

**International Competition Network
Merger Working Group
Notification & Procedures Subgroup**

**SETTING NOTIFICATION THRESHOLDS
FOR MERGER REVIEW**



Report to the ICN Annual Conference
Kyoto, Japan
April 2008

***INTERNATIONAL
COMPETITION
NETWORK***

www.internationalcompetitionnetwork.org

Setting Notification Thresholds for Merger Review¹

The Recommended Practices for Merger Notification and Review Procedures (“Recommended Practices” or “RPs”) state that merger notification thresholds should apply only to transactions with a material nexus to the reviewing jurisdiction, and be based on objectively quantifiable criteria, such as sales or assets. Although they are specific in some aspects of notification thresholds, the Recommended Practices provide little guidance regarding the “material nexus” requirement. As a result, there has been considerable uncertainty and debate about how jurisdictions can establish thresholds that incorporate appropriate material local nexus standards. To address this situation, the Merger Notification and Procedures Subgroup studied how ICN members set and revise merger notification thresholds, surveying 21 members that have examined and adjusted their thresholds in recent years. This report summarizes the most significant results of the survey and seeks to identify approaches and methods that survey respondents indicated worked particularly well, with a view to assisting agencies planning to introduce or revise their notification thresholds in mandatory regimes.²

The principal findings of the survey indicate the following:

- **Start with the Recommended Practices.** The ICN Recommended Practices seek to provide useful guidance on setting notification thresholds; jurisdictions should ensure that their thresholds conform to the Practices, including that their thresholds (i) use revenue and assets based tests instead of market share based tests, and (ii) reflect domestic activities and not merely worldwide activities.
- **Set clear goals of threshold reform.** Setting the goals of threshold reform, such as increasing the percentage of notifications of transactions that raise competition concerns, or determining the desirable number of notifications, is an important first step in the reform efforts.
- **Consider different types of thresholds.** Achieving the goals of threshold reform may require changes to the type of thresholds a jurisdiction currently employs (*e.g.*, a greater focus on domestic revenues rather than worldwide revenues of the parties involved in a transaction).

¹ The Subgroup would like to thank Andreas Reindl for his significant contribution to this report, as well as David Anderson, Jonas Koponen, Dany Assaf, and Sarah McClean. The Subgroup also thanks the many colleagues in ICN member agencies that participated in the interviews that are the basis for this report.

² Thresholds can be an important element of a merger review regime in jurisdictions with voluntary notifications as well, where thresholds can either provide guidance to identify transactions that are most likely to attract the competition authority’s interest or define jurisdictional thresholds that determine whether a competition authority has the power to intervene against a merger. The working group’s survey demonstrated that several jurisdictions with voluntary merger review systems have given considerable thought to the question of how to develop appropriate thresholds. Given the different function of notification thresholds in voluntary and mandatory notification systems, however, this report will not review this discussion.

- **Benchmark based on past experience.** Several jurisdictions found benchmarking based on historical information particularly useful; this exercise has in several cases resulted in substantial upward adjustments of notification thresholds.
- **Compare thresholds with similarly situated jurisdictions.** Comparisons have proven useful in helping agencies determine a reasonable range for their thresholds.
- **Introduce flexibility for future reform.** It may be advisable to maintain flexibility for future adjustments by using inflation indices or by providing for the ability to make changes through non-legislative procedures.

I. Notification Thresholds and the Recommended Practices

Recommended Practices I and II provide guidance on jurisdictional nexus and notification thresholds for purposes of defining transactions that are properly subject to merger notification requirements and review.³ The Practices state that competition agencies should not assert jurisdiction over a merger unless the transaction would have an appreciable impact in the jurisdiction. In other words, jurisdiction should be asserted only over transactions that have a nexus with the jurisdiction concerned that meets an appropriate standard of materiality, based on the merging parties' activity within that jurisdiction. The "local nexus" thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired.

The Practices also recommend that notification thresholds should be clear and understandable, based on objectively quantifiable criteria (such as sales or assets, rather than market share), and based on information that is readily accessible to the merging parties.

While the guidance provided by the Recommended Practices is quite specific in some aspects, for example, preferring sales and assets in the jurisdiction concerned to market share, it is much less specific in other aspects, most notably regarding what constitutes an appropriate standard of materiality as to the level of local nexus required.⁴

³ See <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>. For more information on defining a transaction for purposes of merger review, see http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/23ReportonDefiningMergerTransactionsforPurposesofMergerReview.pdf.

⁴ The lack of specific guidance in the Recommended Practices reflects the fact that there has been no consensus on when thresholds reflect a "material nexus" or on what steps jurisdictions should follow to arrive at such thresholds. When a large number of jurisdictions introduced mandatory pre-notification systems in their merger review regimes, many in the 1990s, setting thresholds involved a large degree of guesswork and experimentation, and was characterized by a lack of transparency. The result was great variation among merger regimes. Accordingly, very little useful information about the factors to consider could be extracted from a comparison of thresholds across jurisdictions. Since then, however, several

II. The Purpose of Notification Thresholds

The Recommended Practices provide a useful explanation of why “materiality” matters. Notification thresholds should screen out transactions that are unlikely to result in appreciable competitive effects in a given jurisdiction, thus avoiding unnecessary transaction costs as well as the commitment of competition agency resources without any corresponding enforcement benefit.⁵ This rationale emphasizes that with an efficient and effective merger review regime, appropriate thresholds limit the expenditure of public and private resources in connection with the notification and review of mergers that are unlikely to raise any competition concerns, while minimizing the costs to society of mergers that have anti-competitive effects but escape review.

As several jurisdictions revising their thresholds have observed, notification thresholds using objective factors such as data on sales and/or assets of the parties or the size of a transaction are not very effective at predicting whether a transaction might raise competitive concerns. Invariably, objective thresholds cast a very wide net to catch the few transactions that merit a closer review. Nonetheless, it is important that thresholds are set at a level calculated to minimize the number of transactions that must be notified that are unlikely to raise competitive concerns, without allowing transactions that do raise concerns to fall outside the notification requirement. The Swedish study of notification thresholds explained, for example, that thresholds should be set at a level that minimizes the sum of error costs, *i.e.*, the costs of notifying and reviewing notifications with no competition concerns and the costs of anti-competitive mergers that escape notification requirements.⁶ As described in greater detail in Section IV, several countries have used this approach in their review of notification thresholds.

Market share thresholds may be a better predictor than objective thresholds for whether a transaction is likely to raise competitive concerns.⁷ In practice, however, a mandatory notification system based on market shares poses many difficulties and costs that all agencies interviewed on the topic concluded outweigh its potential benefits. Such a system injects costs and burdens into transactions, as well as considerable uncertainty and the possibility of substantial delays. As a result, the ICN Recommended Practices and

jurisdictions have revised their notification thresholds, some of them several times. In some cases, this exercise was based on a thorough review of the existing notification system and empirical testing of different thresholds, which provided useful data as a basis for reform, and offers insight that can be useful for other jurisdictions that plan to introduce or revise thresholds.

⁵ Recommended Practice I.B, Comment 1.

⁶ Konkurrensverket, Tröskelvärden för koncentrationsprövningar – Bättre omsättningsgränser för anmälan av företagskoncentrationer 31-33 (2006), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf; English summary available at http://www.kkv.se/upload/Filer/ENG/Publications/rap_2006-3_summary.pdf. Ideally, a jurisdiction should set notification thresholds at a level at which any additional increase in threshold values would cause a net loss to society as the increased costs from anti-competitive transactions that are not notified, reviewed, and remedied would outweigh any cost savings from the reduced number of notifications of transactions that do not raise competitive concerns.

