practice, as well as experience gathered by the PCA over the past seven years.

The Procedural Guidelines are a complex document that aim to cover all important issues relating to jurisdictional issues and merger control procedure. In terms of calculating turnover, they provide additional explanations as to: (i) the notion of the financial year; (ii) the relevant turnovers in mergers and creating a joint venture; (iii) the relevant turnovers in acquisitions of control and acquisitions of assets; (iv) the notion of capital group; (v) the geographic allocation of turnover; and (vi) the applicable currency exchange rates.

First, the turnovers must be allocated to a financial year, which may be different than a calendar year. Even if the financial year periods of the parties to a concentration are different, each of the parties should provide its turnovers in its own financial year.

Under Polish law, the jurisdictional assessment should be made on the basis of the turnover for the financial year "preceding the year of the notification". The PCA explained in the Procedural Guidelines that this covers the entire period when the parties intend to concentrate, until the transaction is closed. This results in cases where the parties enter into a preliminary or conditional agreement in one year, but the closing postpones to the next year, in which case the parties must re-assess the obligation to file a merger notification. This negatively affects the legal predictability and transaction management, and in our opinion should be amended.

Second, the Procedural Guidelines explain that the relevant turnovers in merger and joint venture cases are: (i) the turnover of the parties (joint venture parents) directly participating in

[154] https://uokik.gov.pl/download.php?id=1269

the concentration and their capital groups (whether a parent company or a subsidiary is directly involved); (ii) the turnover of undertakings jointly controlled by the parties' (joint venture parents') capital groups (pro rata to the number of undertakings exercising control); and (iii) the turnover of undertakings jointly controlling the parties' (joint venture parents') capital groups (also pro rata to the number of undertakings exercising control).

Third, the Procedural Guidelines explain that the relevant turnovers in merger and joint venture cases are: (i) the turnover of the acquirer directly participating in the concentration and its capital group (whether a parent company or a subsidiary is directly involved); (ii) the turnover of undertakings jointly controlled by the acquirer's capital group (pro rata to the number of undertakings exercising control); (iii) the turnover of undertakings jointly controlling the acquirer's capital group (also pro rata to the number of undertakings exercising control); as well as (iv) in case of a share deal – the turnover of targets and their subsidiaries, and the turnover of undertakings jointly controlled by them (pro rata to the number of undertakings exercising control); or (v) in the case of an asset deal – the turnover generated by the acquired assets.

As regards calculation of the turnover generated by assets, the Procedural Guidelines state that one should take into account the entire process associated with a particular asset (e.g. production line, manufacturing plant, etc.) and the market environment, as well as industry with which this part of asset is related, rather than just the individual component.

In view of the Procedural Guidelines it remains unclear whether acquisition of assets which will no longer be used for the same business activity, but repurposed for a different business, is a notifiable concentration. In one of our cases the PCA confirmed that such a transaction is not subject to merger control. We believe this should be clearly explained in the new iteration of the Procedural Guidelines.

Fourth, the Procedural Guidelines indicate that for the purpose of jurisdictional assessment the current composition of the capital group should be taken into account, *i.e.,* including any acquisitions and divestments that occurred from the end of the preceding financial year.

Fifth, in terms of geographic allocation of turnover, the Procedural Guidelines indicate that turnover generated in Poland means turnover from sale of goods and services to customers and consumers in the territory of Poland, including imports but excluding exports. The Procedural Guidelines do not go into further detail, although in practice the approach may be different depending on the industry (while usually the residence of the customer is key, in some cases location of the business prevails). In our opinion this should be extended.

Sixth, the Procedural Guidelines explain how to apply currency exchange rates when calculating turnovers. Under Polish law, the applicable PLN-EUR exchange rate is the average rate of the National Bank of Poland effective on the last day of the calendar year preceding the year of the notification. The Procedural Guidelines explain that when dealing with data

reported in other currencies, they first need to be exchanged to PLN at the average rate of the National Bank of Poland effective on the last day of the previous calendar year, and then to EUR.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Under Polish law the local nexus requirement is expressed by the rule that only concentrations that cause or may cause effects on the territory of Poland may be subject to review by the PCA.[155] This means that the PCA has the power to review foreign-to-foreign transactions, whether the undertakings concerned or any of their group companies are incorporated or registered in Poland, as long as the transaction has even potential effects in Poland. *Nota Bene*, this includes also non-full-function foreign-to-foreign joint ventures located outside of Poland (see below), which, in our opinion, should be eliminated from the scope of PCA's scrutiny.

The wording of the law is extremely vague and the law does not specify any criteria for assessing whether a concentration may have an effect on in Poland. The consistent and long-standing interpretation of the PCA is that a transaction may have effect on the territory of Poland if at least one undertaking concerned (or its capital group) generates turnover in Poland. This interpretation leads to a situation where international joint ventures may be subject to review by the PCA even if the joint venture will not be active in Poland. There is no simplified procedure or short form treatment with respect to such cases.

The very broad notion of local nexus, along with the fact that joint ventures which are not full-function and not joint-controlled may be subject to merger control under Polish law, results in a situation where the obligation to notify may affect much more transactions that under other jurisdictions. We assume that a significant number of such transactions are not notified and are not detected. This is either because the parties are simply unaware of the broad nature of the Polish merger control test, or because they take a business decision not to make a filing given that the risk of detection by the authority of these types of transactions is low.

Therefore, we believe that there is a room for change in this regard. First of all, the merger control regime should cover only joint ventures that are full-function and joint-controlled. Furthermore, the interpretation of the local nexus should be changed at the level of legislation or guidelines, with the aim to ensure more precise focus on the Polish market. This can be done

[155] Article 1(2) of the Act

in a number of ways, for example: (i) by limiting the scrutiny to joint ventures that are going to be active in Poland; (ii) by indicating that the local nexus requirement is satisfied if at least one of the joint venture parents is active to an appreciable extent in Poland on the relevant markets on which the joint venture will be active; and/or possibly (iii) by indicating that the local nexus requirement is satisfied if at least two of the joint venture parents generate appreciable turnover in Poland.

In our view, ICC should encourage all countries to adopt uniform local nexus guidelines that will ensure proper focus on the national market, and exclude the powers of authorities to review transactions that are unlikely to have any or appreciable economic effect in their respective jurisdictions.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

No, in light of Article 13(2) of the Act the notion of notifiable transaction includes: (a) merger of two or more independent business entities; (b) acquisition of control over one or more business entities; (c) creating a joint venture and (d) acquisition of assets (an enterprise or its part) generating an appreciable turnover. It follows that the acquisition of minority shareholdings that do not allow the acquirer to exercise either *de jure* nor *de facto* control over the target does not fall within the definition of a notifiable transaction.

However, establishment of a joint venture may be subject to notification to the PCA even if one parent has full control, and other parents have minority, non-controlling stakes in the joint venture.[156]

According to the Procedural Guidelines, acquisition of a minority non-controlling share in an existing business entity may also be treated as creation of joint venture for the purpose of merger notification, if the business entity has not carried out commercial activity before the acquisition, or if it is going to materially change or extend its scope of activity after the acquisition.[157]

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

[156] Procedural Guidelines, section 2.4
[157] Ibid.

A filing fee is required in Poland. The notifying party (or parties) must pay a fee of PLN15,000 (approx. €3,260) for notification of a concentration (regardless of the number of notifying parties per concentration). The fee must be paid before the notification is submitted to the PCA; the proof of payment should be attached to the filing.

However, in our opinion, the fee is low and does not materially affect the cost of the transaction. Therefore, the existence and the level of the fee does not generally affect the notifiability of concentrations or increase the risks associated with non-reporting transactions. It results from the principle of partial chargeability of certain administrative proceedings, which is an established practice in the Polish legal system. The lack of obligation to pay the fee could have a negative impact on the work of the PCA, particularly as a result of it having to deal with unnecessary filings, and could extend the average time of obtaining a clearance. The obligation to pay the fee also has a positive preventive function, thanks to which the quality of notifications themselves improves. For these reasons we believe that the convergence mentioned in the question should not be recommended.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

The Polish notification form (called the Index of Information and Documents) requires identification of relevant markets in which the parties to the concentration operate and identification of the parties and their competitors' market share data with respect to overlapping markets, vertically related markets, and (if applicable) markets affected in the conglomerate aspect.

If there are no overlapping markets on which concentration participants would operate, the presentation of their market shares does not have to be very detailed. However, this does not change the fact that it is mandatory to report estimated market shares.

A simplification of the Polish and, in general, European approach to information provided in concentration notifications would be in our opinion counter-productive. The whole process of defining the relevant markets and competition assessment would be left in its entirety to the competition authority. At present, the notifying party can describe its and other parties' business activities, the transaction and its business environment, an initial proposal of market definitions, and already at the starting point provide data relevant for the assessment of the transaction. This, if properly prepared, significantly shortens merger control proceedings, particularly in simple cases.

Adopting a form based on statistical codes and not requiring the estimated turnover would be inconsistent with the European and Polish concept of defining a relevant market, which depends on many variables. Therefore, it is not possible to standardise all relevant markets defined in existing case law of the PCA and the European Commission by matching them with appropriate statistical codes.

The current descriptive model for defining relevant markets is valid and proven. It also corresponds to the needs of competition law in Poland and Europe. The proposal to adopt a standard form based on the US HSR form should therefore not be recommended.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

The Act sets the maximum fine for a failure to notify at 10% of the notifying party's total turnover in the financial year prior to imposition of the fine.

The PCA can also fine managers of companies participating in a concentration for their failure to notify. The maximum level of such fine is calculated as fifty times the amount of average remuneration and currently is approx. €72,500.

Moreover, the PCA can impose a fine of up to 3% of the notifying party's turnover generated in the financial year preceding the year in which the penalty is imposed that has provided incorrect or misleading information or has failed to provide information requested by the PCA during notification proceedings.

The basis for imposing a fine is a breach of statutory obligations. Thus, in order for such penalty to be imposed, it is not important whether the concentration had any negative effects on market competition. However, it is assumed that a negligible effect of a concentration on the market should, as a rule, be a premise for a reduction of the fine.[158]

When determining the amount of a fine, the PCA should be guided by the principles of proportionality and equality, as well as the duration of a violation and its severity.[159]

If a concentration takes place without notification of the PCA, the gravity of infringement should be determined by the effects of a concentration on the market. The most harmful, of course, are concentrations whose notification would result in a refusal decision.

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[158] Cf. the commentary to the Act: A. Stawicki, E. Wardęga, *Ustawa o ochronie konkurencji i konsumentów. Komentarz, wyd. II*, E. Stawicki (ed.), Warsaw 2016, Article 106.

[159] Cf. the commentary to the Act: J. Krüger, E. Wardęga, *Ustawa o ochronie konkurencji i konsumentów. Komentarz, wyd. II*, E. Stawicki (ed.), Warsaw 2016, Article 111.

In 2005-2020, the PCA imposed fines for a failure to notify in 24 proceedings.[160][161] The largest one, amounting to PLN29,075,726,808 (approx. €6,321,000,000) was imposed on Russia's Gazprom for its failure to notify the establishment of a JV for the construction and operation of the Nord Stream 2 gas pipeline.[162] However, this penalty should be considered as irregular due to specific circumstances of this case. Moreover, please note that the fine was eventually quashed by the courts in 2023.

Another interesting case was the penalty imposed on the chain of Dino Polska S.A. stores.[163] It concerned the acquisition of certain assets of another enterprise without PCA's consent. Dino submitted its notification with delay. The transaction consisted of three stages: (i) acquisition of properties (stage 1); (ii) lease of properties (stage 2); and (iii) acquisition of part of an enterprise (stage 3). Dino Polska reported the transaction to the PCA only at stage 3, while the authority considered that such transaction should have already been notified at the time of the purchase of properties. In connection with this conduct, the PCA imposed a fine of PLN100,000 (approx. €22,000) on the store chain.

Also worth mentioning is a decision of the PCA that imposed a fine of PLN40,000 (approx. €8,700) on one of Poland's largest companies engaged in retail and Internet sales of household appliances and electronics[164]. In this case, the company itself reported to the PCA that it breached the obligation to report a concentration (taking control over Electro.pl). According to the company, the failure to notify resulted from the fact that it was unaware of the obligation to notify in the case of activity that, in its opinion, did not directly concern it but rather a member of its supervisory board. However, the company's explanations did not result in a significant reduction of the fine, because, according to the justification of the decision: "a fine should be severe enough to discourage other businesses from any attempt to infringe upon concentration control regulations".

In our opinion, a standardization of imposed penalties is not necessary. Fines in Poland are set in accordance with the functions they are supposed to fulfil, *i.e.* the preventive function (preventing violations), enforcement and repression[165]. The standardisation of penalties will not influence the ease with which a concentration can be notified. On the contrary, it may cause maximum penalties in some jurisdictions to be either excessive or insufficient.

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[160] Wardyński & Partners' statistics.

[161] No fines were imposed on 2021-2023.

[162] The PCA decision No DKK-178/2020 of 6 October 2020.

[163] The PCA decision No DKK- 270/2019 of 31 December 2019.

[164] The PCA decision No DKK- 132/2013 of 22 October 2013.

[165] Cf. the commentary to the Act: K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014, Article 106.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   The Ukrainian merger control thresholds, for example, are set at the level resulting in catching even marginal transactions, even though the thresholds were increased seven years ago.

   We also understand that planned changes to the Ukraine competition law that will come into force on 1 January 2024 do not cover changes to the turnover thresholds. Thus, marginal transactions will continue to be caught.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    Ukraine. See question 9 above.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR. In Poland an acquisition by an undertaking of part of the assets of another undertaking (the whole or part of an enterprise) is one of the concentrations that is subject to merger control (if the relevant turnover thresholds which includes de minimis turnover generated by the acquired business is exceeded).
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR. The Polish merger control rules do not require a notification of the acquisition of a minority interest or other interests that amount to achieving less than joint control (excluding transactions concerning establishment of the JVs).
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR. Non-full-functional JVs usually have limited or no impact on the market and on competition. Moreover, JVs having no direct link to a given jurisdiction (e.g. JVs to be active only outside the jurisdiction) should not be reportable (see also Recommendation 6).
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR. We agree that turnover thresholds are easier to assess and implement.
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the	FOR. We agree that turnover thresholds are easier to assess and implement.

Draft recommendations	Comments
possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR. Local nexus is very important in our opinion. Especially, we propose recommending that the local nexus for joint ventures be established by referring to (i) the jurisdictions where the joint venture is going to be active (whether according to an initial plan or according to a planned extension of activity) and (ii) an appreciable turnover of at least one, and possibly at least two of the joint venture parents in the relevant jurisdiction. Furthermore, in particular as an alternative to the local activity requirement, it may be proposed that the appreciable turnover should only include turnover of the JV parents generated from the business activity that is going to be carried out by the JV.
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR. The Polish merger control rules provide for a simplified form (however, the minimis thresholds are: 20% for overlapping markets and 30% for vertically related entities).
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in	AGAINST. According to our knowledge, 22 out of the 27 EU member states require a filing fee. Moreover, the filing fee set at an appropriate level also prevents unnecessary submissions. In Poland the fee is low and does not materially affect the

Draft recommendations	Comments
connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	cost of the transaction (fixed fee of PLN15,000 (approx. €3,260), regardless of the number of notifying parties for one concentration.
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR. The existence of guidelines is undoubtedly a positive occurrence. Such guidelines should be published both in respective language(s) and in English and should include actual information on the case law and decision-making practices of the respective NCA in all significant material and procedural matters (including, inter alia, gun jumping and geographic allocation of turnover issues).
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates	FOR. Particularly business-saving transactions would benefit from this solution.

Draft recommendations	Comments
less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	RATHER AGAINST. We believe that such a proposed limitation would result in lack of adequate sanctions in certain cases (e.g. killer acquisitions) and eventually negatively affect the authority of law. However, there must be clearly delineated requirements for when gun jumping occurs and closing around jurisdictions where there is significant delay and limited or no nexus should not be gun jumping.
Filing fees: summary description of existing competition rules, if any	Fixed fee of PLN15,000 (approx. €3,260) per filing, paid at the submission. See also Recommendation 6 and response to Question 6 above.
"Negative experience" reports	The Ukrainian merger control thresholds, for example, are set at the level resulting in catching even marginal transactions.

South Africa

John Oxenham, Primerio International
Michael-James Currie, Primerio International
Patrick Smith, RBB Economics[166]

1. Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

Reportable mergers

The South African Competition Commission ("**SACC**") has not published formal guidelines on the concept of reportable mergers/concentrations although there are several informal publications which provide some guidance on certain aspects of the merger control regime.

Firstly, the SACC has published guidelines on small merger notifications ("**Small Merger Guidelines**").[167] The Small Merger Guidelines confirm that a merger that does not meet the thresholds for either a large or intermediate merger are not automatically liable for notification. The Small Merger Guidelines, however, provide that the SACC may require a small merger to be notified and approved within six months of the implementation of the transaction if the SACC believes that the small merger is likely to substantially prevent or lessen competition or cannot be justified on public interest grounds. Subsequently, the SACC has also published an amendment to the Small Merger Guidelines which contains specific criteria requiring notification for firms within what is termed the "digital market".[168]

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[166] The authors wish to thank Gina Lodolo and Joshua Eveleigh for their assistance with the compilation of the chapter.

[167] Guidelines On Small Merger Notification; April 2009; accessible at: https://www.gov.za/sites/default/files/gcis_document/201409/321283860.pdf , last accessed 8: December 2021.

[168] Final Guidelines on Small Merger Notification; September 2022; accessible at https://www.compcom.co.za/wp-content/uploads/2022/09/Guidelines-on-small-merger-notification.pdf: 19 May 2023.

