

MERGER NOTIFICATION FILING FEES
A Report of the International Competition Network

April 2005

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I. INTRODUCTION AND METHODOLOGY

The Filing Fees project was established under the auspices of the ICN Merger Notification and Procedures Subgroup to undertake a comparative analysis of merger notification filing fee requirements worldwide. This Report provides a comprehensive description of different types of filing fee systems and their rationales. The Report also discusses issues for jurisdictions to consider in connection with the introduction and/or review of a filing fee system. The Report is intended to be of particular benefit to jurisdictions considering changes to their merger filing fee system or that may consider such changes in the future.

To prepare this Report, the project group¹ compiled publicly-available data on ICN members' filing fee systems, including whether filing fees are required and, if so, their size, how they are determined, and their legal basis. The group obtained in-depth information from several competition agencies, including on the legislative history and implementation of filing fees.

The project group then surveyed eighteen representative agencies ("Survey Respondents") to examine in greater depth the issues agencies consider in determining filing fees.² The group selected as Survey Respondents were: (i) agencies represented in the project group; (ii) agencies not in the project group that responded to the initial request for information; and (iii) other agencies based on, *inter alia*, geographic balance and whether the jurisdiction was considering introducing filing fees or reviewing its filing fee system.³ The surveys were critical to the Report, as they provided otherwise unavailable data.

Section II of this Report reviews jurisdictions that do not impose filing fees, including why they chose not to assess fees. Section III reviews jurisdictions with filing fees, providing an overview of their reasons for adopting fees and describing the types of fees and considerations to take into account with respect to each system. Section IV addresses how several jurisdictions use filing fees. Section V discusses how some jurisdictions periodically review their filing fees and the issues they consider in the review. Section VI reviews private parties' concerns about filing fees.

¹ Project participants are listed in Annex A.

² Survey questions posed are set forth in Appendix B.

³ The Survey Respondents were: Canada, Chile, the European Union, France, Germany, Israel, Italy, Japan, Kenya, Korea, Mexico, New Zealand, Spain, Switzerland, Taiwan, the United Kingdom, the United States, and Zambia. Barbados also provided information in the initial stages of the project.

II. JURISDICTIONS WITH NO FILING FEES

Of the 73 jurisdictions with pre-merger notification regimes of which the group is aware, 42 do not charge a filing fee.⁴ The project group surveyed nine of these jurisdictions: Chile,⁵ the European Union, France, Israel, Italy, Japan, Kenya, South Korea, and Taiwan. The discussion contained in this section is based predominantly on information provided by these Survey Respondents, but may not be representative of all merger regimes with no filing fees.

The main reason Survey Respondents from these jurisdictions do not charge filing fees is because they view merger review as a public service that should be funded by general tax revenues. Respondents from these jurisdictions were also concerned that filing fees would impose a burden on the filing parties without a corresponding benefit to the agency, would invoke a negative reaction from the business community, and may be inequitable.

The Survey Respondents that do not charge filing fees can be subdivided according to whether they: (i) have statutory authority to charge fees but do not do so; (ii) considered filing fees but have not adopted them; (iii) have not considered introducing filing fees; and (iv) are currently considering charging filing fees.

1. Jurisdictions with statutory authority to charge filing fees but do not do so

Israel and Taiwan do not charge filing fees despite having statutory authority to do so.⁶ Although Israel's Ministry of Finance provided the impetus to obtain statutory authorization to charge filing fees, Israel's Antitrust Authority (the "Authority") was reluctant to initiate a filing fee because it believed it should conduct initial merger reviews under the new law without charging the parties and, given that the fees would have gone to the Treasury rather than to the Authority, the Authority did not believe that filing fees would enhance the merger review process. To date, the relevant Ministries have not adopted implementing regulations; the matter is still under review.

⁴ See Appendix C.

⁵ Although pre-merger notification in Chile is voluntary, if the parties apply for an advance ruling by the Competition Tribunal, they are responsible for related expenses such as publication in the Official Bulletin.

⁶ Section 20(d) of Israel's *Restrictive Trade Practices Law*, enacted in 2002, provides that persons submitting a notification form should pay a notification fee, in accordance with the regulations promulgated by the Minister of Trade and Regulation and the Minister of Finance.