⁷ This is true even though, for a number of well-known reasons, market shares or changes in market shares are far from perfect as a predictor of competitive effects; for example, even if they can be reliably measured, they are frequently not a good indicator of market power.

other international best practice documents on merger review, such as the OECD Recommendation on merger review, do not support the use of market shares in notification thresholds.⁸ Many jurisdictions have moved away from them in the recent past. As the report will describe below, several jurisdictions that more recently reviewed their notification thresholds, while acknowledging the potential benefits of market share based thresholds, decided against their use because of the costs and uncertainty they generate. Thus, despite their imperfections, thresholds based on objective criteria are preferred; the challenge is in establishing the appropriate criteria.

III. Additional Factors That Determine Costs and Burdens of a Merger Review System

In addition to notification thresholds, a range of other factors will also determine how effectively and efficiently a merger review system works; these factors may in turn influence the choice of appropriate notification thresholds. The combination of all factors will affect the assessment of whether a notification system is unduly burdensome or reasonably effective and efficient. These other factors, while important, are not a substitute for appropriate thresholds that comply with recognized best practices.⁹

Two additional factors are initial information requirements and the ability to quickly clear transactions that do not raise competition concerns.¹⁰ In jurisdictions that require minimal initial information from the parties, the impact of relatively low thresholds that may result in a larger number of notifications may be reduced because the total cost and burden imposed by such a system are relatively low. Canada, Germany, and the United States are well-known examples of such systems. Norway is another example of a jurisdiction that seeks to balance low notification thresholds that lead to a high number of notifications with very limited initial notification requirements. A number of jurisdictions also endeavor to limit notification requirements through an alternate short form notification, which parties can use when they notify a transaction that does not raise competitive concerns.¹¹

The United States and Germany are also examples of systems that can quickly and without additional information clear transactions that obviously do not raise competition concerns. This, again, will influence the perception of whether or not a notification system is considered unduly burdensome.

⁸ See 2005 Recommendation of the Council Concerning Merger Review, at http://www.oecd.org/document/59/0,3343,en_2649_37463_4599739_1_1_1_37463,00.html.

⁹ For example, having limited initial notification requirements may be an important factor to lower the costs and burden of a notification system, but this would not justify the use of thresholds that fail to ensure that notified transactions have a material nexus to the jurisdiction concerned, or otherwise are not in conformity with the Recommended Practices.

¹⁰ Another factor that can affect the costs imposed on merging parties is a filing fee. The subgroup prepared a report on filing fees, available at http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Filing_Fees.pdf

¹¹ Many short form notifications, however, will require more information from the parties as they typically will have to justify (for example, by demonstrating low market shares in affected markets) why the transaction qualifies for a short form/simplified notification.

There are other factors that influence where to set appropriate thresholds in order to minimize costs of a notification system. If, for example, a competition authority retains the ability to review transactions that fall below notification thresholds, the thresholds may be higher than in jurisdictions where notification thresholds also determine jurisdictional review, as there is less risk of error costs resulting from anti-competitive transactions that escape notification. Also, lower thresholds and an increased number of notifications may have particularly high opportunity costs for competition authorities with limited resources. A smaller authority forced to review too many transactions may have little or no resources left to pursue other important enforcement priorities, including cartel enforcement. South Africa appeared to be an example of such a country when it first introduced merger control. This would suggest that smaller, under-resourced authorities should seek comparatively higher thresholds. There may be less likelihood of under-enforcement in non-merger areas for a competition authority with a large staff.

Thus, merger notification is a multi-factor system in which numerous elements determine the optimal mix for each jurisdiction that seeks to minimize costs. Clearly, robust notification thresholds that comply with internationally recognized best practices remain the key factor, but many other factors affect a system's overall burdens and costs. While this report will not discuss any other factors, they should be kept in mind when determining what notification thresholds can be considered "appropriate" in a given jurisdiction.

IV. Setting Thresholds

The following section summarizes the analytical steps and methods used in setting thresholds that emerge from various country reports. Those most commonly used include: setting clear reform goals, including, where possible, a desirable number of notifications; benchmarking based on historical information; determining the appropriate threshold system; examination of domestic industries; comparison with similarly situated jurisdictions that have undertaken reforms; and mechanisms that facilitate future changes of thresholds.

A. Identify Goals of Reform

Reports from a number of jurisdictions highlight the importance of considering upfront what results threshold reform is designed to accomplish. A common goal is to lower the number of total notifications. There are also several examples of jurisdictions that wanted to improve the "mix" of notifications, *i.e.*, reducing the number of notifications of non-problematic transactions, thereby increasing the percentage of notifications of transactions that appear to raise competition concerns.

If a jurisdiction seeks to improve the mix of notifications, it should have some guidance on what would be an appropriate or desirable percentage of notified transactions that are considered problematic. The percentage of transactions that go into more complex (Phase 2 or Second Request - hereafter "second phase") review, measured over a period

of several years, could serve as a rough proxy for problematic mergers, although it would probably be better to include in such an assessment transactions that led to remedies before a second phase investigation was opened, and transactions that were abandoned pending review. The survey results suggest that “problematic” mergers constituting two percent of all notified mergers are at the lower end of a range. Several countries considered a percentage of at least five percent desirable.¹² Some jurisdictions without a second phase review process used other proxies to indicate the number of problematic mergers. In Canada, for example, the number of cases in which the Bureau used formal powers to obtain additional information was used as a proxy for notification of problematic transactions. That measurement also suggested that approximately two percent of all notifications concerned competitively sensitive mergers.¹³

In jurisdictions that articulated the principal goal of reform as the reduction in the total number of notifications, the agencies generally were careful not to lower the target number of notifications so much that problematic transactions would no longer be notified. That approach has the same effect as the approach discussed above: as the total number of notifications decreases and the number of notifications of problematic mergers is held constant, their share of all notifications will increase. For example, France confirmed that as a result of reforms the number of notifications was reduced while the number of problematic notifications remained constant.¹⁴

While most jurisdictions sought primarily to reduce the high number of “unnecessary” notifications, some agencies viewed a reduction in the number of potentially harmful mergers that escape review as the principal goal of reform. The Danish report explains, for example, that the principal focus of the reform debate was the number of problematic mergers that did not have to be notified to the competition authority (and that the authority therefore could not review) because of notification thresholds that were considered to be too high.

Another important goal in revising thresholds can be an adjustment to better target certain types of transactions that fall below the general thresholds for notification. In particular, a number of countries covered in the survey concluded that thresholds should be better targeted to result in a greater number of notifications of smaller, potentially problematic domestic mergers without increasing the total number of notifications. As explained below, if this is the goal of threshold reform, it might not be sufficient to adjust threshold

¹² The results may not always be so clear-cut, however. In the United States, for example, notification thresholds were raised simultaneously with efforts by the antitrust authorities to use the first phase waiting period to investigate vigorously so as to reduce the number of transactions that went to a second phase review (for which a Second Request issued). These two combined efforts would obviously affect numbers.

¹³ Another measure suggested by Canada would focus on the designation of “complex” and “very complex” mergers. With this measurement, approximately 12% of transactions are considered “complex” or “very complex.”

¹⁴ Improving the mix of notified transactions by increasing threshold values assumes that larger transactions/parties are more likely to result in second phase investigations. This may not necessarily be the case. Jurisdictions may be able to analyze their historical notification data to verify whether the assumption applies to them.

values upward or downward, but the threshold system may have to be adjusted (for example, by switching from worldwide to domestic revenues for secondary thresholds).

B. Consider the Type of Thresholds

Finding an appropriate notification threshold system may require not only the upward or downward adjustment of thresholds values, but also a broader inquiry about what types of thresholds a jurisdiction should choose.