A small merger of a firm operating in digital market must notify when the **acquiring firm's** turnover or asset value alone exceeds the large merger combined asset/turnover threshold (currently R6.6 billion). For avoidance of doubt, only the acquiring firm's turnover or asset value (without including the target firm) must exceed the large merger combined turnover/asset value threshold; and at least one of the following criteria must be met for the target firm: the consideration for the acquisition or investment exceeds the combined asset/turnover threshold for intermediate mergers (currently R190 million), the consideration for the acquisition of a part of the target firm is less than R190 million threshold but effectively values the target firm at R190 million or more" : 25% stake at R47.5mn) provided the target firm has activities in South Africa and, as a result of the acquisition, the acquiring firm gains access to commercially sensitive information of the target firm or exerts material influence over the target firm within the meaning of section 12(2)(g) of the Act, (c) at least one of the parties to the transaction has a market share of 35% or more in at least one digital market, or (d)the proposed merger results in combined post-merger market share at which the merged entity gains or reinforces dominance over the market, as defined by the Competition Act."

In relation to joint ventures, the SACC has published a "practitioner update practice note" dated 4 November 2009 ("**Practice Note**")[169] to clarify the application of the merger provisions of the Competition Act 89 of 1998 ("**Act"**) [170] to joint ventures. While the Practice Note is non-binding,[171] it sets out practical guidance on the position that the SACC is likely to adopt regarding the modifiability of joint ventures. In terms of paragraph 13 of the Practice Note, the SACC provides that the merger control provisions of the Act ought to apply to joint ventures, particularly as they may take various forms. The Practice Note does, however, point out that not all joint ventures would constitute a merger. Of particular importance is whether the joint venture satisfies the element of "change of control" and the requisite merger thresholds.

The South African Competition Tribunal ("**Tribunal**") has also published a '*Handbook of Case Law*' which outlines notable developments in South African competition law jurisprudence, including aspects relating to merger control, which is regularly updated. While these are certainly not formally issued guidelines, they serve as an important and practical tool for merging parties to assess whether a particular merger would be deemed 'notifiable'.

It would be helpful if the SACC could update the Practice Note to take into account subsequent jurisprudence from the Competition Tribunal and Competition Appeal Court which has provided further clarity regarding when a "change of control" occurs.[172]

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

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169 Practitioner Note dated 4 November 2009; accessible at: https://www.compcom.co.za/practice-notes-2/, last accessed 8 December 2021.

170 The South African Competition Act 89 of 1998; accessible at https://www.compcom.co.za/wp-content/uploads/2021/03/Competition-Act-A6.pdf, last accessed: 30 November 2021.

171 We note that although the Practitioner Note is not binding, any Guidelines published by the SACC would also be non-binding and would serve a similar purpose as the Practitioner Note in demonstrating the interpretation of the legislation by the SACC.

172 Notable cases in this regard are Caxton and CTP Publishers & Printers Ltd v Naspers Ltd & others (16/FN/Mar04); Goldfields Ltd v Harmony Gold Mining Company Ltd & the Competition Commission (86/FN/Oct04); Johnnic Holdings Ltd v Hosken Consolidated Limited & the Competition Commission; Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd & Sancino Projects Ltd ; Primedia Ltd and Others v Competition Commission and African Media Entertainment Ltd; African Media Entertainment Ltd v Lewis NO and Others; Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd and Others; and Competition Commission v Hosken Consolidated Investment Holdings and Another.

In South Africa, thresholds are calculated using a turnover and/or asset-based threshold (whichever is the greater), which entails both a combined (gross) turnover/asset value as well as a target value, both of which are periodically reviewed. Having a dual threshold (as opposed to a single combined turnover test) assists in ensuring that only transactions which have the potential to harm competition are captured by the mandatory notification regime. The SACC retains the discretion to require parties to a merger which falls below the threshold (*i.e.*a small merger) to notify.

The thresholds are clearly set out and determined according to General Notice 216 of 2009 as amended by Government Gazette no. 1003 of 15 September 2017.[173]

The turnover is calculated based on all turnover in, into or from South Africa and hence foreign-to-foreign mergers would be included.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

The SACC's Rules for the '*Conduct of Proceedings in the Competition Commission*' (which are binding on the Commission) sets out in detail the manner in which the merger thresholds will be

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[173] Determination of Merger Thresholds, Government Gazette No. 1003 of 15 September 2017; accessible at: https://www.comptrib.co.za/Content/Documents/Thresholds%20issued%20in%20terms%20of%20section%2011%20of%20the%20Competition%20Act,%201998%20(Act%20no%2089%20of%201998).pdf, last accessed 30 November 2021. The Threshold Determination provides that the "annual turnover" of a firm equates to the gross revenue of the firm from income in, into or from South Africa due to either the sale of goods, rendering of services or the yielding of interest, royalties or dividends from another's use of the firm's assets. In the calculation of annual turnover, the following are excluded: (i) any amount that the [G.A.A.P] IFRS excludes from gross revenue; and (ii) taxes, tax rebates or similar amounts paid in connection to revenue. Importantly, gains resulting from non-current assets and foreign currency assets do not fall within the ambit of "revenue". Further to this, amounts that represent a duplication between the acquiring and transferred firm do not result in any adjustment towards the annual turnover. In specific regard to banks and insurance firms, "revenue" includes those amounts which the [G.A.A.P] IFRS require to be included, except gains resulting from non-current assets and from foreign currency transactions. If between the date of the financial statements and the date on which the calculation of annual turnover is being made, the firm has recently acquired or divested assets, the turnover from the recently acquired assets must be added to the calculation and the turnover of the recently divested assets must be deducted from the firm's turnover if it was previously included in the firm's turnover.

In regard to the combined valuation of firms, if the acquiring firm is a subsidiary company, the combined assets and turnover of the group's firms must be consolidated. The consolidated asset and turnover of the group excludes those assets or turnover that are a result of transaction between firms in that same group. Where the transferred firm controls any other firm, the combined assets and turnover of those additional firms must be consolidated, excluding assets and turnover resulting from transactions between different parts of the same group. Finally, Item 9 of the Threshold Determination provides that financial statements that are used in the calculation of a firm's assets or turnover must be the firm's audited financial statements of the year prior to the merger or otherwise be financial statements from the previous financial year prior to the merger, prepared under [G.A.A.P] IFRS principles.

assessed with reference to the calculation of turnover and/or asset value.[174] This is detailed and is generally based on best practices. Further, the means of determining South Africa's merger control thresholds is also provided for in the Government Gazette.[175]

The SACC has published draft guidelines in respect of the Small Merger Guidelines (as discussed in response to question 1).[176] Section 13(3) of the Act further provides that the SACC can still exercise its discretion to require parties to a small merger to notify the transaction. In contrast, it is mandatory to notify the SACC of intermediate and large mergers.[177] In this regard, the Small Merger Guidelines were published to introduce separate "thresholds" for mergers in digital markets, although these are mere guidelines and not formal thresholds.[178]

Accordingly, in our view there is sufficient clarity on whether or not the applicable the merger control thresholds will be met in respect of a proposed transaction.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

Local nexus requirement

The Act implicitly contains a local nexus requirement. The turnover thresholds assessment considers the Parties turnover in, into or from the Republic. Further, section 3 of the Act provides that the provisions of the Act applies to "*all economic activity within, or having an effect within, the Republic…*".

The Act does not provide for any simplified or short form procedures. Internally, the Commission categorises mergers as either a category 1, 2 or 3 merger, based on an initial review of the size and complexity of the merger notification. Mergers which are unlikely to have any appreciable

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174 SACC Rules for the Conduct of the Proceedings in the Competition Commission; available at: https://www.compcom.co.za/the-competition-commission-rules/

175 Government Gazette, 15 September 2015, No. 41124; available at: https://www.comptrib.co.za/Content/Documents/Thresholds%20issued%20in%20terms%20of%20section%2011%20of%20the%20Competition%20Act,%201998%20(Act%20no%2089%20of%201998).pdf.

176 Guidelines On Small Merger Notification; September 2022; accessible at https://www.compcom.co.za/wp-content/uploads/2022/09/Guidelines-on-small-merger-notification.pdf , last accessed 8: 19 May 2023.

177 Section 11 of the Act provides that the Minister will make a determination on the threshold and calculation thereof.

178 Draft Guidelines On Small Merger Notification; May 2021; accessible at https://www.compcom.co.za/wp-content/uploads/2021/05/Draft-Guideline-on-small-merger-notification.pdf, last accessed 8 December 2021.

effect on competition are usually categorised as category 1 which are assessed more expeditiously than category 2 or 3 mergers.

One key concern is that foreign mergers with limited local nexus are often considered with a heightened degree of scrutiny as to whether the foreign-to-foreign deal fulfils unrelated public interest obligations. In this regard, in many cases the SACC seems to have adopted a policy decision which essentially requires that a merger must have a public interest *benefit*, particularly as it relates to the increase of ownership by employees or historically disadvantaged persons ("**HDP**").[179]

Most commonly, the SACC recommends that merging parties implement either an employee share scheme or sell a certain shareholding to a company controlled by an HDP. Given that there is a lack of formal jurisprudence or legislation that requires the mandatory promotion of public interest initiatives, clarity as to what the SACC's policy and treatment of foreign mergers would be particularly helpful.

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Acquisitions of minority shareholdings

No. Only transactions which amount to a change of control constitute a "merger" as defined. Absent a majority shareholding or other ability to materially influence the target, no change of control arises.

6. Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

South Africa does require the payment of filing fees. As at 4 December 2018, Government Gazette No. 1336[180] provides that the filing fee for an intermediate merger is ZAR165,000[181] and for a large merger the filing fee is ZAR550,000[182]. No filing fees are required for a small merger

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[179] An HDP is, inter alia, a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race.

[180] Accessible at http://www.compcom.co.za/wp-content/uploads/2018/12/20181204-Comp-Comm-Merger-Filing-Fees.pdf ; last accessed 30 November 2021.

[181] USD 8 522,99 and EUR 7 880,73 as at 19 May 2023.

[182] USD 28 399,86 and EUR 26 269,88 as at 19 May 2023.

that does not meet the thresholds to be considered either an intermediate or large merger. The filing fees in South Africa are generally not considered excessively high.

7. Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes)?

When submitting a merger notification with the SACC, the merging parties are required to provide their respective market share information along with the market shares of their competitors, together with the reasons supporting the methodologies for how the parties determined the respective market share estimates. Where no credible market share information is publicly available, parties are permitted to use "best estimates" as a basis for providing market share information. In circumstances where even guessing market shares would be impractical, parties can intimate as much in the merger forms. Providing some market share information upfront likely assists the SACC in screening mergers and expedites the review of non-contentious transactions. Unless there are separate forms or procedures (such a simplified forms for foreign-to-foreign mergers) then market information would in our view be beneficial to provide upfront.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

According to section 59 of the Act, a failure to notify a merger, the implementation of a merger prohibited by the SACC or the South African Competition Tribunal, the implementation of a merger without approval or the implementation of a merger contrary to conditions imposed by the SACC for approval can result in a penalty of 10% of the parties' turnover in South Africa (based on the firm's turnover in the preceding year).[183] According to the Guidelines for the

[183] The seminal decision regarding the determination of a suitable fine for a failure to notify a merger is that of *Competition Commission v Deican Investments (Pty) Ltd and Another* FTN 151 Aug15, FTN 127Aug15 ("***Deican***").In *Deican*, the South African Competition Tribunal held that in approaching an appropriate penalty, an enquiry into the type of contravention, the nature, duration, gravity and extent of the contravention as well as, application of any aggravating or mitigating factors. This approach was also adopted in the seminal decision of *Competition Commission v Standard Bank of South Africa Ltd* FTN228Feb16 ("***Standard Bank***"), resulting in an administrative penalty of ZAR350 000 being issued upon Standard Bank. Subsequent to the decisions of *Deican* and *Standard Bank*, it is evident that the determination of an appropriate penalty for a failure to notify involves a factual inquiry and differs on a case-by-case basis.

Determination of Administrative Penalties, dated March 2019,[184] the penalty is generally paid by both the acquirer and seller on a joint and several basis. However, in certain circumstances the SACC will levy the penalty only on one of the parties.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

As discussed above, the SACC appears to have recently adopted a policy approach which requires that most notifiable mergers actively promote public interest considerations. As a result of this policy approach, merging parties are now often prone to a large degree of uncertainty, protracted negotiations with the SACC and, ultimately, are typically required to proffer significant remedies and/or or commitments towards public interest initiatives as a means to obtain merger approval, despite the proposed transaction having little or no negative anticompetitive effect. As a practical illustration of the effects of the SACC's policy approach, the SACC prohibited ECP Africa Fund's acquisition of Burger King South Africa and Grand Foods Meat Plant based purely on public interest grounds. Although the transaction was eventually conditionally approved by the Competition Tribunal, such approval was subsequent to a settlement involving extensive public interest remedies and subject to extensive negotiations with the SACC, prolonging its ultimate closure.[185]

In regard to African jurisdictions more generally, the Eswatini Competition Commission calculates the merger filing fee by considering the combined global assets or turnover of the merging parties in and out of Eswatini. This is problematic. While the merging parties' turnover in Eswatini may be negligible, the inclusion of global turnover could result in the filing fee payable in Eswatini being more than the turnover in Eswatini itself. Further, this can result in double payment on the same turnover where the transaction is notifiable in more than one jurisdiction.

Merger filing fees in Cameroon and CEMAC are considered excessively high and in the case of Cameroon are not capped. There is also a jurisdictional concern in CEMAC and that certain member states do not expressly rule out concurrent jurisdiction. Coupled with the high filing fees this places firms in a particularly precarious position – particularly where all turnover and

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[184] Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No 89 of 1998, as amended, March 2019. Accessible at https://www.compcom.co.za/wp-content/uploads/2020/04/42337_29-3_NationalGovernment-Compcom-Guidelines-FTN-and-PI.pdf; last accessed: 8 December 2021.

[185] The full conditions imposed on the transaction can be accessed at: https://www.comptrib.co.za/info-library/case-press-releases/tribunal-releases-public-version-of-conditions-imposed-on-sale-of-burger-king-sa

effects arise in one CEMAC Member State.[186]

10. Other countries: are there any other country that should be included in our report? Please explain why.

We would propose including Nigeria, Eswatini, Cameroon and CEMAC in the report for the reasons set out above but also because there is very limited guidance published by the agencies in respect to how they interpret the merger control laws. Nigeria has a new agency and is the largest economy in Africa. It also has a very developed merger control regime including making use of expedited and simplified merger proceedings involving foreign transactions.

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[186] The report should also include Central African Economic and Monetary Community ("**CEMAC**") and Cameroon. The CEMAC Regulation of 7 April 2019 ("**Regulation**")[186] provides that the filing fee payable by parties will be 0,25% of the merging parties' turnover in CEMAC and notably there is no cap on this filing fee. Accordingly, the notably high filing fee and absence of a statutory cap creates the potential for firms to suffer additional and unreasonable costs when filing a merger in CEMAC, which may have a detrimental impact on the conclusion of a merger and unwillingness to invest where the filing fee would be unreasonably high and uncapped. Further, CEMAC is yet to publish guidelines to deal with transactions that may be notifiable in CEMAC and a CEMAC member state, thereby creating duplicative notification and payment of filing fees to CEMAC and the member state. Accordingly, it would be welcomed for CEMAC to publish guidelines regarding its jurisdiction over a transaction that has no community dimension, so as to avoid both national agencies and CEMAC asserting jurisdiction over the same transaction. Similarly, in Cameroon, the filing fees determined by the Internal Regulation of the Commission of 8 October 2009, have notably high filing fees, without a statutory cap. In this regard, the filing fee is either an opening fee of XAF1 million, or a percentage ranging from 0.20%-0.40% of the parties' combined annual turnover based on seven different thresholds. Of concern is merging parties who have a combined annual turnover at the time of the merger of greater than XAF15 billion, will have to pay a filing fee 0,20% their combined annual turnover, without a maximum cap.

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR IN PART. We support this recommendation to create certainty across jurisdictions for when a transaction is notifiable and ensures that only transactions that have an impact on the market are notifiable.

Notwithstanding the above, we believe it is important to note that ordinary minority protection rights should never be construed as conferring 'control' for purposes of merger control assessment. In this respect, the ability of a minority shareholder to veto strategic transactions may be regarded as an ordinary minority protection right. In practice, such instances should be assessed on a case-by-case basis and there should not, necessarily, be a blanket regulation in this regard.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR IN PART. We support this recommendation to the extent that the acquisition of less than 25% should only trigger a merger filing when the minority interest results in a change of control. We do not agree that a minority interest of less than 25% should never trigger a merger filing as there are circumstances where a minority interest can still be granted veto rights that result in a change of control, which should be notifiable. For instance, where a shareholders agreement provides for different voting thresholds, a minority shareholder with well below 25% shareholding may, in theory, be able to exercise control.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree that Joint Ventures should only be notifiable where they meet the usual thresholds and change of control criteria. The Joint Venture should only be notifiable where the coordination results in a lasting effect that can impact the market.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We support turnover thresholds as being indicative of the potential impact of a firm in a country for purposes of establishing a notification that would be required due to the impact on the economy. Market share thresholds will introduce uncertainty of when to notify as firms often have difficulty of providing precise market shares, while turnover financial information is readily available.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR IN PART. We submit that merger thresholds should not be premised on turnover alone. Rather, merger thresholds should be premised on either the merging parties' turnover or asset value in the jurisdiction (whichever is the greater). In this regard, we note that where this is not the case, competition authorities may not always be notified of mergers that relate to land, non-revenue generating assets and/or infrastructure – all of which may have a particular impact on a market.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree that there should be a local nexus requirement in combination of turnover thresholds that should be met to ensure that only transactions that have an impact on the jurisdiction are notifiable.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or

(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.