In Taiwan, the *Statutory Fee Act*, enacted in 2002, provides a legislative basis for filing fees. In 2003, the Taiwan Fair Trade Commission ("TFTC") directed the staff to conduct a study on whether to introduce filing fees. In 2004, the Commissioners decided that the TFTC should not introduce fees for two reasons. First, the Commissioners noted that the foreign competition authorities that collect filing fees generally incur substantial external expenses, such as retaining outside experts to review transactions. Given that Taiwan's merger control process is relatively new and it is unclear what, if any, external charges the agency may incur, the Commissioners thought it would be premature for the TFTC to charge fees. Second, there was a risk that the business community would react negatively and raise questions as to why the TFTC proposed assessing fees when its annual budget was in place.

2. Jurisdictions that have considered but not adopted filing fees

Other jurisdictions have considered filing fees but decided not to adopt them. For example, the European Commission recommended that it be given the power, but not the obligation, to introduce filing fees as part of its proposed amendments to the European Union's Merger Regulation.⁷ However, the Council of Ministers did not grant this authority,⁸ and there are no plans to introduce EU merger filing fees.

3. Jurisdictions that have not considered introducing filing fees

In Chile, France, Italy, Japan, and South Korea, there have been no legislative proposals or similar initiatives to adopt filing fees nor are there no plans to do so. Japan did not adopt a filing fee regime partly because of the difficulties of making legislative changes that would impose new burdens on its citizens, but can consider introducing fees if circumstances should change.

4. Jurisdictions with no filing fees that are considering introducing them

Several jurisdictions that do not currently impose filing fees for merger review are now considering whether to adopt a filing fee system. For example, Kenya has been considering whether to charge filing fees for the past few years, and this issue has gained momentum

⁷ Article 23(e) of Commission proposal of 11.12.2002, COM(2002) 711 final, OJ C 20, 28.01.2003.

⁸ The Council's deliberations are confidential and it did not make public its reasons for rejecting the Commission's filing fee proposal. *See* Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (Official Journal L 24, 29.01.2004).

recently. The impetus for imposing fees stems from the desire of the competition agency, the Monopolies and Prices Commission ("MPC"), to have a source of funding independent from the central government and to cover the costs associated with merger review and investigations, as current funding may be inadequate. The Kenyan Government and the MPC are consulting with key stakeholders, such as the central Government, sectoral regulators, and consumer organizations, and the MPC is evaluating its funding needs. The MPC expects the Government to table a bill before the Parliament in 2005 that would provide the competition agency with the power to impose and review merger filing fees through secondary legislation.

The Fair Trading Commission of Barbados is considering introducing filing fees and has legislative authority to adopt a cost recovery system based on a fee-for-service principle.⁹

The current draft of the new Serbian Antimonopoly Law would authorize the competition authorities to establish filing fees in connection with premerger notification.

III. JURISDICTIONS THAT HAVE A FILING FEE SYSTEM

Of the 73 jurisdictions with premerger notification regimes of which we are aware, 31 charge filing fees.¹⁰ This section examines the reasons they have adopted a fee system and describes the types of systems used and the issues raised by each of fee systems identified. The discussion contained in this section is predominantly based on information provided by nine diverse Survey Respondents, and may not be representative of all countries with merger regimes that assess filing fees.

1. Overview

The primary reason that jurisdictions have introduced filing fees is full or partial recovery of the cost of merger review and/or the competition agency's total budget. In the latter case, merger filing fees contribute to covering the cost of the agency's activities other than merger review.

⁹ The Fair Trading Commission is empowered to charge fees for services rendered pursuant to the legislation that governs the Commission, the *Fair Trading Commission Act*, CAP 326B and the *Fair Competition Act*, CAP 326C.

¹⁰ See Appendix C.