For example, certain countries might benefit from using only domestic revenues in their thresholds, rather than a combination of worldwide and domestic revenues. A significant number of jurisdictions use a combination of a combined firm worldwide revenue threshold plus a domestic revenue threshold that typically at least two parties to the transaction must meet (or at least the target must meet). In such a system, the worldwide combined firm revenue threshold typically is set relatively high so that the authority is not overwhelmed with too many notifications. As a result, smaller, purely domestic transactions, which nevertheless potentially have negative effects in geographically narrower, domestic markets, might escape notification requirements because the parties do not meet the worldwide combined firm revenue thresholds. Whether such a risk exists will depend mostly on the structure of domestic industries and the size of firms that are active on domestic markets, compared to notification thresholds. In such a situation a country might be better off using domestic revenue thresholds, both for a combined firm revenue threshold as well as for the individual firm revenue threshold, to better capture transactions that affect the domestic market. Sweden, for example, found that its notification system would be better targeted if it replaced its worldwide revenue threshold of SEK 4,000 million with a domestic threshold of SEK 1,000 million. The proposed change was expected to have little effect on the total number of transactions, but to significantly increase the percentage of notifications of problematic transactions.¹⁵

During the review process, several countries also considered whether to switch to market share thresholds because they could better predict when transactions could raise concerns. In each of the reporting countries, these thresholds were rejected because they would insert too much uncertainty into the notification process. In some cases, jurisdictions also explicitly recognized that the use of market share based thresholds is not in line with internationally recognized best practice.

C. Consider Exempting Transactions that Do Not Raise Competitive Concerns

The notification system may also be better targeted by exempting certain types of transactions from notification requirements on the ground that they are unlikely to raise competitive concerns. For example, Canada currently exempts asset securitization transactions from notification requirements. The United States exempts several categories of transactions because of their low likelihood of raising competitive concerns in U.S. markets. Some significant exemptions are: intra-person transactions (where the

¹⁵ In addition, Sweden is considering raising the single firm domestic revenue threshold that would reduce the number of notifications.

acquirer already holds 50% or more of the voting securities of the target and further increases its shareholding, as well as where assets are transferred within the same group or owner of companies (*e.g.*, transfer of assets from one subsidiary to another subsidiary)); and transactions solely for purpose of investment (generally applicable if 10% or less of a company's voting stock is being acquired (15% percent if the acquisition is made by an institutional investor) solely for investment purposes, *i.e.* the acquiring person has no intention of participating in the basic business decisions of the issuer.)¹⁶ In Germany, a concentration between undertakings that had already merged previously arises only if the (second) concentration results in a substantial strengthening of the existing affiliation between the undertakings. Furthermore, if credit institutions, financial institutions or insurance companies acquire shares in another company for the purpose of resale, this does not constitute a merger, as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year.

Other jurisdictions use exemptions to limit the notification burden for smaller transactions. For example, in Argentina, an exemption provides that transactions that meet the applicable turnover thresholds need not be notified where the value of the transaction and the relevant assets are below a certain threshold, thereby exempting the need for small transactions to be notified. Similarly, in Germany merger control law also exempts transactions concerning markets that are of little relevance to the economy as a whole. This so called "minor market clause" applies as far as a market with a sales volume of less than EUR 15 million is concerned and the goods or services on this market have been offered for at least five years.¹⁷ Also, the "de minimis" clause in Germany provides that transactions in which one of the two merging parties is a small business do not fall under German merger control, even if the general thresholds are met.

D. Engage in Benchmarking Based on Historical Information

Many jurisdictions surveyed based the new thresholds, at least in part, on a review of data from previous transactions, evaluating the proposed revisions from this perspective. Although methodologies differed slightly, the basic approach was to look back at several years of previously notified transactions and examine how an increase in notification thresholds would have affected the sample of previous notifications and review. This exercise offered an indication of levels to which thresholds could be increased so that previous transactions that raised competitive concerns would still have been notified. Significantly, many countries that undertook such an exercise concluded that their thresholds could be raised substantially without undermining the effectiveness of their merger regime. The consistent experience in these countries suggests that their pre-

¹⁶ Other notification exemptions in the United States include: (i) transactions in the ordinary course of business; (ii) certain real property transactions (*i.e.*, purchase of certain types of real property including certain new and used facilities, unproductive raw land, office and residential property, hotels, certain recreational land, agricultural land, and retail rental space and warehouses); and (iii) acquisitions of carbon-based mineral reserves (*i.e.*, acquisitions of reserves or of rights to reserves of oil, natural gas, shale, tar sands and coal below a certain value).

¹⁷ Neither Argentina nor Germany was interviewed for this project. The subgroup includes them because they offer interesting examples of an option to consider in threshold reform.

reform thresholds were overly inclusive and captured a high number of non-problematic mergers.

In one case, a competition authority was able to undertake a similar benchmarking exercise before thresholds for mandatory notifications were introduced. The Norwegian competition authority concluded that the thresholds proposed by the legislature would be unworkable because they would result in an unmanageably high number of notifications; it suggested the use of an additional single firm threshold to limit the number of notifications. Although the number of notifications is still very high, even with the second threshold, the initial legislative proposal had been projected to result in five times more notifications than the thresholds that were implemented.

Without at least some empirical work covering past notifications and the potential effects of revised thresholds, any adjustment of thresholds remains guesswork that will not necessarily improve the mix of notifications and reduce the costs and burdens of a notification system. In addition, without an empirical basis for a discussion among stakeholders, concerns that higher thresholds might diminish the effectiveness of merger control as more anticompetitive mergers will not be notified may be much harder to overcome. The result could be weak compromises in threshold reforms that do not improve greatly the way a notification system operates.

E. Consider Identifying a Desirable Number of Transactions to Review Annually

Some countries reported that they considered a “target” number of notifications in reforming their thresholds. Of course, focusing only on the number of notifications has a number of problems. First, countries have different views as to what they consider the “right” number of notifications – for some the number can be very low, for others it can be higher. Thus, it would be impossible to determine a right number that applies across all jurisdictions. Second, countries may have different preferences in light of opportunity costs of merger review: if an agency has very limited resources, it might be better off limiting the number of merger notifications through higher thresholds and focus remaining resources on other areas, even if certain mergers that might raise competition issues would go un-notified. Agencies with more resources can handle more merger notifications if they have enough resources to pursue other important goals. Along the same lines, a lower number of notifications may be considered appropriate where an agency has the power to challenge non-notifiable mergers.

Nevertheless, consideration of what would be a desirable number of notifications can be a useful element in the reform process, if used in connection with other factors. Here again, simulation exercises based on past notifications can be useful to determine the likely number of notifications per year for different notification thresholds. Of course, focusing on the number of notifications should not divert attention from more important goals of threshold reform, *i.e.*, the reduction of costs and burdens of a notification regime.

F. Consider Size of Economy

The size of the economy may affect what a jurisdiction considers reasonable thresholds. A smaller economy may find that firms tend to be smaller (and have less revenues) than firms in similar markets in larger jurisdictions. This may explain why notification thresholds might be lower in smaller economies than in larger economies.

Some interviews suggested that it may be possible to target thresholds to individual country needs by taking into account the total domestic revenue of certain industries. Some agencies indicated that they also considered the size of domestic markets where anticompetitive effects of mergers could be a particular concern. This exercise can help to ensure that revenue based thresholds allow a competition authority to review mergers in specific markets. This goal can be accomplished in two ways, either by adjusting the generally applicable thresholds, or by lowering thresholds for specific industries.

Sweden is an example of the first approach. The Swedish study found that the existing combined firm revenue threshold, which referred to worldwide revenues, exceeded the total revenues of certain important industries in Sweden. This led to the proposal to lower the combined firm revenue threshold, but switch to combined firm *domestic* revenues instead.¹⁸

The Netherlands is an example of the second approach. There, the Ministry of Economic Affairs has the jurisdiction to lower thresholds for particular sectors, and is considering doing so in the healthcare industry. Any departure, however, from a system of general thresholds by using “industry” thresholds creates downside risks that should be carefully balanced against potential benefits. In particular, such a system might undermine legal certainty; it also might be difficult to formulate a principled approach to identifying industries where lower notification thresholds should apply. Canada has rejected the introduction of industry specific thresholds.