FOR. We support having a mechanism available for transactions that meet the relevant threshold, although they are competitively benign as this will ensure that resources are not wasted at the respective agencies and that the administrative burden of the merger filing is proportionate to the impact that the filing will have on the economy.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR IN PART. We do not think that filing fees should be abolished as a reasonable filing fee is sometimes necessary, especially to fund smaller agencies (such as those emerging in various African jurisdictions). The filing fee, should, however, not be excessive such that parties weigh up the penalties of a failure to notify with the filing fee (especially where there is no (or very little) local nexus in the jurisdiction.

As expanded on in our submission, the Eswatini Competition Commission calculates the merger filing fee by considering the combined global assets or turnover of the merging parties in and out of Eswatini. This is problematic in that while the merging parties' turnover in Eswatini may be negligible, the inclusion of global turnover could result in the filing fee payable in Eswatini being more than the turnover in Eswatini itself. Further, this can result in double payment on the same turnover where the transaction is notifiable in more than one jurisdiction.

Merger filing fees in Cameroon and CEMAC are considered excessively high and in the case of Cameroon are not capped. There is also a jurisdictional concern in CEMAC and that certain member states do not expressly rule out concurrent jurisdiction. Coupled with the high filing fees this places firms in a particularly precarious position – particularly where all turnover and effects arise in one CEMAC Member State.[187]

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[187] The report should also include Central African Economic and Monetary Community ("**CEMAC**") and Cameroon. The CEMAC Regulation of 7 April 2019 ("**Regulation**")[187] provides that the filing fee payable by parties will be 0,25% of the merging parties' turnover in CEMAC and notably there is no cap on this filing fee. Accordingly, the notably high filing fee and absence of a statutory cap creates the potential for firms to suffer additional and unreasonable costs when

Accordingly, we recommend a reasonable filing fee that, at minimum, has a nexus to the jurisdiction and strictly proportionate to the actual administrative costs and do not include any tax element.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We support this, especially in application of global transactions that potentially trigger a filing in multiple jurisdictions. In addition to the above, guidelines should also be published in English for filing fees and penalties for a failure to notify.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR. We agree that there should be a mechanism for this, in exceptional circumstances such as those listed above and especially in a global deal where there is the potential for one jurisdiction to have a longer review period that is holding up the deal.

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filing a merger in CEMAC, which may have a detrimental impact on the conclusion of a merger and unwillingness to invest where the filing fee would be unreasonably high and uncapped. Further, CEMAC is yet to publish guidelines to deal with transactions that may be notifiable in CEMAC and a CEMAC member state, thereby creating duplicative notification and payment of filing fees to CEMAC and the member state. Accordingly, it would be welcomed for CEMAC to publish guidelines regarding its jurisdiction over a transaction that has no community dimension, so as to avoid both national agencies and CEMAC asserting jurisdiction over the same transaction. Similarly, in Cameroon, the filing fees determined by the Internal Regulation of the Commission of 8 October 2009, have notably high filing fees, without a statutory cap. In this regard, the filing fee is either an opening fee of XAF1 million, or a percentage ranging from 0.20%-0.40% of the parties' combined annual turnover based on seven different thresholds. Of concern is merging parties who have a combined annual turnover at the time of the merger of greater than XAF15 billion, will have to pay a filing fee 0,20% their combined annual turnover, without a maximum cap.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR. We support limiting fines proportionate to the revenue in the jurisdiction to ensure that the fine is proportionate and will hold deterrence weight for a big and small firm alike. In this regard, the fine should be calculated on the revenue of the firm's turnover into the jurisdiction and exports from the jurisdiction (whether it be both the acquirer and target's turnover or only the acquirer or target respectively) to ensure that the fine is limited to the impact of the turnover of the acquirer / target in the jurisdiction. As seen in South Africa, the percentage should not exceed 10% of the merging parties' annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year and mitigating factors should be expressly set out. In addition, in certain circumstances the SACC will levy the penalty only on one of the parties. We believe that this would also address the situation of a 'killer acquisition' as it provides scope for the penalty to be based on the acquires turnover where the targets turnover is negligible.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR IN PART
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR IN PART
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR IN PART
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of	FOR

Draft recommendations	Comments
the transaction) achieves a significant local turnover in the relevant jurisdiction.	
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR IN PART
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR

Draft recommendations	Comments
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	FOR
Filing fees: summary description of existing competition rules, if any	In South Africa, thresholds are calculated using a turnover and asset-based threshold, which entails both a combined (gross) turnover/asset value as well as a target value, both of which are periodically reviewed. Having a dual threshold (as opposed to a single combined turnover test) assists in ensuring that only transactions which have the potential to harm competition are captured by the mandatory notification regime. The SACC retains the discretion to require parties to a merger which falls below the threshold (*i.e.*a small merger) to notify.

<table>
<tr><th>Draft recommendations</th><th>Comments</th></tr>
<tr><td></td><td>The thresholds are clearly set out and determined according to General Notice 216 of 2009 as amended by Government Gazette no. 1003 of 15 September 2017 as follows:
<table>
<tr><th>Thresholds</th><th>Combined turnover / asset value</th><th>Target turnover/ asset value</th><th>Filing Fee</th></tr>
<tr><td>Intermediate Merger</td><td>ZAR600 million</td><td>ZAR100 million</td><td>ZAR165,000</td></tr>
<tr><td>Large merger</td><td>ZAR6.6 billion</td><td>ZAR190 million</td><td>ZAR550,000</td></tr>
</table></td></tr>
<tr><td>“Negative experience” reports</td><td>The Eswatini Competition Commission calculates the merger filing fee by considering the combined global assets or turnover of the merging parties in and out of Eswatini. This is problematic in that while the merging parties’ turnover in Eswatini may be negligible, the inclusion of global turnover could result in the filing fee payable in Eswatini being more than the turnover in Eswatini itself. Further, this can result in double payment on the same turnover where the transaction is notifiable in more than one jurisdiction.

Merger filing fees in Cameroon and CEMAC are excessively high and in the case of Cameroon is not capped. There is also a jurisdictional concern in CEMAC and that certain member states do not expressly rule out concurrent jurisdiction. Coupled with the high filing fees this places firms in a particularly precarious</td></tr>
</table>

Draft recommendations	Comments
	position – particularly where all turnover and effects arise in one CEMAC Member State.[188]

188 The report should also include Central African Economic and Monetary Community ("**CEMAC**") and Cameroon. The CEMAC Regulation of 7 April 2019 ("**Regulation**")[188] provides that the filing fee payable by parties will be 0,25% of the merging parties' turnover in CEMAC and notably there is no cap on this filing fee. Accordingly, the notably high filing fee and absence of a statutory cap creates the potential for firms to suffer additional and unreasonable costs when filing a merger in CEMAC, which may have a detrimental impact on the conclusion of a merger and unwillingness to invest where the filing fee would be unreasonably high and uncapped. Further, CEMAC is yet to publish guidelines to deal with transactions that may be notifiable in CEMAC and a CEMAC member state, thereby creating duplicative notification and payment of filing fees to CEMAC and the member state. Accordingly, it would be welcomed for CEMAC to publish guidelines regarding its jurisdiction over a transaction that has no community dimension, so as to avoid both national agencies and CEMAC asserting jurisdiction over the same transaction. Similarly, in Cameroon, the filing fees determined by the Internal Regulation of the Commission of 8 October 2009, have notably high filing fees, without a statutory cap. In this regard, the filing fee is either an opening fee of XAF1 million, or a percentage ranging from 0.20%-0.40% of the parties' combined annual turnover based on seven different thresholds. Of concern is merging parties who have a combined annual turnover at the time of the merger of greater than 15 billion XAF, will have to pay a filing fee 0,20% their combined annual turnover, without a maximum cap.

South Korea

Cecil Saehoon Chung, Partner, Yulchon LLC

Yoon Hwan Hwang, Partner, Yulchon LLC

Keon Woong Kim, Partner, Yulchon LLC

Tae Yong Kim, Counsel, Yulchon LLC

(1) Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not

The Korea Fair Trade Commission (the "**KFTC**") has published "*Merger Filing Guidelines*", last amended on December 30, 2022 (the "**Guidelines**") and available here in Korean. The Guidelines provide guidance on the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

The Guidelines clarify Article 11 of the Monopoly Regulation and Fair Trade Act (the "**MRFTA**"), under which reportable transactions are:

(a) acquisition of 20% (15% in case where a target company is listed in Korea (same hereinafter)) or more shares (with voting rights, same hereinafter) of a company;

(b) a shareholder with 20% or more shares of the target company acquiring additional shares of the company, thereby becoming the largest shareholder of the target company;

(c) a company's director, executive officer or employee concurrently becoming a director or an executive officer of the target company ("interlocking directorate");

(d) a merger between companies;

(e) a company acquiring or leasing all or substantial part of the business of another company, or acquiring all or substantial part of the fixed assets for business operations of another company; or

(f) establishing a new company and becoming the largest shareholder.

Effective December 30, 2021, the MRFTA provides for an alternative "transaction value-based" test for determining the reportability of a transaction. Under the new alternative test, even if the target of a transaction does not satisfy the size-of-party test, *i.e.* KRW30 billion (approx.

US$25 million) in worldwide assets or turnover, if the "transaction value or size" is KRW600 billion or greater and the target demonstrates a *substantial* presence in Korea, then the acquisition of the target will be reportable.

Section V.1 of the amended Merger Filing Guidelines establish the following rules for determining the value of a transaction for each type of applicable business combinations.

Type of business combination	Calculation method
Share acquisition	Sum of (i) the acquisition price for all target shares being acquired, (ii) the total book value of any target shares already held by the acquirer, and (iii) liabilities of the target to be assumed by the acquirer prorated to the acquirer's shareholding ratio
Merger	Sum of (i) the total value of all shares to be issued by the acquirer in return for the acquisition (*i.e.* the per-share price multiplied by the number of shares), (ii) any payment to be made by the acquirer to the target's shareholders, and (iii) liabilities of the target to be assumed by the acquirer
Business transfer (including asset acquisitions)	Sum of (i) the transfer payment to be made by the acquirer and (ii) liabilities of the target to be assumed by the acquirer
Participation in formation of a new joint venture company	Total contribution to be made by the largest shareholder of the new JV company

Under Article 19 of the Enforcement Decree of the MRFTA, the target of a transaction has substantial Korean nexus (*i.e.* an alternative Korean nexus test for the alternative transaction value-based reportability test) in case of the following: (1) within the three years preceding the transaction, the target sold products or provided services to at least 1 million people in Korea in a single month during the period, or (2) within the three years preceding the transaction, the target (i) leased Korean R&D facilities or utilized Korean research personnel, and (ii) had an annual "related budget" of at least KRW30 billion as spent and recognized as such on its financial records in any of the three years. Regarding the "one million customer" test, for a company providing content, SNS or other Internet-based services, the test means the net number of customers/users who visited a relevant site during a given month without double-counting the same customers who visited the same site multiple times.

In addition, the KFTC has published "*Merger Filing Guide Book*," which further clarifies the concept of reportable mergers/concentrations and/or the concept of reportable joint venture with more details and examples.

(2) How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

Article 11 of the MRFTA and Article 18 of the MRFTA Enforcement Decree provide for the jurisdictional thresholds for the amount of turnover or asset of undertakings (the "size-of-person" test). However, the Korean jurisdictional thresholds do not include market share thresholds. Market shares are considered only in evaluating the transaction's competitive effects on the relevant markets.

The thresholds are satisfied if:

(a) One party to the transaction has at least KRW300 billion in worldwide assets or turnover;

(b) The other party has at least KRW30 billion in worldwide assets or turnover; and

(c) When (i) both the acquirer and the target in a particular transaction are non-Korean companies or (ii) the acquirer is a Korean company while the target is a non-Korean company, then each non-Korean party must have at least KRW30 billion in Korean turnover to satisfy the additional local Korean nexus test.

As noted above, the MRFTA now provides for an alternative "transaction value-based" test for determining the reportability of a transaction. Under the new alternative test, even if the target of a transaction does not satisfy the size-of-party test, *i.e.* KRW30 billion (approx. US$25 million) in worldwide assets or turnover, if the "transaction value or size" is KRW600 billion or greater and the target demonstrates a substantial presence in Korea, then the acquisition of the target will be reportable.

Article 15 of the MRFTA Enforcement Decree defines "turnover" and "assets" as follows:

(a) Where no new share or corporate bond has been issued during the financial year of the transaction, the amount of assets recorded in the preceding financial year's Balance Sheet;

(b) Where new shares or corporate bonds have been issued during the financial year of the transaction, the sum of (i) the amount of assets recorded in the preceding financial year's Balance Sheet and (ii) the amount of increase in assets due to the issuance of the new shares or corporate bonds;

(c) For the "turnover" amount, it is the amount of turnover recorded in the preceding financial year's Income Statement; and

(d) If a party is primarily engaged in the financial or insurance business, then (i) the amount of assets is the larger of the amount of total capital (*i.e.* total assets minus total liabilities) and the amount of paid-in capital recorded in the preceding financial year's Balance Sheet, and (ii) the amount of turnover is the amount of operating revenues recorded in the preceding financial year's Income Statement.

In our view, ICC should encourage the few countries that are still using market share thresholds to consider amending their merger control thresholds because a turnover/assets threshold is more objective.

(3) Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

Please see our responses to questions 1 and 2 above.

(4) Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?

Yes, Korea has adopted a "local nexus" test. As noted above in response to Question 2, under Article 11 (1) of the MRFTA and Article 18 (3) of the MRFTA Enforcement Decree, when (i) both the acquirer and the target in a particular transaction are non-Korean companies, or (ii) the acquirer is a Korean company while the target is a non-Korean company, then each non-Korean party must have at least KRW 30 billion in Korean turnover to satisfy the local Korean nexus test.

As for the alternative "transaction value-based" test, the local nexus test is met when: (1) within the three years preceding the transaction, the target sold products or provided services to at least one million people in Korea in a single month during the period, or (2) within the three years preceding the transaction, the target (i) leased Korean R&D facilities or utilized Korean research personnel, and (ii) had an annual "related budget" of at least KRW 30 billion as spent and recognized as such on its financial records in any of the three years. Regarding the "one million customer" test, for a company providing content, SNS or other Internet-based services, the test means the net number of customers/users who visited a relevant site during a given month without double-counting the same customers who visited the same site multiple times.

Furthermore, under Section III.6 of the Guidelines, when the target is a non-Korean company (*i.e.* a company with its principal office outside Korea or incorporated outside Korea) and there is no perceivable effect on the Korean commerce, the transaction is subject only to a simplified review.

We do not have sufficient knowledge of or experience in the Swiss local nexus test to opine whether to encourage other jurisdictions to adopt it.

(5) Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Yes, the acquisition of 20% (15% in case of a company listed on a Korean exchange) or more shares in a company is reportable in Korea if it satisfies other thresholds. However, the acquisition of a minority interest in a company without accompanying change of control is subject only to a simplified review and therefore rarely, if ever, results in any prohibition or remedy even though a simplified review can be much more elaborate and time-consuming than the name suggests.

We are not sure whether that fact that most, if not all, minority-interest acquisitions did not result in enforcement actions in Korea alone would also mean such minority interest acquisitions should be categorically exempt from notification altogether. After all, in Korea, very few transactions out of some 900 notifications per year raise significant competitive issues to warrant merger remedies. In theory, from a coordinated effects perspective (or from a changed incentives and abilities analysis perspective), if a particular company has non-controlling minority holdings in a number of companies in the same or similar industries, it could affect its incentives and abilities to undertake certain business conduct using the entity it controls. In addition, when many, if not most, jurisdictions are addressing the "Killer Acquisitions" issue that would not be reportable under the standard filing thresholds, it might be difficult to advocate a categorical exemption of minority-interest acquisitions when other conditions are met.

(6) Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

We confirm that there is no filing fee in Korea. We tend to favour convergence on this issue. However, at the same time, we also understand that each jurisdiction may have unique situations and as such it may be more understandable and/or justified in some jurisdictions than others.

(7) Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);

Yes, fairly detailed market share information for the past two years is required in notifications in Korea, and the adoption of the proposed notification form will be welcome. However, because the KFTC often requests very detailed information in RFIs and will often need market share information

to screen those transactions with no or negligible competitive issues, the elimination of market share information as "required" information in the merger notification form itself is unlikely to result in tangible benefits in Korea.

(8) What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

Under Article 130(1)1 of the MRFTA, in case of failure to notify, the business entity is subject to an administrative fine not exceeding KRW100 million (approx. US$80,000 subject to foreign exchange rate fluctuations), the responsible employee(s) an administrative fine not exceeding KRW10 million. In practice, the administrative fine for failure to notify is imposed only on companies, *i.e.* not on individuals. Additionally, under the KFTC's merger filing violation fine calculation guidelines, administrative fines imposed on companies generally fall well short of the statutory ceiling of KRW100 million. According to a recent KFTC report, in 2021, the KFTC issued a total of KRW425 million in administrative fines for failure to notify in 30 cases (*i.e.* KRW14 million (approx. US$11,000) per case).

At this point, we are not sure if a convergence of some sort on the filing violation penalties is warranted or even feasible.

(9) "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

N/A

(10) Other countries: are there any other country that should be included in our report? Please explain why?

N/A

Draft recommendations	Yulchon comments for South Korea
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	AGAINST. (see immediately below), but for simplified review.
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	NO POSITION; there is no scientific basis for setting a specific threshold, which is bound to be arbitrary. In Korea, the threshold is 20% (15% for companies publicly listed in Korea), and the acquisition of a minority interest without control is subject only to simplified review.
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	AGAINST since the criteria might be unclear in some respects.
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR; market shares could significantly vary depending on the market definition, which is often malleable. Korea does not employ market shares as part of its merger control filing thresholds
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	AGAINST; sales figures could be misleading for a cyclical business; hence the need for an asset + sales threshold such as that in Korea.