In many jurisdictions, the legislature or the department of finance or treasury mandates filing fees to recover the costs associated with reviewing proposed mergers.¹¹ Some jurisdictions share the view that the "recovery of the full costs of a service ensures that the general taxpayer is relieved of costs which are more properly borne by the users who benefit directly from the service."¹² However, other jurisdictions believe merger review is at least in part a public service for which the public should bear at least some of the costs.¹³

Setting the level of filing fees to cover the cost of merger review is not an exact science, as the number of annual merger notifications can vary significantly and the measure of the cost of reviewing any particular transaction varies depending on what costs are taken into account, such as whether fixed costs are considered. Full cost recovery is not always a practical or desirable policy goal. For example, the UK Competition Commission's costs of reviewing twelve mergers referred in 2002 and 2003 varied from £ 262,000 to £ 524,000 per case. The UK Consultation Paper noted that "a fee based on even the lowest of these costs would seriously impact the economic rationale of some mergers."¹⁴

Setting an objective basis for a filing fee presents significant challenges. Ideally, the fee should be easily understood, readily determinable at the time of filing, easily administered, and consistent with the jurisdiction's legislative and policy framework. Other relevant factors may include affordability to merging parties, non-discrimination among enterprises, and predictability to parties.

Filing fees can directly augment the budget, but in most cases fees go to the general treasury and the agency's budget is determined separately.¹⁵

The UK and New Zealand competition agencies currently are considering changes to their filing fee systems and have produced interesting background reports on, among other things,

¹¹ For example, in New Zealand the Treasury has established cost recovery principles.

¹² *UK Merger Fees: Consultation on possible changes to the system of charging firms for the cost of merger control*, Consultation Document (Aug. 2004), www.dti.gov.uk (hereinafter, "UK Consultation Paper").

¹³ *E.g.*, Canada, Japan, New Zealand.

¹⁴ UK Consultation Paper, n. 12, *supra*.

¹⁵ The relationship between filing fees and the agency's budget is addressed more fully in Section IV.

pertinent questions to address.¹⁶ The UK initiated its review in August 2004 and expects to announce the results in 2005. The review includes a public consultation and the preparation of a Regulatory Impact Assessment that considers the impact of possible fee changes on businesses and others. In connection with preparing its Consultation Paper, the UK solicited views from interested stakeholders on a range of issues, including:

- Would an increase in fees be appropriate and, if so, should this be to achieve (a) full cost recovery straight away or in a phased approach or (b) merely greater cost recovery?
- If a phased approach to the introduction of full cost recovery is taken, how best might this be done?
- What merits and drawbacks do you see with the following options for a possible future fee structure, and which would be your preferred option? (Options included flat fees with or without an additional fee for second stage review and banded fees based on turnover of the purchaser, with or without an additional fee for second stage review.)

The New Zealand Ministry of Economic Development recently circulated a discussion paper canvassing views on an increase in filing fees, which have not been changed since they were set in 1990. A review of the relevant data indicated that for the vast majority of applications, the fees levied for the Commission's services "fell well short of full cost recovery" and that "the fees levied did not even begin to cover the cost incurred by the Commission in processing applications." The questions posed in the consultation paper included:

- Is an increase in fees appropriate? If so, for which applications? If not, why not?
- Is the price sensitive entity concern a legitimate one? If so, to what degree? Will a higher fee result in unacceptable numbers of entities choosing not to notify?
- Is a flat fee structure appropriate? Are the fee ranges (proposed in the document) appropriate?

¹⁶ See New Zealand Ministry of Economic Development, *Fees for Clearance and Authorization Applications*, (Nov. 2004), <http://www.med.govt.nz>; UK Consultation Paper, n. 12, *supra*.

- How significant do you think the fee for application is in the decision of whether or not to make an application?
- What proportion of total costs of the application, including legal and economic advice and internal time, do you think is comprised by application fees?

2. Types of fees

Merger filing fee systems are based on either a flat fee or variable fees. Variable fees can be based on the revenues of one or more parties to the transaction, the value of the transaction, or the complexity of the transaction. Based on responses from nine surveyed jurisdictions – Canada, Germany, Mexico, New Zealand, Spain, Switzerland, the UK, the US, and Zambia – this Section looks at four types of fee systems and describes the basis of the fee, how the system is implemented, and considerations to take into account with respect to each system.

(a) Flat fees

Flat fees refer to a uniform charge for service payable at the time of filing. Among Survey Respondents, Canada and Mexico charge a fixed fee that applies to all merger notifications regardless of size or complexity, although their thresholds seek to screen out small transactions. The fee in Canada is C\$ 50,000, and in Mexico, approximately US\$ 10,000.