G. Compare Thresholds Used in Other Jurisdictions

Many of the jurisdictions interviewed reported that they compared proposed thresholds with thresholds in similarly situated jurisdictions. While many domestic factors may be more important in determining the result of threshold reforms, comparison with other jurisdictions is a useful benchmark. Such comparisons can be particularly informative if they include jurisdictions that have recently adjusted their thresholds after a more extensive study of their notification systems, and if other factors that affect the burden and costs of the notification system are also roughly the same. At a minimum, comparisons with peers can help to determine whether proposed thresholds are within a reasonable range.

¹⁸ At the same time, the study recommended an increase in the single firm domestic threshold from SEK 100 million to SEK 200 million. Thus, under the proposed system a notification would be required if the combined firms Swedish revenues exceed SEK 1,000 million and each of at least two parties has Swedish revenues exceeding SEK 200 million.

H. Thresholds may be Higher where Agencies have Jurisdiction to Review Non-Notifiable Transactions

Setting appropriate thresholds will also depend on whether thresholds confer jurisdiction to review a merger or merely establish a duty to notify. Jurisdictions where a competition authority has jurisdiction to review transactions below notification thresholds may be more comfortable with higher thresholds than those where notification thresholds are jurisdictional.

Systems that allow a competition agency to review non-notifiable mergers might be suitable in particular for newer competition regimes as they permit the use of higher notification thresholds that can reduce the number of notifications that the competition authority receives.

The competition agency's ability to review and challenge non-notifiable transactions may raise concerns about the lack of legal certainty. To address such concerns, jurisdictions might consider a two-tiered system with higher thresholds for mandatory notifications and a second, lower threshold above which the competition authority has the power to review non-notifiable transactions and firms can voluntarily submit their transactions for review. In the alternative, legal certainty could be increased by requiring an investigation or challenge of non-notifiable transactions within a relatively short period after the transaction has been consummated.

Current experience with systems that permit competition agencies to review non-notifiable transactions suggests that these systems work well in practice. Quite a few countries have such a system, and the national reports for this study did not suggest that there were concerns about competition agencies unjustifiably investigating non-notifiable transactions (or doing so long after the parties had consummated the transaction and combined their businesses). Nor were concerns raised about a lack of legal certainty.

I. Consultation with Stakeholders Can Help Build Support for Threshold Reforms

Reassessing and amending thresholds might not always be a smooth process as different stakeholders may have different priorities and everyone may not support the reforms. According to the subgroup's April 2005 report on Implementation of the ICN Recommended Practices, the experiences of many jurisdictions demonstrate that all stakeholders, including agency officials, private practitioners, and academics, can play an important role in the merger reform process. Members of the private sector have been effective in highlighting to agency officials the importance of merger reform and the benefits that it can accomplish. Some private parties have expertise or experience that makes them particularly well situated to identify specific problems with a merger review system. Several agencies reported that they consulted with stakeholders before enacting reforms to ensure their support.

J. Adjusting Thresholds should be a Continuous Process

Experience with frequent threshold reform in some countries suggests that good policy might incorporate a review and adjustment of thresholds on a regular basis.¹⁹ Adjustments can be desirable because initial reforms were less effective than anticipated in improving the mix of notifications a competition authority receives, and/or because inflation and the growth of the domestic economy may increase the number of notifiable transactions by lowering the thresholds in real terms.

Some jurisdictions increase thresholds using a price index or other mechanism to prevent a creeping real reduction in threshold values. Others have used inflation indices to determine adjustments in a one time only process without automatic adjustments. Another method to facilitate continuous adjustment is a mandatory review mechanism built into the merger review statute.

An example of a country with multiple threshold revisions is Belgium, where the notification regime has changed five times since 1991, including twice rejecting a market share threshold. On several occasions, more detailed studies and reviews were used in the revision process, leading to thresholds that the competition authority considers satisfactory because they keep the number of notifications very low, without evidence that anti-competitive transactions escape notification and review.

As repeated adjustments may be advisable over a period of time, jurisdictions may consider mechanisms for threshold changes that do not require legislative intervention. Some jurisdictions, for example, provide for the possibility of simple changes in threshold values by government decree or a decision by the competition agency.

V. Introducing New Thresholds

Most of the steps and methods discussed in the previous section focus on revision and reform of existing thresholds. As this report has suggested in several places, it has not been possible to develop a single threshold amount that reflects the Recommended Practices “materiality” requirement. Rather, countries generally have built upon their experiences with existing systems to determine a satisfactory level for threshold amounts. Of course, such an incremental development approach cannot be used by countries that are introducing notification thresholds for the first time. Several factors discussed in this report may also assist those jurisdictions in setting their initial thresholds.²⁰

¹⁹ This idea is supported in Recommended Practice XIII, on review of merger control provisions, which recommends that jurisdictions periodically review their merger control provisions to seek continual improvement in the merger review process, <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

²⁰ Other ICN work product may also be of assistance. *See*, for example, “Implementation Handbook: Examples of Legislative Text, Rules, and Practices that Conform to the Recommended Practices” at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf; and the definitions report *op. cit.*

First, the Recommended Practices provide specific guidance that can be relatively easily implemented. In particular, the more specific recommendations include the use of objectively quantifiable criteria for thresholds (such as the parties' sales or assets, rather than market share). In addition, the Practices emphasize that the parties' activities in the relevant jurisdiction should be taken into account in determining whether their transaction must be notified. Accordingly, notification thresholds should include a reference to the parties' local revenues or assets, and not solely to the parties' worldwide revenues. Vague factors such as a "local effects" to establish jurisdiction or to exclude jurisdiction where such effects are lacking, ought to be avoided.

Second, a comparison with similarly situated jurisdictions may provide useful guidance, in particular with those jurisdictions that have reformed their notification system and where the notification system appears to be effective. Annex B provides information on ICN members' thresholds that conform to the Recommended Practices. Other jurisdictions do not conform for one or more of the following reasons: (1) a merger filing can be triggered by the merging parties' worldwide sales or assets without regard to local nexus; (2) the local nexus test can be satisfied by the sales or assets of the acquiring party alone; (3) notification requirements are based on market share or other non-objective criteria.

Guidance in determining appropriate threshold levels may also be obtained from industry-wide revenues of domestic industries or the size of firms in domestic markets with particular concerns about effects of anticompetitive mergers. In newer emerging market economies, this might include, for example, the size of energy or communications industries, the banking sector, or other industries where review of transactions appears to be particularly desirable. Thresholds could be set at a level so that at least certain transactions in these industry sectors are subject to notification requirements. Alternatively, jurisdictions may consider "special" (lower) thresholds for transactions in a few specified domestic industries that could then give them greater comfort to adopt higher thresholds for all other transactions, although, as described above, any advantages from using non-unitary thresholds must be balanced against the downside risks of such a system.

In addition, countries may consider adopting thresholds that refer solely to the parties' domestic revenues, while avoiding thresholds that refer to the parties' combined worldwide revenues. A notification system that focuses on the parties' combined domestic revenues plus the domestic revenues of at least two parties can be used much more effectively to target transactions with a significant domestic impact. Notification thresholds that refer to the parties' worldwide revenues create two risks: they might result in a high number of notifications of transactions that have little domestic impact which can impose enormous costs in particular on newer competition authorities with limited resources and experience; at the same time, smaller domestic transactions with a potential negative impact on domestic market may escape notification and review.