Draft recommendations	Yulchon comments for South Korea
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR; a simplified review should also be considered here.
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR IN PART. Agree with offering a simplified form for certain transaction categories, but no position, especially for the second approach.
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing**	NO POSITION; there is no filing fee in Korea.

Draft recommendations	Yulchon comments for South Korea
to have such discussions. More transparency on this critical issue should be a priority.	
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR.
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR IN PRINCIPLE, but no position on the appropriateness of the proposed categories.
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company	FOR

Draft recommendations	Yulchon comments for South Korea
achieving little or no turnover to eliminate such a target as a source of future competition.	
Filing fees: summary description of existing competition rules, if any	None in Korea.
"Negative experience" reports	N/A

Switzerland

Fabian Martens, LL.M., LL.M., MA, Pestalozzi Attorneys at Law

1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   The Swiss Competition Commission ("**ComCo**") and its Secretariat ("**Secretariat**") have published, together with the form for the notification of mergers/concentrations, an information sheet providing further guidance regarding the notification ("**Information Sheet**").

   The Information Sheet contains definitions for key terms like a "concentration" or the "undertakings concerned". It also explains the scenarios in which the ComCo will accept a simplified notification, such as multijurisdictional merger filings. The Information Sheet further clarifies which undertakings are subject to the merger notification obligation, explains the procedure if a notification is not considered to be complete, and the schedule and applicable deadlines in the notification procedure. The Information Sheet also contains further guidance regarding the protection of business secrets, sanctions, and fees.

   The Information Sheet by the ComCo is complemented by the communication of the Secretariat on its communication "Practice regarding the notification and assessment of concentrations" ("**Communication**"), to be amended from time to time. In its most recent version dated 1 October 2019, the Communication contains guidance regarding the omission of notification obligations for joint ventures without a nexus to Switzerland, concentrations consisting of more than one transaction, the geographic allocation of turnovers, transactions without market share additions and transactions where control is acquired by ways of a joint venture.

   Both the Information Sheet ("***Merkblatt und Formular Zusammenschlussvorhaben***") and the Communication ("***Praxis zur Meldung und Beurteilung von Zusammenschlüssen***") are available for download from the website of the ComCo (in German, French and Italian).

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

Planned concentrations must typically be notified in Switzerland if certain turnover thresholds are exceeded.

According to Article 9 para. 1 of the Cartel Act ("**CartA**"), planned concentrations of undertakings must be notified to the ComCo prior to their implementation if, in the financial year preceding the concentration,

(a) the undertakings concerned together reported a global turnover of at least CHF2 billion (today approx. US$2.3 billion), or a turnover in Switzerland of at least CHF500 million (today approx. US$580 million), and

(b) at least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million (today approx. US$116 million).

Specific rules apply for the calculations of turnovers to insurance companies (annual gross insurance premium income) and banks (gross income).

A particularity under Swiss law is the notification obligation based on a prior decision regarding dominance in Article 9 para. 4 CartA: Irrespective of turnover thresholds (as set out above), a notification is mandatory if one of the undertakings concerned has been held to be dominant in a market in Switzerland in a final and non-appealable decision in proceedings under the CartA, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof.

We share the view that turnovers are generally a much clearer and more reliable criterion to determine whether a concentration needs to be notified than market shares. The inherent complexity and, as the case may be, lack of predictability of market definitions impose a high burden on undertakings when assessing notification duties especially in multiple jurisdictions. We, therefore, see an advantage in using turnovers as a relevant threshold for merger control, and support the view that a more unified regulation across jurisdictions should be encouraged. As the Swiss example shows, this can, however, not entirely exclude a definition of markets and an assessment of market shares by the authority (such as to determine which markets are potentially affected by the concentration).

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

The calculation of the thresholds is specified in particular by the Ordinance on the Control of Concentrations of Undertakings ("**Merger Control Ordinance**"). The Merger Control Ordinance can be downloaded from the Swiss publication platform for federal law (in English, German, French, Italian).

The Merger Control Ordinance defines the relevant turnovers and deductions (such as VAT) to be considered, the calculation methods for financial years with less than 12 months as well as turnover calculations for concentrations composed of several transactions. The Merger Control Ordinance further defines how turnovers of affiliated entities to the undertakings concerned (*i.e.* subsidiaries, parent companies, sister companies, or joint ventures) must be included in the calculation of turnovers.

Furthermore, reference is made to the Communication of the Secretariat regarding the geographic allocation of turnovers.

The calculation method of turnovers in Switzerland, therefore, largely converges with the EU Merger Regulation. As a result, in practice, there is often sufficient guidance from EU law. We do not see an urgent need for additional guidelines under Swiss law.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

According to the Communication of the Secretariat and case law, joint ventures are – as an exception – not subject to a notification duty if (i) the joint venture has no activities or turnovers in Switzerland (in particular, does not deliver into Switzerland) and (ii) such activities or turnovers in Switzerland are neither planned nor to be expected.

The legal basis for this exception is found in the general territoriality principle according to which Swiss antitrust law only applies to practices that have an effect in Switzerland.[189] As a result, the establishment of a joint venture without local nexus to Switzerland does not fall under the regulation of the CartA. The exception applies for the establishment of a merger and –

[189] Article 2 para. 2 CartA.

according to doctrine – also in the event of a control change in an existing joint venture without nexus in Switzerland.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

   The Swiss merger control system does not require the notification of the acquisition of minority shareholdings without any change of control. However, acquisitions even of minority shareholdings that may confer actual control (e.g. based on contractual agreements such as veto rights or factual circumstances) may be considered a concentration.

   The Swiss merger control system, traditionally, has high thresholds both for the notification duties as well as for the authorities to block a merger or impose conditions on the parties. The federal government is currently working on a new draft of the CartA, which also includes modifications such as the implementation of the SIEC test (which would allow the authority a more active role compared to the current so-called qualified dominance standard). However, we do not see the importance of a notification duty for minority shareholdings in Switzerland, nor does this seem to be discussed in the current revision.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

   Switzerland does require a flat filing fee of CHF5,000 for a phase I review. This includes the review of a draft notification if, subsequently, a formal notification is filed.

   For a (rare) phase II review, no flat fee but an hourly rate of CHF100 up to CHF400 applies.

   We do not consider the convergence of filing fees to be an urgent priority. If and how much the government of a country charge undertakings appears to be a question of national concern and also affected by local effects such as the price levels in a country. Furthermore, and in contrast to different material regulations such as turnover vs. market share thresholds (as above), we do not see any legal uncertainty arising for companies from different filing fees. Having said this, we consider that prohibitively high filing fees (*i.e.* far beyond the level in Switzerland) should be avoided as they may prevent efficient concentrations.

7. Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);

The parties notifying a concentration must provide further details on markets in which certain market shares are exceeded (so-called "affected markets"):

(a) markets in which the cumulated market share in Switzerland of two or more of the involved undertakings amounts to 20% or more; or

(b) markets in which the market share of one of the affected undertakings amounts to 30% or more.

As a result of this requirement to identify affected markets, the notifying parties must assess the market shares.

We cannot finally assess whether the exclusion from any market share information from the notification form would be a workable solution for Switzerland. The current Swiss regulation requires less detailed information from the parties when notifying concentrations that have only little effects on competition (in spite of substantial turnovers). Therefore, the market share thresholds provide for a simplification of the notification procedure in case of low market shares.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

An undertaking implementing a concentration that should have been notified without filing a notification is subject to fines of up to CHF1 million or, in case of repeated failure, up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned. According to the established practice of the competition authorities, the base amount of the fine is typically 0.1 per mill of the annual turnover. This base amount is then increased (within the limit of the maximum fine) or decreased based on various factors, such as the severity for competition in the relevant markets or intent/negligence.

The same fine applies to cases where undertakings fail to observe a suspension obligation (gun jumping), fail to comply with conditions attached to the authorisation of an undertaking, or implement a prohibited concentration.

There is only very limited case law as sanctions for the failure to notify are rare. There have only been a handful of cases throughout the last decade. For instance, in 2012 the ComCo fined a health insurance for the omission of the notification of a concentration in the amount of CHF35,000 (today approx. US$40,600). The amount of the sanction is often not published if it would reveal business secrets of the company.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   N/A.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    N/A.

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We support this recommendation. Change of control is a relatively clear and transparent triggering event that is internationally widely accepted and based on extensive case law. Lower requirements than a change of control may lead to over-enforcement by competition authorities and be a substantial burden to companies.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We agree with this recommendation. See also our position re Recommendation 1.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. Full functionality is, in practice, a useful filter to identify joint-ventures with a potentially relevant and more than temporary effect on markets. Guidance by competition authorities and case law are well established and support the assessment whether full-functionality criteria are met.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We agree with this recommendation and for the reasons stated in the recommendation. The assessment of market shares can be complex and result in substantial legal uncertainty. Furthermore, in practice, mergers often potentially affect a multitude of jurisdictions and require a fast and reliable preliminary assessment by parties and lead counsels. While this can – generally – be done based on turnover data, an assessment of market shares in various jurisdictions appears very difficult without in-depth knowledge of local market conditions and market definitions by local

competition authorities. The serious consequences of a failure to notify in jurisdictions with a mandatory notification system require clear criteria and legal certainty.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We support this recommendation. The valuation of assets does not provide the same degree of legal certainty as turnovers. Furthermore, in most industries, turnovers appear to reflect the economic impact in a market better than asset values.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree with this recommendation. The local nexus is a result of the territoriality principle on which many competition regimes are based. We do not see room for jurisdiction in lack of a local nexus. Review of transactions by competition authorities without relevant nexus in their jurisdiction would lead to inefficient over-enforcement.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR IN PRINCIPLE. We agree in principle with the recommendation that in the described scenarios, a simplified notification should be available. Whether or not the use of specific "forms" is necessary to achieve this should remain open. An alternative and, in some cases, possibly more efficient way may be to discuss the simplifications with the authority on a case-by-case basis (including also other relevant factors like any pre-existing knowledge of the authority with the relevant markets and/or the parties involved, a preliminary assessment of the possible effects of the transaction, or a failing firm scenario).

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR THE SECOND PART ONLY. We consider the decision of a country whether or not to raise fees, including filing fees for merger filings, to be generally at the full discretion of such country. Public law principles for raising fees in such jurisdictions may apply and require to be applied equally to all fees. Specifically, e.g. the "costs-by-cause" principle established in some countries means that services provided by the state specifically for individual companies (such as the assessment of a merger) will have to be paid by these companies who have an individual interest in this assessment.

Nevertheless, we strongly support the second part of the recommendation, according to which the filing fee must be based on transparent criteria and be proportionate to the costs caused. We see, however, a certain tension between these two elements (maximum transparency and/or maximum proportionality). Therefore, we consider also a flat fee – at least for phase I mergers – to be appropriate if it is not excessively high in order to increase predictability of the fee. Therefore, we suggest to remove the "strictly" before "proportionate" in the second part of Recommendation 8.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We agree with this recommendation. Appropriate guidelines and the translation into English language will support parties (especially outside of Switzerland) in their self-assessment.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

PARTLY FOR. We clearly agree with the recommendation that it should be possible to grant waivers under pressing circumstances (this appears to be almost a mandatory fact given that the purpose of antitrust law is to increase effective competition, which may be negatively effected in the events of slow merger clearance in cases of urgency). However, we do not consider it realistic

that countries would accept the 10% rule – as this may result in a substantial limitation of the enforcement powers of such country (in particular, for example, small jurisdictions).

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, i.e. the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

NEUTRAL. We have no comment to the ACM fining policy. In general, we consider the applicable public law principles to fining (including the determination of the correct amount of the fine) to be at the discretion of each country.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
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Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR
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Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR IN PRINCIPLE
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.**	FOR THE SECOND PART ONLY
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Filing fees: summary description of existing competition rules, if any	The filing fee in Switzerland is CHF 5,000 flat for phase I and effort-based in phase II.
"Negative experience" reports	N/A

Turkey

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Ali Kağan Uçar, ELIG Gürkaynak Attorneys-at-Law

1. Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

The Turkish Competition Authority ("***TCA***" or "***Authority***") sheds light on the concept of reportable mergers/concentrations and/or the concept of reportable joint venture under different legislative pieces and guidelines.

Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), published in the Official Gazette on October 7, 2010, available on the TCA's website in Turkish and English[190]) languages draws the general framework of reportable mergers/concentrations and the concept of reportable joint ventures in Turkey.

With a view to providing further guidance to undertakings, the TCA has also issued several guidelines on the critical issues in merger control processes:

v. The TCA's Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions (the "***Non-Horizontal Guidelines***"), available on the TCA's website in Turkish and English as well as the Guidelines on the Assessment of Horizontal Mergers and Acquisitions (the "***Horizontal Guidelines***"), available on the TCA's website in Turkish and English, provide guidance on the concept of reportable mergers/concentrations and the concept of reportable joint ventures.

vi. The TCA's Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("***Turnover Guidelines***"), available on the TCA's website in Turkish and English, explain the fundamental notions referred under the template merger control notification form, the calculation method of turnover thresholds as well as permissible ancillary restraints within a merger notification form.

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190 Please note that the English version of Communiqué No. 2010/4 is not up-to-date and does not reflect the amendments of March 4, 2022 by the time of submission of this Report (*i.e.*February 8, 2023).

vii. Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("***Control Guidelines***"), available on the TCA's website in Turkish and English, clarifies which transactions constitutes "merger", "acquisition" or "joint venture". It also lays down the circumstances where the change of control occurs and when a joint venture meets the full-functionality criteria.

viii. Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions ("***Remedy Guidelines***"), available on the TCA's website in Turkish and English, provides guidance on remedies to be proposed by the parties to the TCA with a view to eliminating the competitive risks arising out of a transaction. Specifically, it deals with the fundamentals of remedies, the main requirements as well as the methods required to be followed.

ix. Guidelines on the Definition of Relevant Market ("***Relevant Market Guidelines***"), available on the TCA's website in Turkish and English, sets out the criteria to be considered when defining the relevant product market and the relevant geographical market. The Relevant Market Guidelines also explain how total market size and the market share of each supplier are calculated.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

The Turkish jurisdictional thresholds are defined only by reference to turnover. Currently, there is no market share or asset value threshold applicable in Turkey.

Please note that the Turkish merger control regime used to implement market share thresholds until 2011. However, the market share-based system was replaced by the turnover based threshold system with Communiqué No 2010/4, which entered into force in 2011. Paragraph 2 of the Turnover Guidelines cites reaching a higher legal certainty as the reason of this amendment.

The Turkish jurisdictional thresholds do not involve any metrics other than turnover, such as asset value or market share. If the parties meet the turnover thresholds, the transaction will be subject to a mandatory merger control filing, regardless of the parties' market shares or positions in the market. In this respect, the notion of turnover under Turkish law is, *mutatis mutandis*, tantamount to the concept of turnover under EU law.

In our view, in the event that the results of the survey shows that certain jurisdictions apply asset-based or market share thresholds, we encourage ICC to recommend using turnover based thresholds for the purposes of merger control filings on the grounds that;

i. Although asset-based thresholds seem to be easily administrable, it would be burdensome for undertakings to gauge asset values by objective standards, which would eventually lead inconsistencies and undermine the legal certainty. In the absence of clear guidance, asset-based thresholds would also create difficulties in self-assessment processes.

ii. Market share thresholds, on the other hand, would be much more difficult to implement, as the market delineation is the cornerstone of such assessments. Given the changing landscape in the newly emerging markets, undertakings would experience difficulties in setting geographical boundaries and defining product markets. Moreover, without access to competitors' sales data and number of users, the calculation of market shares would not be possible in certain markets.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

As explained above, Communiqué No 2010/4 defines the general scope of notifiable transactions under the Turkish merger control regime. According to Article 5 of Communiqué No 2010/4,

(1) a merger of two or more undertakings; or

(2) the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or persons which currently control at least one undertaking, through (i) the purchase of assets or some or all of its shares; (ii) an agreement; or (iii) another instrument.

are deemed to be merger or acquisition within the meaning of the Turkish merger control regime.

As regards the joint ventures, so long as there is a change in control on a lasting basis involving a full-function joint venture and the turnover thresholds under Article 7 of Communiqué No. 2010/4 are met, the transaction at hand would require a mandatory merger control filing before the Turkish Competition Authority and there are no exceptions to avoid the filing requirement. To that end, as long as the parents of a greenfield joint venture meet the jurisdictional thresholds, a greenfield joint venture is also subject to mandatory merger control filing. The

settled decisional practice of the Board clearly demonstrates that concentrations would be notifiable despite their lack of effects in Turkey (*i.e.* JV is not and will not be active in Turkey).

Furthermore, according to Article 7 of Communiqué No. 2010/4, a transaction is notifiable in Turkey if one of the following alternative turnover thresholds is triggered:

i. The combined aggregate Turkish turnover of all the transaction parties exceeds TL750 million (approximately €43.2 million or US$45.3 million) and the Turkish turnover of each of at least two of the transaction parties exceeds TL250 million (approximately €14.4 million or US$15.1 million), OR

ii. The Turkish turnover of the transferred assets or businesses in acquisitions exceeds TL250 million (approximately €14.4 million or US$15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL3 billion (approximately €172.8 million or US$181.3 million) OR the Turkish turnover of any of the parties in mergers exceeds TL250 million (approximately €14.4 million or US$15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL3 billion (approximately €172.8 million or US$181.3 million)[191]

Communiqué No. 2010/4 also provides a special merger control regime for undertakings active in certain markets/sectors. Pursuant to Article 5(2) of Communiqué No. 2010/4, "*the TL 250 million Turkish turnover* thresholds" mentioned above will not be sought for the acquired undertakings active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

Therefore, the mere fact that the Turkish turnover figure of a target remains below the relevant jurisdictional threshold would not allow the parties to rule out a mandatory notification requirement. In this respect, if the target has activities in the sectors mentioned above somewhere in the world, and if it is also commercially active in Turkey, the exception to the local threshold will apply and a mandatory notification requirement could still be triggered solely by the worldwide or Turkish turnover figures of the other parties to the transaction.

4. Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint

[191] Pursuant to Article 8(6) of Communiqué No. 2010/4 and paragraph 24 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, for the purpose of calculating the turnovers, the amounts in foreign currencies will be converted to TL in accordance with the applicable Turkish Central Bank average buying rate for the relevant year.

ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?

In principle, there is no "local nexus" test in Turkey. Where the relevant turnover thresholds are met, foreign-to-foreign transactions, including joint ventures, must be notified to the TCA and be approved prior to closing of the transaction. This is the case even for creation of joint ventures without any activity in Turkey, where the thresholds are triggered simply by the parents' Turkish turnover. For example;

i. *Mitsubishi Corporation/Wallenius Wilhelmsen*[192] concerned the creation of a full-function joint venture for inland vehicle logistics services in Thailand which is not and is not expected to be active in Turkey following the consummation of the transaction. Although this full-function joint venture will solely combine the parties' respective inland finished vehicle logistics businesses in the South-East Asia and the transaction will not result in any affected markets/overlaps in Turkey, the Authority established jurisdiction over the transaction and approved it.

ii. *Generali/Union-Zaragoza Properties*[193] involved the acquisition of joint control over an existing joint venture in a transaction where the joint venture's activities are limited solely to owning and managing a shopping mall, namely Puerto Venecia, and a few stand-alone shops located inZaragoza, Spain. Thus, the joint venture did not have any Turkey-related activities and was notin a position to enter the Turkish market in the future. Nevertheless, the Authority found that the transaction is subject to a mandatory merger control filing in Turkey and rendered an approval decision.

iii. In *ADPM/Vinci Airports/Astaldi*[194]*,* which concerns the formation of a greenfield airport management JV regarding the management of Santiago Airport in Chile, the Board decided that the transaction is subject to merger control filing in Turkey because the jurisdictional turnover thresholds were exceeded by the parent companies even though the JV will not be operating in Turkey, and will execute all its economic activities on the management of Santiago Airport in Chile.

As for the simplified procedures, there is not a specific fast-track merger control filing procedure in Turkey similar as the one in the EU. That being said, in transactions which do not result in any affected markets in Turkey (*i.e.* no overlap between the activities of the transaction parties in Turkey), the scope of the information to be provided within the merger control filing would be limited to general information such as the parties' global and Turkish activities and

[192] Mitsubishi Corporation/Wallenius Wilhelmsen (16.1.2020, 20-04/35-18).
[193] Generali/Union-Zaragoza Properties (06.02.2020, 20-08/73-41).
[194] ADPM/Vinci Airports/Astaldi (01.09.2015, 15-34/509-157).

management structure, description of the transaction, a general description on the relevant product markets, etc. (short-form notification).

We believe that requiring parties to notify transactions which have no chilling effects on competition in a given jurisdiction leads to unnecessary red-tape costs and efficiency losses in the economic activities. Therefore, in our view, ICC should encourage the countries to adopt a local nexus requirement or simplified procedures such as fast-track applications or comfort letters after a short review.

5. **Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?**

No, in light of Article 5 of Communiqué No. 2010/4, the acquisition of minority shareholdings that do not amount to a permanent change of control does not require the notification of the acquisition.

Communiqué No 2010/4 provides the definition of "control" which is akin to the definition in Article 3 of Council Regulation No 139/2004. According to Article 5(2) of Communiqué No 2010/4, control can be constituted by rights, agreements or any other means that – either separately or jointly, de facto or de jure – confer the possibility of exercising a decisive influence on an undertaking, particularly by ownership or the right to use all or part of the assets of an undertaking, or by rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

Acquisition of minority interests can amount to a merger, if and to the extent that it leads to a change in the control structure of the target entity. In other words, if minority interests acquired are granted certain veto rights that may influence the management of the company (e.g. privileged shares conferring management powers), then the nature of control could be deemed changed (from sole to joint control) and the transaction could be subject to filing. As specified under the Guidelines on Cases Considered as a Merger or Acquisition and the Concept of Control, available on the TCA's website in Turkish and English, such veto rights must be related to strategic decisions on the business policy, and they must go beyond normal "minority rights", *i.e.*the veto rights normally accorded to minority shareholders to protect their financial interests.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

We confirm that the Turkish jurisdiction does not require any filing fees for any transaction to be submitted to the TCA.

Filing fees pose a financial barrier for submission of a merger control filing, and therefore may result in reluctance of the transaction parties to file transactions. This case may be prevalent especially in cases where the transaction has no or little nexus to a given jurisdiction. Therefore, we favour a convergence where no filing fee is required to encourage more undertakings to notify. We also stress that, in jurisdictions adopting a filing fee system, the filing fee should be, at least, based on transparent criteria and be proportionate to the actual administrative costs supported by the regulator.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

The standardised notification form of the TCA requires provision of market shares for transactions which lead to affected markets in Turkey. Under Turkish merger control regime, affected markets consist of relevant product markets that may potentially be affected by the notified transaction and where;

a) two or more of the parties have commercial activities in the same product market (horizontal relationship),

b) at least one of the parties is engaged in commercial activities in markets which are upstream or downstream from the product market any of the other parties (vertical relationship).

The template notification form of the TCA not only requires market share information for all undertakings concerned but also demands market share information of the competitors which hold more than 5% market share in the affected market, for the last three years.

However, it may be burdensome for the parties to gather and provide antitrust agencies with detailed market shares. Furthermore, analysis of market data proves to be a very costly task while the proper antitrust assessment does not raise issues. In this respect, we favour simplified notification forms requiring little information for transactions unlikely to raise antitrust concerns in Turkey. We also support simplified notification forms for creation of joint ventures which will not operate in Turkey or acquisition of joint control over undertakings without any operations in Turkey. To that end, the adoption of a notification form which does not require the submission of market share information (but only turnover broken down according to statistical codes) in the same manner as the US HSR form would be a desirable improvement.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

In Turkish Competition Law, there is an explicit suspension requirement (*i.e.*a transaction cannot be closed before obtaining the approval of the Competition Board if the thresholds are met), which was set out under Article 11 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") and Article 10(5) of Communique No. 2010/4. Accordingly, the Turkish merger control regime classifies the implementation of a notifiable transaction before obtaining the approval of the Board as "gun-jumping". Under Article 10(8) of Communique No. 2010/4, a transaction is deemed to be realized (*i.e.,* closed) on the date when the change in control occurs.

If the parties to a notifiable transaction fail to comply with the suspension requirement, in other words, close a notifiable transaction without the approval of the Board or do not notify the notifiable transaction at all, the Competition Board has no chance other than enforcing the sanctions and legal consequences set forth under the Turkish merger control regime. To that end, the Board has imposed administrative monetary fines in numerous cases so far for either (i) closing the transaction prior to Board's approval or (ii) not notifying the transaction at all. As such, imposition of a fine for violating the suspension requirement is a usual occurrence in the Turkish merger control regime. There are a number of examples in the Board's decisional practice where fines were levied on undertakings for violations of the suspension requirement (e.g. BMW/Daimler/Ford/Porsche/Ionity (20-36/483-211, 28.07.2020), Brookfield/JCI (20-21/278-132, 30.04.2020), A-Tex/Labelon (16-42/693-311, 06.12.2016), Ersoy/Sesli (14-22/422-186, 25.06.2014), Electro World (13-50/717-304, 05.09.2013), Tekno İnşaat (12-08/224-55, 23.02.2012), Zhejiang/Kiri (11-33/723-226, 02.06.2011), Ajans Press/Inter Press (10-66/1402-523, 21.10.2010), Mesa Mesken/TOBB (10-56/1088-408, 26.08.2010), CVRD Canada Inc. (10-49/949-332, 08.07.2010), Flir Systems Holding/ Raymarine (10-44/762-246, 17.06.2010), Batıçim/Borares (10-38/641-217, 27.05.2010), TKS/Sarten (10-31/471-175, 15.04.2010), Kansai Paint Co. Ltd./ Akzo Nobel Coatings (09-34/791-194, 5.8.2009), Kiler/Yimpaş (09-33/728-168, 15.7.2009), Verifone/Lipman (09-14/300-73, 13.4.2009), Fina/Turkon (09-02/19-12, 14.01.2009), Çallı/Turyağ (08-63/1048-407, 12.11.2008), Eastpharma Sarl/Deva (07-34/355-133, 24.4.2007), Harry's/Fresh Cake/BNP (07-61/722-253, 25.07.2007), Doğuş Otomotiv/Katalonya (07-66/813-308, 22.8.2007), Total S.A./CEPSA (06-92/1186-355, 20.12.2006), Mauna/Tyco International (06-46/586-159, 29.6.2006), Konfrut/Dinter (05-84/1149-329, 15.12.2005), Doğan Yayın Holding/Turkish Daily News (00-49/519-284, 12.12.2000).

Pursuant to Article 16 of Law No. 4054 in case of failure to comply with the suspension requirement, two scenarios are possible, depending on whether the deal raises competition issues:

i. If the Competition Board decides that the transaction is not within the scope of Article 7 of the Law No. 4054 (the transaction does not significantly impede effective competition in any market for goods or services within the whole or part of the country),

a monetary fine of 0.1% of the acquirer's Turkish turnover shall be imposed. The minimum amount of this fine is set at TL105,688 (approx. €5,000) until December 31, 2023 and is revised annually. In the event of a merger, the fine is imposed on both parties. All the parents of a full-function JV are considered as separate acquirers and would thus be imposed a fine. Once the Competition Board detects the failure to notify, it will impose the monetary fine automatically. The transaction will also be deemed invalid with all its legal consequences insofar as the Turkish jurisdiction is concerned (although the invalidity point is more a theoretical than a real legal risk).

ii. In addition to the monetary fine applicable to the violation of the suspension requirement above, if the Competition Board decides that the transaction is within the scope of Article 7 of the Law No. 4054, *i.e.,* if the transaction is deemed problematic under the SIEC test applicable in Turkey, Article 11 of Law No. 4054 allows the Authority to (i) ex officio initiate an investigation in case the suspension requirement is violated, (ii) order structural and/or behavioural remedies to restore the situation as before the closing (restitution in integrum) and (iii) impose a turnover-based fine (up to 10% of the incumbent parties' annual Turkish turnover including the export sales) on the incumbent parties. Each of the executive members of the incumbent parties who are deemed to have played a significant role in the infringement may also be fined up to 5% of the fine imposed on the incumbent parties, as a result of implementing a problematic transaction without obtaining approval of the Board.

Furthermore, if the transaction in question is found to be problematic, the Turkish Competition Board may deem it necessary to take interim measures to protect the competition in the relevant market. Accordingly, if the parties do not comply with the measures the Board has taken, as per Article 17 of the Law No. 4054, the Board may further impose a daily administrative fine of 0.05% of annual gross revenues of the relevant undertakings in Turkey (including the export sales), until the Parties comply with the Board's decision.

If a notifiable transaction has not been notified, the Competition Board may investigate the transaction on its own initiative, regardless of how it became aware of the transaction.

For the purpose of fine calculation, the Competition Board will rely on the Turkish turnover (including export sales) that is achieved in the financial year preceding the date of the fining decision. If this is not possible, the Competition Board will rely on the turnover generated in the financial year closest to the date of the fining decision.

The legal consequences of violation of the suspension requirement are also applicable to foreign-to-foreign transactions. In other words, when it comes to violation of suspension requirement, the Board does not treat the transactions differently in terms of sanctions and imposes administrative fines to foreign-to-foreign/pure offshore transactions as well. The

Fairless-Simsmetal[195] and *Longsheng*[196] decisions are clear examples whereby the Board imposed turnover based monetary fines on the foreign-to-foreign transactions.

If the results of this survey depict that the countries impose penalties with great disparity, ICC should encourage convergence on penalties in case of violation of the suspension requirement. Having uniform or similar penalties would result in the parties to the transaction to at least have an opinion on the consequences of the violation of the suspension requirement in the other jurisdictions. When this is the case, the parties to the transaction may consult a local counsel, acquire thorough and accurate information on the local merger control regime in that specific jurisdiction, and eventually submit a merger control filing to the relevant competition authority.

9. **"Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.**

   N/A

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

    N/A

[195] Fairless-Simsmetal (16.09.2009; 09-42/1057-269)

[196] Longsheng (02.06.2011; 11-33/723-226)

Position on recommendations from ICC

Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.

FOR. We support this recommendation. The main legislative piece regulating the Turkish merger control regime, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), is also in line with this recommendation as well. By doing so, a certain level of clarity and predictability is provided to undertakings concerned and transaction parties.

Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

FOR. We agree with this recommendation. Minority interest acquisitions should only be notified if the concerned acquisition results in a change of control in order to cut red-tape costs of both parties and competition agencies, whereas the restriction or distortion of competition can still be addressed by the authorities if it is deemed necessary to intervene.

Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

FOR. We agree with Recommendation 3, as the competition agencies should primarily dedicate their merger control sources to structural changes in the market, which involve fully-functional joint ventures that will operate on a lasting basis.

Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

FOR. We support Recommendation 4, as it would reinforce legal certainty. Likewise, due to the practical difficulties in enforcement, the market share-based thresholds under Turkish competition law were replaced in 2011 and are no longer in force, since they tend to fail to reflect the parties' actual positions in certain markets, especially in the data-driven ones. In the presence of growing discussions as to the dynamic market structures, particularly including digital markets as

addressed in many different jurisdictions, abolishing market share based thresholds and adopting turnover based ones could help providing legal certainty.

Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.

FOR. We support Recommendation 5 on the grounds that turnover based thresholds could help providing the companies with greater predictability and legal certainty whilst facilitating self-assessment of the notifiability of transactions, compared to asset based thresholds. Asset based thresholds may fall short in indicating the potential impact of transactions on competition.

Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.

FOR. We agree with Recommendation 6. In principle, there is not a specific "local nexus" test under Turkish competition law. The turnover-based thresholds in force often require the parties to notify transactions with very small nexus to Turkey and result in cross-border repercussions when the undertakings concerned strive to fulfil the merger control obligations. In this respect, establishing local nexus thresholds would lessen the administrative burden on both parties and the competition agencies.

Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where:

- **(i) the parties' activities do not overlap horizontally and / or are not vertically-related; or**
- **(ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.**

FOR. We are in favour of Recommendation 7. Simplified notification forms for transactions that are not likely to cause competition concerns would alleviate costly tasks such as gathering detailed information on market shares and/or analysis of market data.

Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

FOR. We support Recommendation 8. We appreciate the praise given to the absence of filing fee system, and believe that it is not crucial for the healthy enforcement of competition law. Although we encourage other jurisdictions to adopt a similar approach, we acknowledge the presence of competition authorities which may need to apply such fees to cover their costs. In this respect, the further recommendation on ensuring that the filing fees are transparent and strictly proportionate to the actual administrative costs is also encouraged.

Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.

FOR. We agree with Recommendation 9. In order to establish efficient competition law enforcement systems, the competition agencies are expected to publish guidelines, and build effective communication channels with stakeholders both before and after the merger control process is initiated. To that end, while comprehensive guidelines shed light on the merger control process and help parties to self-assess and comply with regulations, effective communication channels established with stakeholders at post-filing stage would allow parties to develop an understanding of the competitive concerns arising out of the transaction and come up with bull's eye solutions in a timely manner, which would eventually expedite review processes.

Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

FOR. We agree with Recommendation 10. However, it should not be disregarded that the competition authorities should establish mechanisms to unify conflicting practices and decisions to ensure consistency and legal certainty. Accordingly, any diverging practices and decisions should be adequately justified when implementing a waiver mechanism under exceptional

circumstances.

Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, i.e. the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

FOR. We support Recommendation 11. Fines for gun jumping should be disincentivizing, and the fining policy should be pro rata the relevant undertakings' turnovers. The policy of the Dutch Competition Authority is in line with the motivation behind this recommendation as to the predictability and proportionality of fines whilst being capable of taking away potential incentives for gun jumping.

On an additional note, the Turkish competition law also imposes turnover based fines for gun jumping and such fines are mostly based on the turnovers generated in Turkey. More specifically, if the parties to a notifiable transaction violate the suspension requirement, a turnover based administrative monetary fine (based on the Turkish turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) shall be imposed on each of the incumbent firms (*i.e.* the acquirer(s) in the case of an acquisition (including joint ventures (*i.e.* all ultimately control acquiring parties)); both merging parties in the case of a merger).

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds,	FOR

Draft recommendations	Comments
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Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical**	FOR

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Draft recommendations	Comments
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Filing fees: summary description of existing competition rules, if any	There is no applicable filing fee for a merger control filings before the Turkish Competition Authority.
"Negative experience" reports	N/A

United kingdom

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1. Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.

Reportable mergers/concentrations

UK merger control is governed by the Enterprise Act 2002 ("**the Act**"), as amended by the Enterprise and Regulatory Reform Act 2013 ("**ERRA**"). The Competition and Markets Authority ("**CMA**") is the national competition authority and primary enforcement body in the UK.

The CMA's "*Mergers: Guidance on the CMA's jurisdiction and procedure"* publication ("**CMA Guidance**")[1] provides general information and guidance on the procedures used by the CMA with respect to the UK merger control regime.