The flat fee system has the advantages of objectivity, up-front certainty for parties, and easy administrability for agencies. Flat fees do not, however, bear any correlation to the transaction's size or complexity. They therefore raise concerns that fees for simple transactions contribute to the cost of reviewing more complex transactions. Some smaller businesses view flat fees as unfair because they impose a proportionally larger burden on smaller firms (and perhaps smaller transactions). To allay this concern, some jurisdictions, such as the UK, exempt small businesses from filing fees.

(b) Fee for service

Some jurisdictions charge filing fees on a straight "fee for service" basis, pursuant to which the fee directly reflects the amount of time the agency spends reviewing the transaction.

In Switzerland, while there is a fixed fee for initial notification,¹⁷ fees for second phase merger review are based on an hourly fee.¹⁸ The total filing fee therefore depends on the number of hours the agency spends reviewing the file.¹⁹

In Germany, the filing fee is based on a combination of fee for service and the "economic significance" of a proposed transaction. The main determinants of "economic significance" are the merging parties' domestic turnover and their shares of the relevant market(s) as well as the parties' "economic interest" in the transaction, based on five factors.²⁰ The Bundeskartellamt (the German competition agency) has developed a standard procedure to calculate the fee, which ranges from 0 to € 50,000, based on personnel and material expenses of the review and the economic significance of the proposed merger.²¹ In practice, most mergers are cleared in the first phase, with typical filing fees of € 1,000 to € 10,000. The average filing fee was approximately € 6,000 during 2002-04.²²

The main advantage of the fee for service approach is that the fee is related to the cost of assessing the particular transaction. Disadvantages include that mergers in industries that have not been subject to recent examination may require more work and thus entail higher fees, parties do not know what the fee will be when they notify, administration may be more burdensome for the agency than for flat fees, and fees can be recovered only after the agency

¹⁷ The fee for first phase merger review is based on an estimate by the Expert Commission that a case handler spends an average time of 23 billing-hours on a first-phase investigation, based on which the Commission calculated a fee of CHF 5,000 for the first phase procedure.

¹⁸ Billing rates range from CHF 100-400 per hour, depending on the level of experience of the case handler (trainee, lawyer, *etc.*).

¹⁹ The parties can appeal the fee determination to the Appeals Commission for Competition Matters under Art. 44 of the *Act on Cartels*, which provide: "Appeals to the Appeals Commission against decisions of the Commission or its Secretariat, as well as against measures of force pursuant to Article 42 para. 2, may be lodged with the Appeals Commission for Competition Matters."

²⁰ Thus, the German filing fee system does not fall exclusively in the category of "fee for service" but, rather, contains elements of a fee based on the complexity of the transaction and on parties' revenues.

²¹ However, if the Bundeskartellamt's personnel and material expenses are unusually high in a particular case, taking into account the economic importance of the merger, the fee may be increased up to twice that amount.

²² Parties may appeal the agency's fee determination, in which case a court reviews whether the agency has applied the criteria correctly or whether it has grossly violated its discretionary power.

completes its review. There is also the potential for disputes between parties and agencies regarding the fee calculation, particularly the amount of time spent reviewing a file.²³

(c) Tiered fees based on complexity

Some jurisdictions have a tiered fee system based on whether the transaction is complex or raises substantive issues.

In Zambia, there is one fixed fee if the merging parties' combined market share is less than 40% and the preliminary investigation shows that there are no substantive issues, and a higher fixed fee for transactions that raise substantive issues.

Austria assesses a flat fee for the initial merger notification, with an additional fee if the review proceeds to second phase.

Barbados is in the process of adopting a tiered fee regime with a fixed notification fee and, if necessary, a full investigation fee to cover the costs of investigating more complex transactions.

If there is no correlation between a transaction's size and the level of complexity of competition issues it raises,²⁴ fees based on complexity may have the perceived advantage of being more "fair" than flat fee systems because the fee is directly related to the work involved in reviewing a transaction. Disadvantages of this system include its subjectivity – *i.e.*, potential for disagreement about the classification of a transaction -- and uncertainty about the level of the fee at the time of filing. In addition, charging a fee based on the costs of a second-phase review may undermine the economic basis for some transactions and conceivably contribute to the parties abandoning them if the competition agency conducts an in-depth review.²⁵

²³ See, *e.g.*, Merger Streamlining Group, *Submission to the US-EU Merger Working Group Regarding Best Practices for International Merger Review* (Nov. 26, 2002), at n. 36, which states that the amount of a filing fee "should be specified clearly and should not be dependent on the duration of a review process (which would provide agencies with an incentive to prolong reviews)." The Merger Streamlining Group describes itself as "a group of international businesses, which have broad experience with the merger review processes of many jurisdictions."