Along the same lines, when considering the appropriate notification thresholds, countries need to be cognizant of the potentially significant costs of a merger review regime that

requires a large number of notifications of competitively insignificant transactions. Certain jurisdictions initially established rather low thresholds and later revised them upward significantly without losing notifications of problematic transactions. Thus, it may be advisable to consider these costs when the notification thresholds are initially set so as to avoid setting them too low and later being forced to substantially increase them.

Another method to limit the number of notifications a competition agency receives without creating an unreasonable risk that anticompetitive mergers will not be reviewed is a de-coupling of notification requirement and the competition agency's jurisdiction and ability to review a transaction. As discussed above, additional steps can be taken to increase legal certainty in such a system, although experience in jurisdictions that have such a system suggests that there are few, if any, complaints about insufficient legal certainty. The number of unnecessary notifications can also be reduced by creating exemptions for transactions that almost certainly will not raise competitive concerns (*e.g.*, asset securitization transactions or other exemptions as discussed in Section IV.C above).

It also may be advisable to provide for periodic review of thresholds when a new merger review regime is adopted. For example, when thresholds are adopted for the first time, a competition authority could be compelled within a relatively short period of time to assess the effectiveness of the notification regime in order to determine whether adjustments to thresholds would be advisable. In addition, jurisdictions may consider mechanisms to facilitate the adjustment of notification thresholds, such as periodic adjustments based on a price index, or mechanisms to adjust notification values through simplified procedures and without legislative intervention.

Annex A

ICN Jurisdictions Participating in Survey

1. Australia
2. Austria
3. Belgium
4. Canada
5. Czech Republic
6. Denmark
7. El Salvador
8. European Commission
9. Finland
10. France (DGCCRF)
11. Honduras
12. Japan
13. Mexico
14. Netherlands
15. New Zealand
16. Norway
17. Russia
18. Singapore
19. South Africa (Competition Commission)
20. Sweden
21. United States (FTC and DOJ)

**ANNEX B. CHART OF ICN JURISDICTIONS' CONFORMING THRESHOLDS
 (MANDATORY REGIMES)**

Jurisdiction	2006 Total GDP (EUR billions) ²¹	Turnover Local Threshold Amount [each of 2/target] (in EUR millions)	Assets Local Threshold Amount [each of 2/target] (in EUR <u>millions</u>)
Belgium	312.2	40	
Croatia	34.0	3.5	
Canada	996.7	34.6	
Denmark	219.2	40.2	
EFTA	562.7	100.0	
Estonia	13.1	1.9	
European Union	11569.9	100.0	
Finland	166.8	20.0	
France	1,776.6	50	
Hungary	89.9	1.9	
Iceland	12.6	0.6	
Ireland*	177.3	2	
Japan	3456.6	6.8	6.8
Korea	707.3	16.7	25.0
Lithuania	23.7	1.4	
Malta	4.4	0.2	
Mexico	668.4	66.5	31.0
Netherlands	523.7	30	
Norway	247.7	2.5	
Romania	96.9	4.0	
South Africa	203.1	23.4 and 3.5	23.4 and 3.5
Sweden	306.6	10.8	
Switzerland	302.5	63.6	
United States	10514.4	50.2	

* One prong of Ireland's two part nexus test does not specify a value, and therefore does not meet the "materiality" requirement of the RPs

²¹ Exchange rate calculated at 2006 levels.

ANNEX C. Case study: Reforms of the Belgian merger control thresholds

Domestic merger control was first introduced in Belgium in 1993 following the enactment of the country's first competition regime in 1991. Since then, Belgium's merger notification thresholds have been adjusted on four separate occasions (March 1995, April 1999, June 1999 and July 2005). While each reform occurred for slightly different reasons, the main underlying aim for each was to reduce the number of unproblematic transactions notified to the Belgian Competition Authority (the "Authority")²² to ensure sufficient resources were available for other enforcement tasks.

The evolutions of Belgium's merger notification thresholds are instructive from an ICN Recommended Practices ("ICN's RPs" or "RP") perspective. Since the enactment of the original thresholds in 1991, the Belgian thresholds have undergone a steady progression from what would now be seen as RP non-compliance in their early days (thresholds involving a turnover and market share tests with limited or no local nexus requirement) to full RP compliance today (thresholds involving only local turnover set at appropriate levels for the Belgian economy). In fact, the latest reforms in 2005, which produced the thresholds applicable today, had as one of their stated aims that the Belgian thresholds should be fully compliant with the ICN's RPs.

Mandatory merger review introduced by the Competition Act of 1991

The Competition Act of 1991 introduced a mandatory merger notification regime. The thresholds required the notification of concentrations where:

- (i) the combined worldwide turnover of the parties exceeded BEF 1 billion (approx. € 25 million); and
- (ii) the combined market share of the parties exceeded 20 per cent of the market concerned (no aggregation needed).

These original turnover threshold had no empirical basis and involved industrial policy considerations. It was set at a fairly low level in order to ensure that the Authority had the power to intervene in the mergers of even relatively small Belgian businesses. The market share test was derived from the then draft EC Merger Regulation ("ECMR") which indicated that the EC Commission would not block mergers with a market share below 20 per cent. The rationale behind the market share test was that the Authority would not require notification of a merger that the EC would not block, thus, in effect, a substantive test was used for jurisdictional purposes.

First amendment (March 1995)

The 1991 thresholds resulted in a significant number of mergers being notified to the Authority which posed no threat to competition on the Belgium market. The Authority had to divert a significant proportion of its limited resources away from non-merger work

²² Comprising the Competition Service (investigatory body) and the Competition Council/College of Prosecutors (decisional body)).

to reviewing mergers with little or no connection with Belgium. The rationale behind the 1995 amendment was to limit the number of notifications and allow the Authority to re-balance its enforcement resources.

The revised thresholds involved an increase in both turnover and market share levels. The new thresholds required the notification of concentrations where:

- (i) the combined worldwide turnover of the parties exceeded BEF 3 billion (approx. € 75 million); and
- (ii) the combined market share of the parties exceeded 25 per cent of the market concerned (no aggregation needed).

Second amendment - (April 1999)

The 1995 amendments did not have the desired effect, as, by 1997, the number of merger notifications had reached an all-time high of 60. The Authority had hoped that the use of an “effects” test, whereby the thresholds could only be met where the target had some local turnover or share, would help eliminate the notifications of mergers with no local effects. However, the non-legislative “effects” test and the legislation’s market share test provided too much uncertainty to merging parties, and as a result, merger notifications did not decrease. The Authority found that parties continued to either notify unproblematic deals on a “fail safe” basis or had to engage the Authority’s staff (in this case, the Competition Service) in such extensive pre-filing dialogue to establish jurisdiction (which still often resulted in fail-safe filings as the Competition Service could not bind the Competition Council on jurisdictional issues) that the resource utilisation issue did not diminish as hoped.

It was against this background of an increasing workload due to more mergers than ever before being notified, that the Authority undertook detailed research before putting forward any further reforms.

Goals of reform

When undertaking the research to reform the merger thresholds, the Authority applied six key conditions:

- the new threshold test must be clear and objective to ensure legal certainty. The new thresholds had to be objective and based on turnover;
- the new threshold test should limit the number of notification to only those having a material impact on the Belgian market;
- the new threshold test must have a local nexus and therefore the turnover test applied should be Belgian turnover only;

- the new threshold test should be set at a sufficiently high level to free up resources and to allow the Authority to focus on notifications with material issues;
- the new threshold test should increase the similarity between the Belgium system and that at EU level under the ECMR; and
- the new threshold test should ensure to the greatest extent possible that the thresholds would not result in potentially problematic (second phase) mergers escaping the notification requirement.