The Act will apply to completed or anticipated mergers where:

a) two or more "enterprises" cease to be distinct, or there are arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct;
b) the jurisdictional thresholds are met; and

c) either (i) the merger has not yet taken place, or (ii) the date of the merger must be no more than four months before the day a Phase 2 reference is made.[2]

Each of these will be considered in turn.

i. Enterprises ceasing to be distinct

A merger situation requires that two or more "enterprises"[3] cease to be distinct, or there are arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct (*i.e.*, as a result of the enterprises being brought under common ownership or control). The Act distinguishes three levels of interest that amount to control (including moving from one level to another)[4]:

(11) material influence (the ability of the acquirer materially to influence the commercial policy of the target, irrespective of shareholding). This is the lowest level of control that may give rise to a relevant merger situation. The three main ways in which material influence can manifest are:[5]

- exercising votes at shareholders' meetings: the size of the acquirer's minority shareholding in the target company will typically have a direct bearing on the extent of the acquirer's voting power at a shareholders' meeting, and thus on the acquirer's influence on the corporate and strategic decisions of the target company;
- board representation, including the corporate/industry expertise, other relevant experience or incentives of the various members of the board; and
- other sources, such as agreements with the target company.

When determining whether "material influence" arises, the CMA will consider all relevant facts in the round. The CMA has in the past concluded that material influence existed even in cases of minority shareholdings of c. 16%, combined with other factors.[6]

(12) *De facto* control (i.e., the ability of the acquirer unilaterally to determine the target's commercial policy, for instance where the acquirer has in practice control of more than half of the votes actually cast at shareholder meetings): there is no 'bright line' between factors which might give rise to material influence and those giving rise to *de facto* control. The CMA has the ability under section 26(3) of the Act to decide whether or not to treat *de facto* control as equivalent to 'control' for the purposes of establishing whether enterprises have been 'brought under common ownership or common control' within the meaning of the Act.[7]

(13) A controlling interest (*de jure* or legal control), typically as a result of a shareholding conferring more than 50% of the voting rights in a company: only one shareholder can have a controlling interest, but it is not uncommon for a company to be subject to the control (in the wider senses described above) of two or more major shareholders at the same time – in a joint venture, for instance.

ii. Jurisdictional thresholds

The jurisdictional thresholds must be satisfied for a relevant merger situation to arise (see Question 2 for more details).

iii. The merger has not yet taken place, or it has taken place not more than four months before a referral is made

Finally, the merger must not have taken place yet or it must have taken place not more than four months before a referral is made, unless the merger took place without it having been made public and without the CMA being informed of it, in which case the four-month period starts from the announcement or at the time that the CMA is informed of it.

The CMA has the power to 'call in' a merger for investigation – if the jurisdictional thresholds are met – within four months from the date of completion of the transaction or when material facts relating to the transaction have been made public (whichever is later).

The UK merger control regime is voluntary in nature and there is no requirement to notify a qualifying transaction to the CMA. However, the CMA Guidance states[9] that in cases that do raise the possibility of competition concerns, parties should consider carefully whether to notify the merger to the CMA as:

- the CMA may become aware of the transaction through its own dedicated mergers intelligence function (including through complaints); and
- a decision not to notify the CMA carries particular risks once the merger has been completed.[10]

Reportable joint ventures

The creation of a joint venture or a change in control of an existing joint venture may constitute a relevant merger situation under the Act, assuming the other jurisdictional tests are met.

The CMA will first examine whether previously distinct business activities have come under common control (that is, more than one shareholder has 'control' as defined by the Act).[11] By definition, this means that there must be pre-existing businesses that cease to be distinct. Hence, where two parties enter into a 'greenfield' joint venture and no existing assets or business activities are transferred to it, there will be no relevant merger situation. Even where the parents do transfer certain business activities to the joint venture, these must be sufficient to constitute an "enterprise" for a merger situation to arise.

The CMA applies the same jurisdictional thresholds (detailed below) for joint ventures, but the rules for calculating the relevant turnover and share of supply may differ in the context of the creation of a joint venture. For example, where the UK turnover generated by the assets that will be contributed to the joint venture is less than £70 million, the share of supply of the enterprises ceasing to be distinct is usually calculated by reference to the activities of the joint venture alone (*i.e.*, the parent companies' shares of supply are not included). However, where the joint venture

will remain active in the same areas as the joint venture, the CMA may determine that the share of supply test (described below) is met by aggregating the joint venture parents' shares of supply in respect of the overlapping activities.

2. How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

Jurisdictional thresholds in the UK merger control regime

A transaction will qualify for investigation in the UK where two or more enterprises cease to be distinct and either one or both of the following criteria is satisfied:[12]

a) the value of the UK turnover associated with the enterprise which is being acquired exceeds £70 million (the "turnover test"); and/or
b) as a result of the merger, a share of at least 25% of the supply or purchase of goods or services of any description in the UK or a substantial part of it will be created or enhanced (the "share of supply test").

In April 2023, the UK Government introduced the Digital Markets, Competition and Consumers Bill (the "DMCC Bill") which, when passed into law, will amend the CMA's jurisdiction to review mergers. As currently drafted, the threshold for the turnover test will increase from £70 million to £100 million. In addition, there will be a new threshold introduced whereby the CMA will have the power to review mergers where one party has a share of supply greater than 33% and a turnover exceeding £350 million.

Guidelines on the notion "turnover", "asset value" or "market share"

The CMA Guidance explains in detail how the CMA approaches the definitions of "turnover" and "share of supply" when determining whether the above jurisdictional thresholds are met.[13]

Turnover

The turnover test applies to the turnover of the acquired enterprise that was generated in relation to customers within the UK in the business year preceding the date of completion of the merger or, if the merger has not yet taken place, the date of the reference for a phase 2 investigation. Similar to other merger control regimes, sales rebates, VAT and other turnover-related taxes are

deducted. Turnover is aggregated for all parts of the target business, less any intra-group turnover.

The figures in the enterprise's latest published accounts will normally be sufficient to measure whether the turnover test is met, unless there have been significant changes since the accounts were prepared (i.e., if parts of the businesses have been divested). Where company accounts do not provide a relevant figure, for example where only part of a business is being acquired or the accounts do not provide a suitable geographic breakdown of turnover, the CMA will consider evidence presented by the merger parties and other interested parties to form its own view as to what it believes to be the value of UK turnover for jurisdictional purposes.

Under section 28 of the Act, two scenarios may be distinguished for the purposes of calculating turnover, depending on whether or not the relevant enterprises remain under the same ownership and control after the merger.[14]

- Where one or more enterprises remain under the same ownership and control after the merger, turnover is calculated by taking the total value of all enterprises ceasing to be distinct and deducting the turnover of those enterprises that remain under the same ownership and control after the merger. Hence, in a straightforward acquisition, where the acquirer and target cease to be distinct from each other, the relevant turnover is that of the target. In a joint venture scenario, the turnover is the sum of the turnover of each of the contributed enterprises (which are, effectively, the target enterprises).
- Where none of the enterprises concerned remains under the same ownership and control, the relevant turnover will be calculated by adding together the turnovers of all the enterprises involved and taking away the turnover of the enterprise with the highest UK turnover. This includes both full legal mergers, where the relevant turnover would be that of the existing enterprise with the smaller UK turnover, and joint ventures, where the relevant turnover would be that of all the existing companies, excluding the company with the largest UK turnover.

Share of supply

Under section 23 of the Act, the "share of supply test" is generally[15] satisfied if the merged enterprises:

- both[16] either supply or acquire goods or services of a particular description in the UK (*i.e.*, there must be an overlap between the parties' activities in the UK); and
- will, after the merger, supply or acquire 25% or more of those goods or services, in the UK as a whole or in a substantial part of it.[17]

The Act confers on the CMA significant discretion to identify, for the purposes of applying the share of supply test, a specific category of goods and services supplied or acquired by the merger parties. The application of the share of supply test is guided by the following key principles[18]:

- The share of supply test is not a market share test. Therefore, the goods/services to which it is applied need not amount to a relevant economic market, and can aggregate, for example, intra-group and third-party sales. This should not prejudice how these goods/services might be treated in the CMA's substantive assessment.
- The CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met.
- The CMA will consider the commercial reality of the merger parties' activities when assessing how goods or services are supplied, focusing on substance rather than the legal form of arrangements. The CMA will consider whether there are sufficient elements of common functionality between the merger parties' activities.
- The CMA may apply such criteria as it considers appropriate to decide whether certain goods or services should be treated as goods or services of a separate description (and therefore not taken into account in assessing whether the share of supply test is met) in any particular case.

The CMA cannot apply the share of supply test unless the merger parties together supply or acquire the same category of goods and services (of any description). The test cannot capture mergers where the relationship between the merger parties is purely vertical in nature and where there is no overlap between the merger parties' activities based on any reasonable description. The share of supply test requires that the merger has a sufficient UK nexus, namely, that it would result in the creation or enhancement of at least a 25% share of supply or acquisition of goods either in the UK or in a substantial part of the UK. The parties do not have to be legally incorporated in the UK.

Turnover will generally be considered UK turnover where customers are located in the UK or where the purchase or procurement decision is taken in the UK. In *Sabre / Farelogix*,[19] jurisdiction was established on the basis that Sabre's share of the relevant services to UK airlines was above 25% and Farelogix supplied the relevant services to one UK airline (British Airways) which British Airways used to market interline segments in the context of its interline arrangement with American Airlines, even though the revenue received for interline bookings with a British Airways segment was minimal and British Airways paid no fees to Farelogix. The UK's Competition Appeal Tribunal later upheld this decision, finding that British Airways received the benefit of the service through its agreement with American Airlines which was sufficient to conclude that Farelogix's services were supplied in the UK.[20]

For a "substantial part of the UK", the test may be satisfied on the basis of the share of supply in a relatively wide geographic area (such as the UK, Great Britain, England, Scotland, Wales or

Northern Ireland), even if the transaction's competitive impact is more likely to be regional or local in nature. There is no statutory definition of a "substantial part".[21]

The merger must result in an increment to the share of supply or acquisition. Where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment. Where there is no increment, the share of supply test cannot be satisfied.[22]

The increase in the share of supply must result from the enterprises ceasing to be distinct. In the case of an acquisition, this requires calculation of the share of supply based on the activities of the acquirer and the target company.

Under section 23(5) of the Act, the CMA may have regard to the value, cost, price, quantity, capacity, number of workers employed or any other criterion, or combination of criteria, in determining whether the 25% threshold is met.

If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?

We would agree that turnover-based thresholds are preferable to asset-value thresholds, given that asset values can be difficult to determine (and can often fluctuate) and do not necessarily reflect economic activity. In certain jurisdictions, the tests are based on metrics such as minimum wages (e.g. Costa Rica, Ecuador) and in others there is a combined assets threshold, and it is often very challenging for large acquirer groups (such as private equity firms) to determine the value of their total group assets.

Regarding market share thresholds, the approach taken by different jurisdictions in respect of the threshold itself tends to vary significantly. Certain jurisdictions focus on the likelihood of a transaction resulting in a position of market power, by applying a relatively high combined market share threshold (e.g. Bahrain applies a 40% threshold), whereas other jurisdictions apply a lower threshold (e.g. Australia has a 20% threshold). The basis of the analysis also varies between different jurisdictions - the UK is an example of a jurisdiction that applies a 'share of supply test' which is generally much broader in scope than the market share tests applied by other regimes. Finally, certain jurisdictions require an overlap or vertical relationship between the activities of the parties (e.g. the UK requires a horizontal overlap), while in other jurisdictions this is not necessary (e.g. Spain).

In such circumstances, it can be quite difficult to confirm that the parties' shares do not exceed the relevant thresholds. It is also disproportionately burdensome to require companies to compile market data in order to assess reportability (potentially across many product markets), particularly in jurisdictions where no third-party data is readily available, where the company has very limited

local presence or visibility into the characteristics of the relevant markets, or indeed where the markets have not previously been defined by authorities.

We would in principle be in favour of the removal or simplification of market share thresholds in order to achieve greater international convergence. We would however anticipate significant pushback in relation to certain jurisdictions (including in the UK and Australia) where the relevant tests have worked well from the perspective of the authorities, and note that regimes are increasingly in favour of more flexible thresholds to afford themselves jurisdiction to review a broader scope of transactions, such as killer acquisitions.

3. Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.

The CMA Guidance

The most recent version of the CMA Guidance was published in January 2022.[23] Chapter 4 of the guidance sets out the legal criteria for a merger to constitute a "relevant merger situation" under the UK merger control legislation, and the factors used by the CMA when applying the jurisdictional tests. Salient points of clarification covered by the new guidance include the following:

i. *Enterprises*

In the case of asset acquisitions in particular, the CMA's assessment of whether a combination of assets constitutes the activities of a business is fact-specific and assessed on a case by case basis. The CMA will have particular regard to any transfers of tangible or intangible assets, business data, employees, goodwill, and certain types of IP (trademarks, trade names, domain names).

For businesses that are no longer (or have not yet started) actively trading, the CMA will consider whether the assets being transferred would be employed in combination to commence active trading. The CMA Guidance clarifies that the CMA will consider factors such as the period of time elapsed since the business was last trading (if relevant), the extent and cost of actions required in order for the business to start trading; views of customers, investors and competitors; and whether goodwill or other benefits may be acquired beyond the assets that are being transferred. The CMA considers the principles in the *Eurotunnel* judgments[24] (which related to the acquisition of assets from a company that had ceased trading) to be of broader application to such cases.

ii. *Material influence*

As mentioned above, material influence over the target's policy is the lowest level of control under the UK's merger control legislation. The CMA Guidance clarifies that the CMA will consider the right

or ability to obtain board representation (even if it has not yet been exercised or there is no certainty about when it will be exercised in the future) as a relevant factor, and that board representation alone may be sufficient to confer material influence. This is consistent with the CMA's approach in *Amazon/Deliveroo*.[25] The CMA may also have regard to the status and expertise of the acquirer, and its corresponding influence with other shareholders, and may consider whether, given the identity and corporate policy of the target company, the acquirer may be able materially to influence policy formulation through, for example, meetings with other shareholders.[26]

In relation to minority shareholdings, the CMA Guidance clarifies that any size of shareholding may be examined by the CMA, even shareholdings of less than 15%. It is noted, however, that material influence for shareholdings of less than 15% has rarely been found in the CMA's decisional practice.[27] Equally, given the nature of the decisions that would typically require a special resolution – and which a shareholder could therefore veto with a 25% interest – a share of voting rights in excess of 25% is likely to be seen as conferring the ability materially to influence policy.

Protection rights normally accorded to minority shareholders (such as those in the context of a liquidation) are not likely to give rise to material influence.

iii. *Share of supply test*

The CMA Guidance maintains the long-standing position of the CMA that the share of supply test is not a market share test based on an economic assessment and that the CMA can have regard to any reasonable description of a set of goods or services to establish an "overlap" between the parties' activities, including on the basis of sufficient elements of common functionality. The CMA's broad discretion to group goods and services on the basis of any criteria that it considers appropriate in the particular circumstances of the case has since been confirmed in a Competition Appeal Tribunal judgment.[28]

In light of the CMA's flexibility in defining the relevant set of goods or services, although the share of supply test cannot be met where the relationship between the parties is purely vertical, in past cases the CMA has been able to assert jurisdiction even in transactions that the Parties argued were predominantly vertical in nature.[29]

In relation to pipeline products, the CMA Guidance clarifies that presence on a market in the UK may be established through pipeline products or services (and in the absence of any UK turnover).[30]

4. Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in

particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?

Local nexus requirement

The jurisdictional thresholds include a local nexus requirement. The turnover test relates to turnover generated in relation to customers located within the UK, and the share of supply test requires the creation or enhancement of at least a 25% share of supply or acquisition of goods or services either in the UK or in a substantial part of the UK. As regards the latter, the CMA Guidance confirms that the merger parties need not be legally incorporated in the UK, and that provision of goods or service to customers located in the UK would be sufficient. However, it notes that the CMA may also take into account a number of factors, including, such as customer relationships (even when not governed by contract), making available services to potential users or "making arrangements for the use of computer software".[31]

As the UK merger control regime does not have a mandatory filing requirement, the absence of a significant local nexus may feature in merging parties' assessments of whether to submit a notification in the UK. For example, parties to international joint ventures are free to take a business decision not to engage with the CMA if the joint venture has no sales in the UK. However, taking such a view has in recent years become a higher risk strategy, as the CMA has interpreted the share of supply test increasingly flexibly and has asserted jurisdiction to conduct "own-initiative" investigations into transactions even with minimal nexus to the UK.

In practice, it is virtually impossible to conduct an exhaustive *ex ante* assessment of the possible relevant factors and criteria that the CMA may select to later assert jurisdiction over the merger. For example:

- In *Sabre/Farelogix*[32] (a merger that the CMA ultimately blocked) jurisdiction was established on the basis that Sabre's share of the relevant services to UK airlines was above 25% and Farelogix supplied the relevant services to one UK airline (British Airways) which British Airways used to market interline segments in the context of its interline arrangement with American Airlines, even though the revenue received for interline bookings with a British Airways segment was minimal and British Airways paid no fees to Farelogix. The UK's Competition Appeal Tribunal later upheld this decision, finding that British Airways received the benefit of the service through its agreement with American Airlines which was sufficient to conclude that Farelogix's services were supplied in the UK.[33]
- In *Roche/Spark*[34], only Roche's product was available for purchase, and Spark generated no turnover in the UK. However, the CMA asserted jurisdiction based on UK-located employees engaged in R&D and commercialisation activities (or alternatively, based on the number of UK patents for Haemophilia A treatments).

Although there is no “short form” procedure as such, parties to international joint ventures with limited UK nexus who wish to minimise the risk of an unexpected CMA investigation have the option of submitting an informal briefing paper to the CMA. The purpose of this short submission is to explain why the transaction will not result in a substantial lessening of competition in the UK and arguments around limited UK nexus often feature as part of the advocacy.

Should local nexus guidelines be adopted?