²⁴ The Canadian Competition Bureau reviewed all transactions notified to it and completed in fiscal year 2003-04 and found no such correlation.

²⁵ This issue was raised in the UK Consultation Paper as a theoretical issue, rather than in the context of a particular jurisdiction's merger review system.

(d) Tiered fees based on size of transaction / size of revenues

A tiered fee structure can be based on transaction size or on the volume of the parties' revenues in the jurisdiction.

The United States has a three-tiered system, with a filing fee of US\$ 45,000, US\$ 125,000 or US\$ 280,000 depending on the value of the voting securities or assets held as a result of the transaction. One practical issue the US has faced in implementing this system is valuing transactions that are close to the tier boundaries. The FTC has developed clarifying rules and guidance to address this concern.²⁶

In Spain, filing fees can be € 3,000, € 6,000, € 12,000, or € 24,000 - € 60,000, depending on the parties' revenues in Spain.

In Kenya, the current proposal is for a tiered fee based upon the parties' revenues: "complex" (highest revenues), "intermediate" (middle revenues); and "simple" (lowest revenues). Although the precise level of fees for each category has not yet been established, the proposed fee is based on the parties' revenues. The proposal does not clarify the revenue basis, *e.g.*, whether fees would be based on the parties' worldwide or Kenyan revenues.

To the extent that there may be a correlation between the size of a transaction or the size (revenues) of the parties and the resources the agency is likely to expend in reviewing the transaction, tiered fees may be perceived as a more "fair" method than a flat fee. (However, depending on the transaction, fees based on the size of the transaction or of a party's revenues may bear no relationship to the amount of work required to review the transaction.) In addition, tiered fees have the advantage of appearing to be based on the parties' ability to pay, and therefore to be less likely to inhibit transactions.

Fees based on transaction size can potentially lead to disputes regarding the determination of the value of the transaction. In a multijurisdictional transaction, another question is whether to consider the size of the entire transaction or just the portion that relates to the reviewing jurisdiction.

²⁶ See www.ftc.gov/bc/hsr/hsrvaluation.htm.

IV. USE OF FILING FEES

This section reviews the relationship between filing fees collected and an agency's budget. Most Survey Respondents' jurisdictions determine agency budgets independently from the amount of merger filing fees collected, and most filing fees ultimately go into a central treasury or equivalent rather than directly to the competition agency.

Some believe that a system in which the agency's funding is based on the amount of filing fees collected may have two disadvantages. First, it may undermine the agency's actual or perceived objectivity because it creates incentives for the agency to apply filing fee regulations to maximize fees, and therefore the agency's budget. Private sector representatives have raised concerns that a fee for service system may cause agencies to spend resources on and extend review timetables for transactions that do not raise competitive concerns in the jurisdiction. Similar concerns have been raised about filing fees based on an agency's determination of the complexity of a transaction.

Second, in periods of low merger activity, the agency's revenues may decrease significantly, which could adversely affect the agency's non-merger enforcement. In its submission to the U.S. Senate Committee on Appropriations, the American Bar Association Section of Antitrust Law highlighted this concern in opposing funding the US antitrust agencies through filing fees:

[A]s a practical matter, so long as the agencies look to filing fee revenues to fund their operations, there may be a tendency to overfund the agency when merger activity is high, and to underfund them when merger activity is low. There may be a tendency, in other words, to assume that the projection of merger activity that forms the basis for projections of filing fee revenue is a valid projection of agency workload, when merger enforcement is only one of several important programs funded by Congress.²⁷

Others have suggested that an agency that retains filing fees may have more independence from other parts of the government that would otherwise be responsible for funding the agency.

²⁷ Letter from Roxane C. Busey, Chair, Section of Antitrust Law (2001-02), American Bar Association, to the Honorable Fritz Hollings and the Honorable Judd Gregg (Apr. 18, 2002).