Research results - local nexus and market share issues

The Authority's analysis determined that the 1991 and 1995 turnover thresholds did not meet the conditions for reform as:

- the threshold test was combined and, as such, a filing was technically possible where one of the parties did not have any activities in Belgium; and
- the turnover was worldwide and, as such, had a limited local nexus.

The analysis also highlighted the following problems relating to the 1991 and 1995 market share thresholds:

- the difficulty (and expense) parties faced when defining the relevant product and geographic market(s);
- the difficulty (and expense) parties faced when estimating market shares;
- the difficulty (and expense) parties faced when determining combined market shares - in particularly when the merger notification was in relation to a hostile bid; and
- the drain on the Authority's resources consulting with parties on the applicability of the market share and effects tests.

Revised merger thresholds

The reform work that started in 1997 led to a revision of the thresholds in April 1999. The new thresholds changed the worldwide turnover test to a domestic turnover test and eliminated the market share test. The new thresholds required the notification of concentrations where:

- (i) the combined turnover of the parties in Belgium exceeded €25 million; and
- (ii) at least two of the firms concerned each had a turnover in Belgium of at least €10 million.

In setting these thresholds, the Authority undertook a filing “impact analysis” and determined that the revised thresholds would have reduced the number of merger notifications received by some 80 per cent.

Third amendment - an increase in turnover (June 1999)

The reforms enacted in April 1999 involved major changes to the very nature of the thresholds and as such they had to be put through a full (and lengthy) legislative procedure. The actual value of the threshold levels was agreed by the legislature much earlier in the process and by the time they came into force in April 1999, they were viewed as out-of-date and too low.

As a result, the April 1999 thresholds were subject to an almost immediate increase affected through a quicker process (as they only involved increasing the financial levels) that went through in June 1999.

The new thresholds required the notification of concentrations where:

- (i) the combined turnover of the parties in Belgium exceeded €40 million; and
- (ii) at least two of the firms concerned each had a turnover in Belgium of at least €15 million.

Fourth amendment (July 2005)

In September 2002, a new review was instigated which eventually resulted in the July 2005 reforms and the thresholds in effect today. The reform process was led by a group of experts (the “Group of Experts”) from members of the private bar, the Authority, academics, and members of the Federation of Enterprises in Belgium.

Goals of reform

The Group of Experts had a number of key objectives to achieve when devising the revised thresholds. These objectives were:

- the new threshold test should be clear and objective;
- the new threshold test should ensure a clear jurisdictional nexus;
- the new threshold test should be set at a sufficiently high level to ensure only mergers with significant local impact would be caught;
- the new threshold test should be clear and readily accessible; and
- the new threshold test should aim to ensure that Belgian merger control is fully in line with ICN’s RPs.

Application of impact analysis

Research carried out by the Group of Experts involved a full consideration of various threshold systems including worldwide turnover, local turnover, all parties' turnover, target companies turnover, and market share thresholds.

Further work was carried out on individual turnover threshold levels to determine, based upon previous filing data, the number of likely filings that would result at differing Euro threshold levels, focusing primarily on the turnover required in Belgium for individual parties at the €30 million and €40 million levels. The research revealed that at the €30m level, too many non-problematic cases were caught, whereas at €40m, many fewer non-problematic cases were caught and, crucially, all previous phase two cases would have been caught. Accordingly, the analysis favoured the use of the €40m figure for the second threshold.

The Group of Experts also considered the reintroduction of a market share test but concluded it was not a viable option for the same reasons it was removed in the first place. The thresholds were also assessed to test whether the relevant level would have resulted in any previous "second phase" cases not being caught by the notification requirement.

The reform project also included consideration of the thresholds applicable in neighboring and similarly sized economies. Dialogue with Dutch colleagues was found to be particularly helpful on account of geographical proximity and similarities in the relative size of each country's economy.

Revised merger thresholds

The reform work resulted in a revision of the thresholds in July 2005 that are the thresholds applicable in Belgium today. The current thresholds require mandatory notification in respect of concentrations if:

- (i) the combined turnover of the parties in Belgium exceeds €100 million; and
- (ii) each of at least two of the parties concerned has a turnover in Belgium of at least €40 million.

Even with thresholds set at this level, the Authority has recognized that they will still catch some non-problematic transactions. In such cases, in order to reduce the burden on the parties and the agencies, the Authority has instituted a "simplified procedure" involving a reduced information burden for the parties and a reduced investigation time period.

Ongoing reform

In order to ensure that Belgium's merger thresholds are reviewed regularly, they are subject to an evaluation by the Authority every three years. This evaluation takes into account, among other things, the economic impact of the mergers reviewed and the administrative burden placed on undertakings that have to comply with the merger

notification rules. It also ensures that the merger thresholds take into account changes in market conditions and any inflationary pressures.

The levels set after the 2005 reforms are proving to be a success. They are perceived by the staff to be working well, catching the right cases, and keeping notifications to the minimum required to discharge their duties fully. In 2007, the Authority received 17 total notifications, 16 of which were handled through its simplified procedure and one which went into the second phase procedure (and is still on-going at the time of writing). In addition, the current thresholds are also broadly perceived to be working well by the private sector, a result greatly assisted by the inclusion of and input by the private sector in the 2005 reform process.

Accordingly, at this time it appears unlikely that the Authority's staff will recommend changes when the next three-year review is undertaken during 2008/2009.

Dave Anderson, Partner, Berwin Leighton Paisner LLP

Bert Stulens, Competition Prosecutor General, Belgian Competition Authority
March 2008

ANNEX D. Case study: Reforms of the Swedish merger review thresholds

Merger review was introduced in Sweden in 1983²³ and thresholds for mandatory notification were first adopted in 1993.²⁴ Since then, the thresholds have been adjusted twice (in 1997 and 2000) with a view to reducing the number of unproblematic notifications.

In 2005, the Swedish Competition Authority (“Authority”) received 90 merger notifications; 75 in 2004; and 65 in 2003. In that period, in-depth investigations were opened in approximately 2.5 per cent of the notified cases.

The current Swedish legislation prescribes mandatory notification in respect of concentrations if:

- (i) The combined global turnover of the parties exceeds SEK 4,000 million (around €425 million); and
- (ii) Each of at least two parties has a turnover in Sweden exceeding SEK 100 million (around €11 million).

In case of transactions that meet only the first, but not the second threshold, the parties may voluntarily notify concentrations and the Authority may also request such concentrations to be notified.

In 2006, the Authority published a report containing an in-house analysis of how the current thresholds have operated and a proposal for new thresholds. The Authority’s proposal was included in the Swedish Government’s Bill for a new Competition Act, which was sent to Parliament in March 2008.

1 Mandatory merger review introduced by the Competition Act of 1993

The Competition Act of 1993 introduced mandatory merger review in Sweden. Section 37 of the Act prescribed mandatory notification of “acquisitions” of companies conducting business in Sweden if the combined global turnover of the parties exceeded SEK 4,000 million (around €425 million).

The preparatory works to the Act stated that merger control should only occur in exceptional circumstances and that only the largest acquisitions should be subject to review. Therefore, SEK 4,000 million (around €425 million) was considered to be a reasonable threshold level.²⁵

2 The 1997 reform

Since the 1993 rules only related to global turnover and the target conducting business in Sweden, many notifications involved parties with only a negligible turnover in Sweden which posed no threat to competition on the Swedish market. A committee appointed to evaluate the 1993 Act found that a reform of the merger

²³ *Konkurrenslag (1982:729)*.

²⁴ *Konkurrenslag (1993:20)*.

²⁵ Prop. 1992/93:56, p. 40.

thresholds was so urgent that it put forward a proposal for change even before it had completed its review of the Act as a whole.²⁶

Several different alternative changes were considered. Some industry representatives argued that the mandatory regime ought to be abolished altogether and that the Authority should investigate mergers on its own initiative. Others argued that the threshold should be increased or reduced. Alternative thresholds, e.g., based on market shares, were also discussed.