We are in favour of a local nexus requirement in relation to all merger control regimes. A requirement for parties to file in the absence of any local effect on competition results in a significant use of time and resources for both businesses and the regulator with no offsetting benefit to competition. We see a benefit to local nexus tests being introduced alongside turnover thresholds (where they are already used).

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Acquisition of minority shareholdings

Noting that the UK merger control regime is voluntary, for a merger to be reviewable by the CMA, there must be an acquisition by an enterprise of, at a minimum, “material influence” over policies that are relevant to the commercial behaviour of the target. This is a lower threshold than the EU standard of "decisive influence" that is commonly applied in many jurisdictions globally. In determining whether material influence exists, the CMA may take into account a number of subjective and context-specific factors. For example, in *Amazon/Deliveroo*[35], the CMA found that a 16% minority interest investment was considered to confer material influence, taking into account factors such as Amazon's board representation, its status and expertise (which conferred influence over other shareholders) and its current and possible future commercial relationships with the target.

While the regime does therefore typically require an acquisition of at least some degree of influence over the target, an exception exists in relation to those acquisitions made by a consortium of investors. Where investors act together to secure (and then exercise) control of a target, the CMA may opt to treat them as "associated persons" and to aggregate their collective interests for the purpose of assessing whether the material influence test is satisfied, even if none of the investors, individually, will gain any degree of control over the target (see, for example, *Nottingham Tramlink*[36]).

Prohibition decisions or remedies

There have been no cases in which an investment, as part of a consortium, that conferred no influence or control on an individual investor has been subject to a prohibition or remedies. However, there have been some, albeit rare, cases in which an investment conferring material influence only (*i.e.* not decisive influence) has been subject to prohibition or remedies. In particular, investments of material influence were required to be unwound in both the *Ryanair/Aer Lingus*[37] and *BSkyB/ITV*[38], despite the fact that in both cases the acquirer had held the relevant interest for some time by the time of the authority's decision, and the authority found no evidence that the structural link had resulted in any competitive harm by the time of the decision. In *Ryanair/Aer Lingus*, the minority interest had been held for some six and a half years by the time of the decision, and the authority found that, in that period, competition between Ryanair and Aer Lingus had remained intense, that Ryanair had not exercised its voting rights in a way that had harmed Aer Lingus's ability to compete effectively, had not wielded any particular influence over other shareholders and had not received any competitively sensitive information in its capacity as a shareholder. Moreover, there was no evidence that Ryanair's financial interest in Aer Lingus had caused it to raise its own prices, no evidence to suggest that Aer Lingus competed less fiercely in order to avoid antagonising its largest shareholder and no evidence to suggest that coordinated effects had arisen between the two airlines. Consequently, there is scant empirical evidence that asserting jurisdiction over investments that do not confer decisive influence, but do confer material influence, is justified for the prevention of anticompetitive mergers.

6. Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?

Filing fees

Filing fees are payable under the UK merger control regime when a transaction is reviewed by the CMA, whether the transaction is voluntarily notified by the parties or called in for review by the CMA (although in the latter case there is an exception for transactions that give rise only to material influence over the target). Acquirers that meet the definition of a "small and medium sized enterprise" are exempt from the filing fees.

Where fees are payable, they range between £40,000 (where the target has UK turnover of £20 million or less) up to £160,000 (where the target's UK turnover exceeds £120 million).

As the UK is a voluntary filing regime, filing fees tend to be paid only in respect of mergers that give rise to actual or potential competition issues. In particular, no filing fee is payable if the parties submit a briefing paper to seek an informal view from the CMA as to whether it would be minded to call in a particular transaction (if not notified), which is a common way for the parties to obtain comfort for deals that raise minimal, but conceivable, competition issues.

Should there be filing fees?

We would not recommend the complete abolishment of all filing fees globally. In many instances, these are a critical source of funding to antitrust agencies (whether emerging agencies, or more established agencies such as those in the UK and the US). We do agree however that they should not be excessive and should only reflect the actual administrative costs of resourcing to the authority. The tiered structure implemented by some jurisdictions – based on target turnover or transaction value – can help ensure that disproportionate costs are not placed on smaller mergers which may discourage the parties from notifying.

7. Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes).

Market share information in the notification form

The UK Merger Notice requests the provision of the parties' (and their principal competitors') shares of supply for each of the relevant markets, as well as documents in the parties' possession which assess or analyse the merger with respect to market shares. Given the CMA's broad discretion to identify criteria on which to determine the share of supply test (as detailed in response to Question 2 above), the parties are therefore often required to provide granular market share data across many plausible market segments where their goods or services overlap.

What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information?

We note that comprehensive reforms were proposed in June 2023 by the US Federal Trade Commission (FTC) and the Department of Justice (DOJ). These proposals were motivated by the agencies' view that the information currently required to be submitted in connection with the HSR filings is "*insufficient… to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers.*"

If implemented, the changes would significantly expand the scope of data, documents, and other information required, greatly increasing the disclosure burden and time required to prepare filings. This would include:

- details about the transaction rationale, investment vehicles, and corporate relationships;

- information related to products or services in both horizontal products and non-horizontal business relationships such as supply agreements;
- projected revenue streams, transactional analyses and internal documents describing market conditions, and the structure of entities involved such as private equity investments;
- details regarding previous acquisitions; and
- information relating to the labour market, including data on employee classifications, geographic market information, and workplace safety histories. The agencies will also collect information on foreign subsidies from "foreign entities of concern", currently China, Iran, North Korea, and Russia.

As a result, the distinction between the HSR process and those more "front-loaded" regimes (such as those in the UK and the EU) will be considerably less stark. Nevertheless, for those transactions that raise limited or no substantive competition concerns, we would support the broader use of simplified and even super-simplified notification forms.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

Penalties for failure to notify

There is no penalty for failure to notify in the UK as the regime is voluntary and non-suspensory, meaning transactions meeting the jurisdictional thresholds can be completed without prior clearance from the CMA.

For completeness, however, while it is for the merger parties to self-assess whether to complete a merger without first seeking clearance, unnotified mergers remain at risk from being 'called in' by the CMA for review. If the CMA does then decide that the merger requires scrutiny after the merger is completed (and, very rarely, in anticipated mergers), interim enforcement orders ("**IEOs**") may be imposed to prevent the further integration of the parties' businesses and preserve the pre-merger competitive structure of the relevant market(s). It is here that potential penalties may be imposed by the CMA for non-compliance.

The CMA has the power under the Act to intervene in mergers and prevent the integration of two merging businesses, either by issuing an IEO under section 72 of the Act during a Phase 1 investigation, or an interim order under section 81 of the Act during a Phase 2 investigation (together, "**Interim Measures**"). The CMA states that it will "*act proportionately in imposing Interim Measures, whilst having regard to the necessity of preventing pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action*".[39]

Under the Act, the CMA has the power to impose a fixed penalty of up to 5% of the total value of the global group turnover of the party involved where they fail to comply with interim measures "without reasonable cause".[40] Despite having this power since 2014, it was not until 2018 that the CMA first used it and imposed a fine of £100,000 in *Electro Rent / Microlease*.[41]

These fining powers have since been used on a number of occasions. In October 2021, the CMA imposed a fine of £50.5 million on Meta for breaching the IEO imposed at the start of its investigation into Facebook's acquisition of Giphy.[42] The penalty decision, which was upheld on appeal to the Competition Appeal Tribunal, concerned the submission of fortnightly compliance statements with significant qualifications, not informing the CMA that a supplier had experienced a loss of service exceeding 24 hours, and changes to key staff without the CMA's prior consent. Meta was then fined an additional £1.5 million in the same investigation in February 2022 for failing to alert the CMA in advance of key staff leaving the company as was required by the IEO,[43] and in the same month it fined JD Sports and Footasylum £4.3 million and £380,000 respectively for failing to have safeguards in place, sharing commercially sensitive information and failing to alert the CMA about meetings between executives of the two companies.[44]

The CMA is therefore sending strong message that while the voluntary regime will continue to allow parties more flexibility, it will actively control their conduct whilst interim measures are in place and "*will not hesitate to make full use of its fining powers [and] impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence*."[45]

If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

We support a fining policy whereby the fine is calculated by reference to the percentage of the revenue generated by the relevant undertakings concerned in the relevant jurisdiction, as opposed to a percentage based on global revenues. The specific percentage should then be determined on a case-by-case basis, reflecting the severity (*e.g.*, timing) and impact of the infringement to ensure it is sufficiently dissuasive. The policy should adequately allow authorities to address killer acquisitions by fining the acquirer appropriately.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life examples will help support/substantiate the specific points where changes would be most needed.

Not applicable.

[1] Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2revised (as amended on 4 January 2022), available here. Note that the CMA is currently consulting on proposed updates to its published guidance on its merger investigation process.

[2] An exception exists where the merger took place without having been made public, in which case the four-month period starts from the earlier of the time the merger was made public (e.g., when it was announced, or when it received significant press coverage in the national or trade press) or the time the CMA was informed about it.

[3] The term "enterprise" is defined in section 129 of the Act as the activities, or part of the activities, of a business. This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question could be carried on for gain or reward. However, there is no requirement that the transferred activities have generated, or are expected to generate, a profit or dividend for shareholders: indeed, the transferred activities may be loss-making or conducted on a not-for-profit basis. In making a judgment as to whether or not the activities of a business, or part of a business, constitute an enterprise, the CMA will have regard to the substance of the arrangement under consideration, rather than merely its legal form. See also: CMA Guidance, paragraphs 4.10/4.11.

[4] Section 129 of the Act.

[5] CMA Guidance, paragraph 4.21-4.39.

[6] *Amazon/Deliveroo* [2020] ME/6836/19; *RWE/E.On Merger Inquiry* [2019] ME/6800/19.

[7] CMA Guidance, paragraphs 4.33/4.34.

[8] CMA Guidance, paragraph 4.35.

[9] Paragraph 6.3.

[10] Please refer to Question 8 for further information.

[11] CMA Guidance, paragraph 4.59.

[12] Section 23 of the Act.

[13] CMA Guidance, paragraphs 4.52 onwards.

[14] CMA Guidance, paragraph 4.53.

[15] There are certain exceptions for specific sectors, e.g. newspapers and/or broadcasting, and transactions between National Healthcare Service ("NHS") foundation trusts.

[16] Where more than two enterprises cease to be distinct, at least two of them must supply or acquire such goods or services.

[17] CMA Guidance, paragraph 4.58.

[18] CMA Guidance, paragraph 4.59

[19] *Sabre/Farelogix* [2019] ME/6806/19.

[20] *Sabre Corporation v Competition and Markets Authority* [2021] 1345/12/20.

[21] CMA Guidance, paragraphs 4.60-4.65.

[22] Special rules apply in relation to the shares of supply of newspapers and/or broadcasting, where no increment is required where the Secretary of State issues a special intervention notice. Where the target is a relevant enterprise, the share of supply test is met if, before the merger, the relevant enterprise has a share of supply or purchase of 25% or more of relevant goods or services in the UK or in a substantial part of it. The test is met even if the share of supply does not increase as a result of the merger. The relevant goods or services for the purposes of deciding whether the share of supply test is met are those by virtue of which the target enterprise qualifies as a relevant enterprise. This provision adds to, rather than replaces, the share of supply test. For mergers involving two or more 'water enterprises' the jurisdictional test is based on turnover only.

[23] The CMA is in the process of updating its Guidance, with proposed changes to increase engagement between the CMA and merger parties in Phase 2. The updated draft Guidance (published in November 2023 for consultation) is available here.

[24] *Groupe Eurotunnel S.A and SeaFrance S.A Merger Inquiry* [2014] ME/5570/12.

[25] *Amazon/Deliveroo* [2020] ME/6836/19.

[26] *Amazon/Deliveroo* [2020] ME/6836/19; *RWE/E.On Merger Inquiry* [2019] ME/6800/19; *BskyB/ITV plc Merger Inquiry* [2007].

[27] *CVC Capital / Six Nations Rugby* [2021] ME/6930/21 – in relation to a 14.3% minority investment.

[28] *Sabre/Farelogix* [2019] ME/6806/19.

[29] *Facebook/Giphy* [2021] ME/6891-20; *Google/Looker* [2020] ME/6839/19.

[30] *Roche/Spark* [2020] ME/6831/19.

[31] CMA Guidance, paragraph 4.60.

[32] *Sabre/Farelogix* [2019] ME/6806/19.

[33] *Sabre Corporation v Competition and Markets Authority* [2021] 1345/12/20.

[34] *Roche/Spark* [2020] ME/6831/19.

[35] *Amazon/Deliveroo* [2020] ME/6836/19.

[36] *Tramlink Nottingham Consortium of NET* [2011] ME/5094/11.

[37] *Ryanair/Aer Lingus* [2015] ME/4694/10.

[38] *BskyB/ITV plc Merger Inquiry* [2007].

[39] Interim measures in merger investigations, paragraph 1.7.

[40] Section 94(A) of the Act. The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (the Interim Measures Order) makes provision for when an enterprise is to be treated as controlled and the turnover (both in and outside of the UK) of an enterprise.

[41] *Electro Rent / Test Equipment Asset Management Limited* [2018] ME/6676-17, notice of penalty paragraph 3. Electro Rent failed to first seek the consent of the CMA before issuing a break clause terminating the lease over the only premises Electro Rent and its subsidiary had in the UK without reasonable excuse.

[42] *Facebook/Giphy Inc* [2020].

[43] *Facebook/Giphy Inc* [2020].

[44] *JD Sports/Footasylum* [2021].

[45] Interim measures in merger investigations, paragraph 7.8.

Summary table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR.
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR.
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR.
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR IN PART. We would in principle support the removal of market share thresholds in those jurisdictions which operate a mandatory regime (e.g., Israel, Morocco, Portugal, Spain, Taiwan), and instead utilising turnover-based thresholds. This would achieve greater legal certainty, given that turnover data is typically recorded in accordance with international accounting principles whereas market share data is often open to interpretation (e.g., where each party is feeding in to a combined threshold and providing their own respective best estimates in respect of an uncertain total market size). Moreover,

Draft recommendations	Comments
	it is disproportionately burdensome to require companies to compile market data in order to assess reportability (potentially across many product markets), particularly in jurisdictions where no third-party data is readily available, where the company has very limited local presence or visibility into the characteristics of the relevant markets, or indeed where the markets have not previously been defined by authorities. For those jurisdictions which operate a voluntary regime focused on market share data (including the UK, Australia, and Singapore), we would anticipate significant pushback as regards the potential abolition of these thresholds, given the relevant tests have worked well from the perspective of the authorities in terms of capturing only those mergers which have the potential to materially affect competition. More generally, we note that regimes are increasingly in favour of more flexible thresholds to afford themselves jurisdiction to review a broader scope of transactions, such as killer acquisitions.
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are much easier to assess and to implement.	FOR.

Draft recommendations	Comments
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR IN PART. We support Recommendation 6 insofar as there should be a local nexus threshold in place for any regime to have jurisdiction. However, the requirement that the target "achieves a significant local turnover" then excludes those companies whose turnover does not yet reflect their competitive potential, and many regimes have amended their thresholds in order to capture transactions involving such companies (e.g., digital or pharmaceutical companies which are not yet generating revenue). Rather, we recommend that the target must have "substantial domestic operations" (assessed using similar principles as under the Austrian, German, and Korean regimes).
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR.
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.	FOR THE SECOND PART. We would not recommend the complete abolishment of all filing fees globally. In many instances, these are a critical source of funding to antitrust agencies (whether emerging agencies, or more established agencies such as those in the UK and the US). We do agree however that they should not be excessive and should only reflect the actual administrative costs of

Draft recommendations	Comments
If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	resourcing to the authority. The tiered structure implemented by some jurisdictions – based on target turnover or transaction value – can help ensure that disproportionate costs are not placed on smaller mergers which may discourage the parties from notifying.
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR.
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR.

Draft recommendations	Comments
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	FOR.
Filing fees: summary description of existing competition rules, if any	Filing fees are payable under the UK merger control regime when a transaction is reviewed by the CMA, whether the transaction is voluntarily notified by the parties or called in for review by the CMA (although in the latter case there is an exception for transactions that give rise only to material influence over the target). Acquirers that meet the definition of a "small and medium sized enterprise" are exempt from the filing fees. Where fees are payable, they range between £40,000 (where the target has UK turnover of £20 million or less) up to £160,000 (where the target's UK turnover exceeds £120 million). As the UK is a voluntary filing regime, filing fees tend to be paid only in respect of mergers that give rise to actual or potential competition issues. In particular, no filing fee is payable if the parties submit a briefing paper to seek an informal view from the CMA as to whether it would be minded to call in a particular transaction (if not

Draft recommendations	Comments
	notified), which is a common way for the parties to obtain comfort for deals that raise minimal, but conceivable, competition issues.

United States

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1. **Has your respective competition authority published guidelines to clarify the concept of reportable mergers/concentrations and/or the concept of reportable joint venture? If so, please provide their references and a summary thereof. If this is not the case, please explain whether this situation is satisfactory or not.**

   Whether a transaction is reportable to antitrust authorities in the United States is governed by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended (the "**HSR Act**"), and rules ("**HSR Rules**") promulgated by the Federal Trade Commission ("**FTC**") with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice ("**DOJ**").

   The text of the HSR Act can be found in Chapter 15, Section 18 of the U.S. Code (15 U.S.C. §18a) and the text of the HSR Rules can be found in the U.S. Code of Federal Regulations (16 C.F.R. §§ 801-803). The FTC and DOJ are currently reviewing the HSR Rules, their previous guidance, and the HSR form. Revisions have been expected since 2022.