In Germany, the primary rationale for filing fees is full cost recovery. However, Germany's experience since 1973 has shown that the merger filing fees normally cover more than 50%, but not the full budget, of the Bundeskartellamt, and that the amount of fees the agency collects affects the Bundeskartellamt's budget only minimally. The Bundeskartellamt's budget is determined as a separate, independent item in the budget plan under the auspices of the Federal Ministry of Economics and Labour and must be approved by the Parliament. The budget is therefore entirely independent of the filing fees collected. However, the converse is not true, *i.e.*, filing fees are determined with the agency's budget in mind. The fees the Bundeskartellamt collects go to the central treasury rather than to the agency.²⁸

In Spain, approximately 50% of the revenue generated by filing fees goes to the Competition Court. In 2004, these fees accounted for approximately only 6% of the Competition Court's budget.

In the UK, income from merger fees has fallen significantly below merger review costs since filing fees were introduced. Although filing fees were designed to cover the average annual costs of the Department of Trade and Industry, the Office of Fair Trading, and the Competition Commission to administer the merger review process,²⁹ annual deficits since 1990 have ranged from £ 800,000 to over £ 2 million. In accordance with UK Government Accounting, the calculation of costs includes all resources used in supplying the service (*i.e.*, all direct and indirect costs), but does not include the costs of the competition authorities in other operations. Fees are collected by the Office of Fair Trading but are paid directly to the Exchequer (Treasury) rather than directly funding the agency.

In Mexico, the Treasury Department determined the level of filing fees with the goal of full recovery of the costs associated with the merger review process, after requesting that the Mexican competition authority provide an estimate of all fixed and variable costs involved in merger review. The competition agency's budget is determined independently from the

²⁸ There is one minor exception: if the filing fees collected exceed the expected filing fees during a one-year period, the Bundeskartellamt is allowed to retain 30% of the "surplus." In absolute and relative terms, this amount will make only a minor difference to the agency's entire budget. There is no equivalent budget cut in case the collected filing fees fall short of the expected amount.

²⁹ The UK introduced filing fees in 1990 based on: (i) the general principle of UK government accounting that the cost of providing services to non-Exchequer bodies should be charged at a suitable rate to cover costs; (ii) the principle that costs of merger control should be recovered from users rather than through general taxation; and (iii) a specific need to recover the costs of procedural improvements to the competition regime introduced in the late 1980s.

filing fees. Parties pay the fees directly to the Treasury Department, which updates fee levels every 6 to 12 months.

In the United States, filing fee revenue is deposited into a Treasury Department account and allocated equally to the FTC and the Antitrust Division of the Department of Justice ("Antitrust Division") to offset their total appropriations. Filing fees cover a portion of the agencies' total appropriations. For example, in 2003, the Antitrust Division funding was approximately US\$ 133 million, of which approximately US\$ 56 million was offset by merger filing fees. The FTC's 2003 funding was approximately US\$ 177 million of which approximately US\$ 56 million was offset by merger filing fees.

In Kenya, the goal of the proposed filing fee is full recovery of the costs of merger investigations as well as non-merger activities if possible. However, the fees are not expected to cover staff salaries.

In Zambia, filing fees only supplement the Commission's annual grant from the government. The Commission retains all filing fees, which account for an average of only about 2% of its annual budget. As the central government provides 85% of the Commission's budget, the Commission does not depend on filing fees for its operations.

In Canada, the Competition Bureau views filing fees as part of the government's effort to improve service delivery.³⁰ The determination of the size of the fee was based on the costs of merger review. Full costs were determined by calculating direct costs, Bureau and Industry Canada overhead and shared services, depreciation of capital, and the Bureau's share of other government departments' services. These costs were then related to the number of transactions. The Bureau has used these fees to improve its operation and service levels, such as by introducing service standards. The Bureau's fees are consistent with the Canadian federal government's policy that services be funded by those who benefit from them most, rather than by all Canadians through general taxation. However, given that the public benefits from effective enforcement and administration of the *Competition Act*, Bureau funds may, through general taxation, pay a portion of the costs.

³⁰ When Canada introduced fees in 1997, service standards were an important issue that arose during consultations. Stakeholders requested that service standards be well defined and that the Bureau elaborate on the documentation that would be required for service standards to be met.