With the objective of ensuring that most notified acquisitions had a real connection to Sweden (i.e., in addition to the target conducting business there), the Swedish Government was of the view that absent a sufficiently high turnover generated in the country, transactions should be excluded from notifiability.²⁷

Accordingly, Section 37 of the Act was reformed in 1997.²⁸ The amended provision added, in addition to the requirement that combined global turnover of the parties exceed SEK 4,000 million (around €425 million), a requirement that the target company had a turnover in Sweden exceeding SEK 100 million (around €11 million). Moreover, in circumstances where the new requirement was not fulfilled, the Authority was given the option to request that the parties' file a notification, if this was justified in particular cases. In addition, parties were entitled to notify such acquisitions voluntarily.

When the 1997 change was prepared, it was argued that the new threshold should be set at SEK 200 million (around €21 million) rather than SEK 100 million (around €11 million), particularly since the SEK 200 million threshold was used in the Authority's *de minimis* guidelines for restrictive agreements.²⁹ Ultimately, it was thought that the *de minimis* guidelines had been designed for a purpose (i.e., agreements and concerted practices between "small" undertakings and decisions of associations between "small" undertakings) that was not analogous to merger review and that a lower threshold was appropriate for the purposes of merger review.³⁰

The Government-appointed committee which conducted the review of the thresholds proposed that acquisitions of target companies that did not reach the SEK 100 million (around €11 million) threshold should still be subject to mandatory notification, where an acquisition resulted in the creation or strengthening of a dominant position on the Swedish market.³¹ This proposal was deemed to be fraught with definition problems, unpredictable, and too prone to errors, in large part because of the subjective nature of the requirement. With a view to avoiding under-enforcement, the Authority was given powers to request,

²⁶ *Konkurrenslagsutredningens (N 1995:11) förslag till ändring av anmälningsskyldigheten vid företagsförvärv enligt 37 § konkurrenslagen (1993:20)* and Government Bill 1996/97:82, p. 5 and 9.

²⁷ Prop. 1996/97:82, pp. 9-11.

²⁸ *Lag (1997:221) om ändring i konkurrenslagen (1993:20)*.

²⁹ *Konkurrensverkets författningssamling (KKVFS) (1993:2)*.

³⁰ Prop. 1996/97:82, pp. 9-10.

³¹ *Konkurrenslagsutredningens (N 1995:11) förslag till ändring av anmälningsskyldigheten vid företagsförvärv enligt 37 § konkurrenslagen (1993:20)*.

in particular cases, notification of acquisitions where the SEK 100 million (around €11 million) threshold was not satisfied.³²

3 The 2000 reform

Another reform of Section 37 took place in 2000, motivated by the goal of bringing the regime more closely into alignment with the EC Merger Regulation,³³ by introducing the “concentration” concept to describe the class of transactions capable of being reviewed. In addition, the thresholds prescribing mandatory review were altered to mirror the world-wide/national turnover-based thresholds used in the EC Merger Regulation. The purpose of this revision was to reduce the number of simple filings and thereby enable the Authority to allocate resources more efficiently, as well as to exclude from notification requirements the concentrations that occurred abroad and did not have sufficient effect on the Swedish market.³⁴

This reform resulted in the wording of Section 37 that is in force today.³⁵ The relevant thresholds prescribe mandatory notification for concentrations where: (i) the combined global turnover of the parties exceeds SEK 4,000 million (around € 425 million); and (ii) each of at least two parties has a turnover in Sweden exceeding SEK 100 million (around €11 million). Parties may voluntarily notify concentrations even if the second requirement is not satisfied, and the Authority may also in particular cases request such concentrations to be notified.

The amendment to Section 37 that was ultimately adopted did not reflect the Government-appointed revision committee’s recommendation that each of at least two parties should have a turnover in Sweden exceeding SEK 200 million (around €21 million), which it believed would allow for a more efficient use of resources. Moreover, the committee argued that the option to request notifications of smaller concentrations, where the threshold was not met, should be a sufficient tool for the Authority to ensure that anticompetitive concentrations were curbed. The committee believed that a higher threshold would mean an increase in the number of voluntary notifications.³⁶

Statistics relied upon by the Swedish Government in selecting the lower threshold showed that there were few companies with a Swedish turnover above SEK 200 million, but that many firms generated turnover in the range between SEK 100 million and SEK 200 million. It was thought that a SEK 200 million threshold would render it more likely that the Authority would request notifications. The Government’s view was that this, in turn, would entail too much unpredictability for merging parties. Moreover, since Swedish thresholds appeared high in

³² Prop. 1996/97:82, pp. 10-11.

³³ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. [1990] L/257/90, as amended.

³⁴ Prop. 1998/99:144, p. 68-70.

³⁵ *Lag (2000:88) om ändring i konkurrenslagen (1993:20)*.

³⁶ Prop. 1998/99:144, p. 69.

comparison with thresholds in other EU Member States convinced the Government that SEK 100 million was the best solution.³⁷

The SEK 4,000 million (around €425 million) threshold was reviewed, but not changed. The committee raised, in addition, the question about excluding certain types of concentrations from the obligation to notify as these types of concentrations normally do not raise any anticompetitive concerns. But this question was abandoned since it was deemed to be likely to lead to definition problems and create unpredictability.³⁸

4 The Swedish Competition Authority's 2006 review and report

The Authority reviewed the current thresholds in 2006 and, on the basis of its findings, prepared a report that proposed changes to the current thresholds.³⁹

Under the Authority's proposal, a concentration would be subject to mandatory notification where:

- (i) The parties' combined turnover in *Sweden* exceeds SEK 1,000 million (around €106 million); and
- (ii) Each of at least two parties has a turnover in Sweden exceeding SEK 200 million (around €21 million).

The Authority's possibility to request notifications, and the option for merging parties to notify voluntarily, were proposed to be retained in respect of transactions where the second requirement is not satisfied.

According to the Authority, these changes would allow for a more targeted merger review by: (a) capturing transactions more likely to produce significant effects in Sweden (having regard to the role of national merger review within the broader EU framework); and (b) reducing the number of simple cases. The Authority did not necessarily expect that its proposal would reduce its merger workload, since the complexity of the transactions notified was expected to increase.

4.1 Objective: A more focussed review system

The aim of the 2006 Report was to investigate the effectiveness of the current thresholds against the backdrop of experience gained over several years. When notification thresholds were introduced in 1993, there was no Swedish experience as to what methodology to use in order to set the merger thresholds at an appropriate level. Furthermore, it was generally thought that there was scope, under the current system, to reduce the administrative burden for both companies and the Authority. Since only a very small (by international comparisons)

³⁷ Prop. 1998/99:144, p. 70.

³⁸ *Betänkande av Konkurrenslagsutredningen SOU 1998:98, Konkurrenslagens regler om företagskoncentration*, pp. 245-246.

³⁹ The analysis and proposal for reform is set forth in the report *Tröskelvärden för koncentrationsprövningar – Bättre omsättningsgränser för anmälan av företagskoncentrationer*, available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf; English summary available at http://www.kkv.se/upload/Filer/ENG/Publications/rap_2006-3_summary.pdf.

proportion (around 2.5 per cent) of all notifications resulted in in-depth investigations, it was thought that a revision could help modify the caseload so that complex matters would represent a larger proportion of all notifications and the percentage of notifications leading to second phase investigations would increase. In other words, the Authority was concerned not so much about effects on the absolute number of notifications, but about a system that would better target the problematic transactions. The Authority also believed that a revision of the thresholds was advisable, with a view to increasing convergence with the OECD Council Recommendation on merger review and the ICN Recommended Practices for Merger Notification and Review Procedures.