   The FTC has issued 18 "formal interpretations" of the HSR Rules, but has not issued a new formal interpretation since 1999, and the last amendment was issued in 2001. In contrast, the Premerger Notification Office of the FTC ("**PNO**") has issued hundreds of informal interpretations of the HSR Rules in response to questions posed by merging parties. In practice, lawyers in the United States rely on these informal interpretations to understand how the HSR Rules apply to certain fact patterns, but a recent blog post written by the current Director of the FTC Bureau of Competition in August 2021 warned parties against relying on informal interpretations, stating that the informal interpretations "are not reviewed or authorised by the

Commission" and therefore "do not carry the force of law" and "may not reflect modern market realities or the policy position of the Commission." The PNO has not published an informal interpretation since June 2021, although it has continued to provide parties informal guidance in unpublished correspondence.

The HSR Act and HSR Rules are highly complex. Determining whether a transaction is reportable often requires the analysis of attorneys who specialise in HSR practice. At a high level, however, the HSR Act applies to transactions in which assets, voting securities, or control of a non-corporate entity are acquired. If the size of the transaction and the size of the parties to such a transaction exceed certain thresholds, and no exemptions apply, the HSR Act requires each of the parties to the transaction to submit a prenotification form with the FTC and DOJ and to observe a waiting period before closing the transaction and proceeding with any integration of the assets or companies.

2. **How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion "turnover", "asset value" or "market share"? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?**

The relevant thresholds under the HSR Act relate to the size of the transaction and the size of the parties to the transaction. In addition, each exemption to the HSR Act has criteria that must be satisfied for the exemption to apply. Most, though not all, of these thresholds are updated yearly.

Market shares are not used in determining whether a transaction is subject to the HSR Act or whether any exemption applies.

Assets and revenue are relevant to the following aspects of the analysis:

- Size-of-Transaction threshold: The size-of-transaction threshold is met if the acquiring person will hold voting securities, non-corporate interests, and/or assets of the acquired person valued above a certain amount. This threshold is updated yearly.
- Size-of-Person threshold: The size-of-person threshold is only applicable when the transaction is valued above the size-of-transaction threshold but below a certain size-of-transaction cap. In order to satisfy the size-of-person test, both the acquiring and acquired person must have had a certain amount of annual net sales or total assets in the previous fiscal year. Transactions above the size-of-transaction cap are subject to the HSR Act regardless of the size of the parties, assuming no other exemption applies. These thresholds are updated yearly.

- Carbon-Based Mineral exemption: The availability of this exemption depends on the value of the reserves, rights and the associated production and exploration assets.
- Foreign Asset exemption: The availability of this exemption depends in part on the amount of sales into the United States generated by the foreign assets, the value of the total assets the parties have in the United States, and the amount of sales the parties have in or into the United States. These thresholds are updated yearly.
- Foreign Issuer exemption: The availability of this exemption depends in part on the value of the assets and sales the foreign issuer and the parties to the transaction have in or into the United States. These thresholds are updated yearly.
- 802.4 exemption: The availability of this exemption depends in part on the value of the non-exempt assets held by the acquired company.

The value of assets is the higher of the Fair Market Value or, if determined, the Acquisition Price. The Acquisition Price is the amount of consideration to be received by the acquired person for the assets in question. In an asset acquisition, assumed debt must also be included in determining the Acquisition Price. If the Acquisition Price is not determined, then Fair Market Value governs. Fair Market Value must be determined by the board of directors of the acquiring person, or its delegee, within 60 days of making an HSR filing or, if no filing is required, within 60 days of closing. There are no specific rules or accounting techniques for determining the Fair Market Value, but it must be determined in good faith.

The amount of revenue is to be determined based on the last regularly prepared annual income statement, which cannot be more than fifteen months old. When determining sales in or into the United States, revenues are generally attributed to the country where the product or service was provided.

3. **Has your respective competition authority published guidelines to clarify its merger control thresholds? If so, please provide their references and a summary thereof. If no such guidelines exist, please indicate whether the publication of such guidelines (or of more detailed guidelines) would be advisable.**

The FTC publishes inflation-adjusted changes to the HSR thresholds on an annual basis. Other guidance on how to calculate the size of transaction, or the size of the parties to determine whether the thresholds are exceeded is contained in the formal and informal interpretations discussed in response to question 1 above.

4. **Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures without any such local nexus? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?**

A local nexus is not explicitly required under the HSR Act or HSR Rules, but the concept of a local nexus is implicitly embodied in the following parts of the HSR reportability analysis:

- Foreign Asset exemption: The acquisition of foreign assets are exempt from the HSR Act if certain thresholds on sales into the United States and assets held in the United States are not exceeded.
- Foreign Issuer exemption: The acquisition of voting securities or non-corporate interests in a foreign issuer are exempt from the HSR Act if certain thresholds on sales into the United States and assets held in the United States are not exceeded.
- Size-of-Transaction threshold: Once the exempt non-U.S. assets and equity are determined and excluded, the size-of-transaction will be the Fair Market Value of any non-exempt assets or equity being acquired.

There is no simplified procedure with respect to international joint ventures; if an international joint venture involves a notifiable transaction, trips the notification thresholds, and is not subject to exemptions, then it must be notified to the antitrust agencies under the normal process.

Requiring notification and review of transactions that have no local nexus, and therefore no appreciable impact on commerce in a country, unnecessarily consumes the limited resources of both the merging parties and the antitrust agencies. Therefore, at least a degree of local nexus should be required.

5. Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?

Whether an acquisition of minority interests is reportable under the HSR Act depends on the type of company whose interests are being acquired. The acquisition of minority interests in corporations can be reportable, but the acquisition of membership interests in non-corporate entities is not reportable unless the acquiring person obtains "control" over the non-corporate entity.

Some acquisitions of minority interests in a corporation may qualify for an exemption if the acquirer's cumulative holdings in the issuer are below a certain threshold of all outstanding securities of the issuer. For example, acquisitions below 10% of a corporation's outstanding voting securities are exempt if the acquisition is made solely for the purpose of investment. A 15% threshold applies to similar acquisitions made by certain "institutional investors" such as registered mutual funds.

In 2020, the FTC proposed a "*de minimis*" exemption that would exempt all acquisitions that result in holdings below 10% of an issuer's securities regardless of the acquirer's investment

intent. The FTC, however, is still considering the public comments submitted in response to that proposed rule and it has not become final.

With respect to enforcement, acquisitions of minority interests can be divided into two categories:

(1) "Cross-ownership" acquisitions in which a company acquires a minority interest in one company while having a controlling interest in a competitor of that company.

(2) "Common ownership" acquisitions in which an investor holds minority interests in two or more competitors in the same industry but does not hold a controlling interest in any of the competitors. This frequently occurs in the context of index funds and other sector funds.

There are examples of enforcement actions brought against cross-ownership acquisitions on the theory that the governance rights that accompany the minority interest in a competitor can be used to obtain access to competitively sensitive information or to influence how the competitor operates.[197] There is also a concern that the revenue stream derived from the minority interest in the competitor can cause the acquiring company to compete less aggressively against the company in which it holds a minority interest.[198]

In recent years, academic researchers have attempted to apply the concerns that arise in the cross-ownership context involving one firm's minority interest in a competitor with the more complex common-ownership context in which an investor holds only minority investment positions in many companies, some of which may be competitors. Some academic analyses have purported to find a correlation between the extent of common ownership in an industry and anticompetitive effects.[199] Other papers, however, have called into question the validity of these findings.[200] Antitrust enforcers in the United State have generally been undecided on whether common ownership has anticompetitive effects and have called for more study.[201]

To date, no enforcement cases have been brought in the United States on the common-ownership theory. The HSR form provides little information to screen for common-ownership concerns, because it reports only one party's acquisitions of shares in a single company. The filing does indicate whether that filing person (or an "associate" – for example, other funds in

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197 See e.g., *In re TC Group*, File No. 061-0197 (F.T.C. Jan. 29, 2007) (requiring the establishment of firewalls, removal of directors and divestiture of governance rights to permit an investor with a 50% interest in the managing partner of one company to acquire a 22% interest in a competitor to the company).

198 See Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 13 (2010).

199 See e.g., José Azar, Martin C. Schmalz, and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. Fin. 1513 (2018).

200 See, e.g., Eric Lewis and Randy Chugh, *DOJ Economic Analysis Group Discussion Paper, Common Ownership and Airlines: Evaluating an Alternative Ownership Data Source* 19-1 (Apr. 2019).

201 See DOJ/FTC Submission of the United States to OECD Hearing on Common Ownership by institutional investors and its impact on competition at ¶ 15 (Nov. 28, 2017); Notice of Proposed Rulemaking, *Premerger Notification, Reporting and Waiting Period Requirements,* 85 Fed.Reg. 77053, 77061 (Dec. 1, 2020) (characterizing the academic debate as "unsettled").

the same family) holds 5% or more of other companies in the same industry as the target, but it does not provide information outside the specific parties to the transaction. A full analysis of common ownership under proposed academic theories requires data on how competitors in an industry generally are held by common investors.

Accordingly, HSR filings are more useful for screening acquisitions of minority interests in the cross-ownership context than in the common ownership context.

6. **Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favour a convergence where no filing fees would be required anywhere?**

The HSR Rules require the acquiring party to pay a fee, currently in the range of US$30,000 to US$2.25 million depending on the size of the transaction, when submitting its filing. Both the FTC and the Antitrust Division of the DOJ are largely funded by HSR filing fees; therefore, changing the filing fee system would require a major overhaul to the congressional budgeting process.

7. **Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information (but only the turnover of the target and the turnover of the acquirer broken down according to statistical codes);**

The HSR prenotification form does not require market share information. However, recent informal comments by some officials at the antitrust agencies suggest that they may be considering expanding the information requests included in the notification form.[202] It is unclear if such additional requests, if any, will include market share information.

In our view, market share information requests impose significant burdens on the merging parties, as it requires defining the relevant market, which is often a resource-intensive exercise that is not always subject to universal agreement. Parties may affirmatively define the market in one way, but ultimately the agencies would still need to do the analytical work to assess competitive effects. Jurisdictions with a history of defining markets at the filing stage have published decades of precedent on which parties can rely when defining markets, and while this can provide guidance, it does not necessarily reflect changing technologies and dynamics that affect competition. Without consideration of a well-defined market and other factors

[202] See, e.g., Testimony of Chair Lina M. Khan Before the House Appropriations Subcommittee on Financial Services and General Government, May 18, 2022 (stating that Chairperson Khan's "goal is to introduce a new form that will collect upfront probative information about the merger").

affecting the competitive dynamics in a relevant market, market share information alone is unlikely to accurately reflect competitive effects.[203] Further, requiring market share information at the merger notification stage is likely to impose disproportionate burdens on the smaller merging parties as well as notifiable but non-problematic transactions.

8. What is the penalty in your jurisdiction for failure to notify? Please describe the legal provisions and provide a summary of the relevant precedents. If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?

Parties who close a reportable transaction without filing complete notifications and observing the waiting period are subject to civil penalties. As of January, 2023, the maximum daily penalty is US$50,120.

US antitrust agencies are unlikely to impose civil penalties the first time an acquirer inadvertently fails to file a required notification. Moreover, civil penalties for an inadvertent failure to file generally are mitigated by factors such as whether a prompt submission of a corrective filing was made, whether the acquirer gained any financial benefit, and whether safeguards have been implemented to ensure future compliance. A repeat offender, however, may face substantial fines, even if those fines fall short of the maximum daily penalty.

By way of recent examples, in late 2021, the FTC announced significant civil penalties in two matters.

(1) Werner Enterprises, Inc. founder Clarence L. Werner agreed to pay a US$486,900 civil penalty to settle allegations for failure to file. According to a complaint, over the course of more than a decade, Mr. Werner made several acquisitions of stock that should have been reported, including several large open-market purchases. The complaint alleges that he also made additional reportable acquisitions after learning that he was in violation of the Act.

(2) Biglari Holdings Inc. agreed to pay a US$1.4 million civil penalty to settle allegations arising from two acquisitions. According to a complaint, the acquisitions, coupled with its pre-existing holdings, caused it to exceed the filing threshold. Biglari claimed that it did not know that it had to aggregate its existing holdings when calculating the size of the transaction, but Biglari had previously been required to pay US$850,000 in civil penalties for failure to make other required filings.

9. "Negative experience" reports: does any member of your Country Working Group want to report a negative experience and/or an issue in any country (its own country or another one), where it had to report a merger? Most certainly, these "negative experience" reports will be made on an anonymous basis and will be treated confidentially. It is hoped that these real-life

[203] See, e.g., Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, Section 5.2 (2010).

examples will help support/substantiate the specific points where changes would be most needed.

In the United States, the Country Working Group reports three negative experiences.

First, the US antitrust agencies have indefinitely suspended "early terminations" of the waiting period under the HSR Act. The statutory waiting period in most cases is 30 days, or 15 days for cash tender offers or bankruptcies. Prior to the suspension, the agencies granted early terminations for transactions that raised no competitive concerns, in roughly half of notified transactions. After the suspension, parties must observe the full applicable waiting period for most reportable transactions irrespective of whether the transactions present concerns about adverse impacts to competition.

This suspension, which was originally supposed to be temporary but has been in effect since February 2021, imposes significant, undue burdens on the parties. As two commissioners on the Federal Trade Commission explained, "impeding the transfer of assets could have knock-on effects that harm employees, small businesses, and financially imperilled firms."

Second, both here in the US and abroad, competition agencies are now reviewing transactions that have little or no nexus to their countries or using foreign competition agencies to delay the review of domestic transactions. In at least one known instance, US antitrust agencies sued two biotech companies to protect hypothetical future competition, encouraged a foreign regulatory agency that lacks jurisdiction to pursue the investigation, and withdrew its federal court lawsuit to forestall a trial on the merits while pursuing an ultimately unsuccessful administrative trial. In another instance, a UK competition agency blocked a technology transaction that had no meaningful nexus to the UK, a move that many view as ignoring both tradition and principles of international comity.

Third, US antitrust agencies could streamline the merger review process by lowering some unnecessary procedural hurdles and burdens. For example, under current processes, the agencies essentially impose a strict liability regime for the inclusion of certain documents with the HSR filing, which can result in the agencies rejecting certain merger filings for technical issues that are inadvertent and result in no prejudice to the agencies. Similarly, the requirement to use the NAICS code system can impose needless costs and burdens on companies, as many companies typically do not track revenues using those codes. The agencies could expedite the merger review process, and conserve resources for all concerned, by resolving these issues.

10. **Other countries: are there any other country that should be included in our report? Please explain why?**

N/A

Summary Table

Draft recommendations	Comments
Recommendation 1: ICC recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or *de facto*) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic investments/transactions.	FOR. The change of decisive control may reorient the competitive incentives of the parties. Such is less the case in acquisitions of less than control.
Recommendation 2: ICC recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of *de facto* (sole or joint) control. Alternatively, ICC recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.	FOR, although unlikely not be adopted in the United States, where there is a long history of examining under-threshold transactions and prohibiting interlocking directorates where the minority investments is between competing entities.
Recommendation 3: ICC recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.	FOR. The vast majority of non-full functioning joint ventures are procompetitive and, given that, it is an inefficient use of resources to examine such transactions.
Recommendation 4: ICC recommends that the few countries, which have adopted market share thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.	FOR. The United States does not employ market shares as part of its merger control filing thresholds. Market share is an unpredictable threshold because the relevant market definition is often debated between the transacting parties and the reviewing agency.
Recommendation 5: ICC recommends that the few countries, which have adopted asset-value thresholds, should consider the possibility of abolishing such thresholds, taking into account the fact that most	AGAINST. Asset value as a threshold has worked in the United States, exempting certain transactions with minimum assets in the United States and thus limited nexus.

Draft recommendations	Comments
countries have adopted turnover thresholds, which are much easier to assess and to implement.	
Recommendation 6: ICC recommends that, for any acquisition of control by one or more acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover in the relevant jurisdiction.	FOR. Many countries that have no nexus requirement in their merger control thresholds cause unnecessary delay and transaction costs.
Recommendation 7: ICC recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.	FOR. The United States has a simplified form and merger control reviews are an iterative process whereby the reviewing agency is provided more information as its concerns grow.
Recommendation 8: ICC appreciates the absence of merger control filing fees in a number of jurisdictions (e.g. Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, ICC recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees. **If this is not possible, ICC further recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. ICC stands ready to engage in any**	AGAINST. The United States employs filing fees to fund the review agency. Accordingly, those that are required users of the process pay for it, while those who are not required to use the process do not pay.

Draft recommendations	Comments
discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.	
Recommendation 9: ICC recommends that antitrust agencies publish guidelines available both in their respective language(s) and in English on the following issues: (i) definition of a reportable merger; (ii) notification thresholds and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. ICC acknowledges that this is already the case for a number of regulators.	FOR. The United States merger control agencies have for years indicated that they are drafting new guidelines that explain their current review process and thinking. However, transacting parties have been in the dark for more than two years leading toa lack of transparency and predictability.
Recommendation 10: ICC recommends that the transaction parties should be able to apply for a waiver to close the transaction before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.	FOR. The possibility of shortening the suspensory period exists in the United States and had been successfully deployed for decades. The current United Staters merger control agencies have suspended such process without reason and against significant public disapproval. Further the United States merger control system has shortened suspensory periods for bankruptcy proceedings and tender offers. Having to hold up a necessary transaction in jurisdictions where there is limited or no nexus is inefficient.
Recommendation 11: ICC observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. ICC is of the view that such an approach	FOR AND AGAINST. Fines should be limited to the turnover in the jurisdiction where the gun jumping is claimed to occur. However, there must be clearly delineated requirements for when gun jumping occurs and closing around jurisdictions where

Draft recommendations	Comments
would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, *i.e.* the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.	there is significant delay and limited or no nexus should not be gun jumping.
Filing fees: summary description of existing competition rules, if any	See above.
Negative experience" reports	N/A, no filing fee in France

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