4.2 Sources: The agency's own resources/experience and international comparisons

Initially, the Authority considered whether industry and trade organizations should be heard as part of the review process, but ultimately the Authority decided to use its own material and experiences in the report and to complement this with statistics from other national competition authorities. Based on the Authority's experience with the current legislation, the report identified specific problems in the way the current thresholds determine notifiability of concentrations.

4.3 Market share thresholds not appropriate

The Authority considered at an early stage of the 2006 reforms whether market shares could be analysed as a potential substitute or complement to the current thresholds. In line with international best practice, such a scheme was abandoned early owing to lack of predictability.

4.4 The upper threshold: Reduce the absolute level, narrow the geographic scope

The Authority found that since the Swedish economy is relatively small, many concentrations could result in considerable negative effects on competition in spite of the fact that the parties' combined worldwide revenues fell below the threshold of SEK 4,000 million. The analysis in this regard was based on experiences from previous cases and on statistics on the structure of the domestic economy.

By way of example, a case in 2005 involved the planned combination of the #1 and #2 Swedish cinema chains. The acquisition would have led to a very high market concentration, but the turnover of the total cinema market was just above SEK 1,000 million. That transaction had been notifiable only because the acquiring party belonged to a group of companies with a turnover exceeding SEK 4,000 million. In addition to cinemas, the report also highlighted other industries (including opticians, car rentals and commercial radio channels) where the domestic, industry-wide turnover was less than SEK 4,000 million.

The current rule, which references global turnover, was deemed to be inappropriate, since global turnover is typically a poor indicator of domestic competitive impact. Some matters are like the cinema case, where the threshold is not reached even though a transaction represents a credible threat to effective competition. In other cases, only a small part of the turnover originates from

business in Sweden, and in most of those cases, the effects on competition in Sweden will be negligible.

The Authority also compared the Swedish thresholds to the notification standards used in other jurisdictions. Compared to thresholds used in several, similarly situated European states (Denmark, Finland, Belgium, Netherlands, Switzerland), and having regard to the relative size of the Swedish economy, the SEK 4,000 million threshold was deemed to be too high. Conversely, the lower threshold, which references domestic turnover of SEK 100 million, was deemed to be too low. The report concluded that by reducing the upper threshold from SEK 4,000 million to SEK 1,000 million the number of notifications would in principle increase – but that such an increase would be offset by a change from global to domestic turnover.

All in all, the report recognised that it is difficult to assess the impact of a reduced upper threshold, especially since the case-mix would also expect to change. It was also not possible to rely on statistics derived from prior cases to any great extent. Reducing the threshold will naturally lead to more notifications, but it is not possible to quantify the increase with certainty. The report estimated a likely increase of between 25 to 30 per cent.

It was easier to measure the impact a narrower geographic scope for the threshold would have had on previous cases, since notifying parties report their Swedish turnover pursuant to the notification form. The Authority found that by replacing global with domestic turnover, the number of filings made in the past would have been reduced by 22 per cent.

Thus, while ultimately the absolute number of notifications might not be reduced by the proposed changes, the revised thresholds were expected to better target transactions more likely to raise competition problems. The report estimated that the number of problematic cases that might be identified and resolved under the proposal could increase by 40 per cent.

Few problematic concentrations are close to the current threshold of SEK 4,000 million. In the large majority of the concentrations that have resulted in in-depth investigations, the parties' combined global turnover was well above SEK 4,000 million.

4.5 The lower threshold: Increase the absolute level

In contrast to the upper threshold, the Authority found that the lower threshold was too low, when compared to the same type of thresholds used in other comparable countries. The report concluded that by raising the lower threshold to SEK 200 million, the number of notifications could be reduced by 40 per cent without seriously risking that harmful concentration would “fall between the cracks”. This conclusion was reached by applying the suggested threshold to a sample of previous actual notifications.

4.6 Retain the possibility of requesting notifications in particular cases

As discussed above, the Authority has the power to request, in particular cases, that parties notify (before or after closing) concentrations that do not satisfy the SEK 100 million threshold. The Authority recognized that this possibility reduces predictability for merging parties and, accordingly, it is used very restrictively. Indeed, it has been used only on two or three occasions since 1997. Obviously, a precondition to requesting a filing is that the Authority is aware of the concentration. In this regard, the report confirms that the Authority's experience shows that it likely becomes aware of anticompetitive concentrations. With the current regime, the Authority becomes aware of one or two concentrations each year that it would have wanted to investigate but lacked jurisdiction because of the SEK 4,000 million threshold.

5 The Government's 2008 proposal for reform

In February 2008, the Swedish Government launched a proposal for a new Swedish Competition Act.⁴⁰ Most of the obvious changes in the Government's proposal were editorial or procedural in nature. With respect to the merger review system, the Government proposed the following changes:

- New jurisdictional thresholds: The Government proposed that the thresholds be changed as recommended by the Authority's 2006 report. The Government's proposal was primarily motivated by findings in that report.
- New triggering event: The Government proposed that it should be possible for merging parties to notify a transaction for review as soon as they can demonstrate that they intend to carry out a notifiable concentration. A concentration shall be notified before it is put into effect. This proposal entails an alignment with the EC Merger Regulation and with ICN Recommended Practices.
- Extension of review period when remedies are offered: The Government proposed that the Authority's review of mergers in Phase I be extended by 10 working days (i.e., from 25 working days to 35 working days) when a party proposes commitments to resolve competition concerns identified by the Competition Authority. This proposal would entail an alignment with the procedure under the EC Merger Regulation.
- New substantive test: The Government proposed that the new Competition Act should contain a substantive review standard conforming to that used in the EC Merger Regulation. In other words, the current test, which is based on the "dominance-test" used in the original EC Merger Regulation,⁴¹ is proposed to be replaced by a test based on the "significant

⁴⁰ *Lagrådsremiss, Ny konkurrenslag m.m.*, 21 February 2008.

⁴¹ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. [1990] L/257/90, as amended.

impediment of effective competition” standard that applies pursuant to the recast EC Merger Regulation.⁴²

A theme of increased alignment with the EC law and with international practice runs through the Government’s proposal (and has also been a prominent feature of previous reforms). If the Government’s proposal is adopted, the new Competition Act would enter into force in November 2008.

6 Concluding remarks

When the Swedish Government in 2004 launched the process to prepare a new Competition Act, the reform did not comprise the merger thresholds. However, as the proposal for a new Act was submitted to industry, trade associations, the bar and others for opinions in 2006, the Authority’s 2006 report on thresholds was included.⁴³

The costs and burdens of the merger review system were not primary subjects of the 2006 report, but the Authority estimated that only 10 per cent of the total cost of merger control falls to the Authority. The Authority also estimated that the suggested adjustment of the thresholds might reduce costs for industry of around SEK 10 million (around €1 million). The Authority estimated that consumers would experience a similar gain from improved competition.

At the practical level, the Authority found that the method used in the report (analysis of its own previous cases and comparisons with other jurisdictions) constituted a helpful analytical tool. Naturally, new authorities do not have the possibility to use their own case law or decisional practice when deciding on the level of notification thresholds for the first time, but comparisons with the experience with thresholds in similar jurisdictions would also likely be useful in those circumstances.

As noted in this case study, there have been several reforms of the Swedish thresholds. However, the Authority’s study does not provide any general guidelines on when or how often thresholds should be thoroughly revised. An informal, albeit less structured, evaluation takes place every day in the daily work on merger cases. The need for revision depends on how the economy in a jurisdiction evolves and, accordingly, many external factors, including changes in the political climate, can give impetus for a revision.

⁴² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), O.J. [1994] L 24/1.

⁴³ There were few comments on the merger review system in general (four respondents proposed that a voluntary notification system should be introduced) and even fewer on the thresholds (one respondent agreed in part with the proposal to adjust the thresholds).