The Bureau receives all filing fees, and uses them exclusively for merger-related activities. Although the level varies annually, for the period from 1998-1999 to 2003-2004, filing fees represented approximately 70% of the Bureau's merger review costs and less than 20% of the Bureau's total budget. When operating costs related to merger review exceed the revenue generated through filing fees, the Bureau's base budget covers any shortfalls.

Barbados is in the process of adopting a filing fee based on partial cost recovery, which will, if adopted, recoup a proportion of the costs incurred in delivering specific services, take account of public interest considerations, and reduce inefficiency in fee charges. The cost basis will include only the labor cost of delivering each service; costs incurred as a result of the use of equipment, materials, and supplies will not be included to ensure that charges remain affordable. A proposed fixed application fee is designed to recover the average expense of a preliminary investigation. A second fixed charge would recover the average estimated expenses incurred during a full investigation, including review by the Commissioners.

V. PERIODIC REVIEW OF FILING FEES

Many countries review their filing fees periodically. As discussed above, the United Kingdom and New Zealand are conducting an extensive consultation process with respect to proposed increases of their filing fees. Canada, the United States, Switzerland, Spain, and Germany undertook reviews of their fees prior to increasing them.

1. Built-in review

In some jurisdictions, the filing fee is tied to a standard multiplier unit used for all government unit-structured fees; when the multiplier unit fee is adjusted, the filing fees are adjusted as well. For example, in Zambia, the fixed filing unit can be reviewed only by the Minister of Justice in conjunction with the Minister of Finance for all government-unit structured fees; the Treasury Department updates the filing fee every 6-12 months. To some extent, a built-in review of filing fees functions as a safeguard against inflation.

2. Jurisdictions that reviewed fees, and issues considered

In 2003, Canada increased filing fees from a flat fee of C\$ 25,000 to a flat fee of C\$ 50,000. At the same time, to reduce the burden on smaller transactions, the size of transaction

threshold was increased from C\$ 35 million to C\$ 50 million. The Treasury Board's External Charging Policy determines the fees and requires departments to review their external charging activities periodically. Stakeholders have an opportunity to voice comments about the *Fees and Service Standards Policy* in a forum held every two years.³¹ In connection with a recent forum, the Bureau examined the efficiency of the current fee system and discussed the feasibility of potential alternatives with stakeholders.³²

In 2001, the United States amended its pre-merger reporting legislation to exempt relatively smaller transactions by raising the reporting threshold based on the size of the transaction from \$US 15 million to \$US 50 million (indexed for future changes in GNP). A tiered fee system based on transaction value was introduced to achieve the same level of revenues as the previous system.³³ Under the amended law, some previously reportable transactions are exempt from premerger reporting (and hence a filing fee), some transactions are subject to the same \$45,000 filing fee, and relatively larger transactions are assessed higher fees.

Switzerland recently changed its filing fee regime on the basis that other departments of the Swiss Administration had higher fees. Until April 1, 2004, there were no filing fees for first-phase merger review. During a consultation process, the Swiss Finance Administration recommended an increase in fees. The Expert Commission in charge of drafting the new law introduced a fixed CHF 5,000 fee for first-phase merger review and raised the hourly rate for second-phase reviews.³⁴

In 2001, Spain revised its filing fee because of a sharp increase in the number, size, and complexity of notified mergers as a result of amendments to the merger notification law and

³¹ Prior to introducing fees, in June 1997, the Bureau hosted fora on the development of the Fee and Service Standards Policy for certain services and regulatory processes provided pursuant to the *Competition Act*. On November 3, 1997, the Bureau introduced filing fees and published the Fee and Service Standards Handbook, which reflected the Policy and the results of the consultations and implementation processes.

³² See Competition Bureau Consultation on Fees and Service Standards, Toronto (Nov. 2, 2004). The alternative fee systems considered were: (i) fees based on complexity rating; (ii) fees based on transaction size; (iii) fees varying with the time needed to examine the transaction (or fixed amount plus hourly rate); and, (iv) different fees for advance ruling certificate requests and merger notification filings.

³³ See 146 Cong. Rec. S11240 (daily ed., Oct. 27, 2000) (statement of Senator Kohl in support of the reform of pre-merger reporting legislation, incorporated into the Commerce-Justice-State Appropriations Act for Fiscal Year 2001).

³⁴ The CHF 5,000 fixed rate was calculated on the basis of an average time of 23 billing-hours per first-phase merger review. Fees were changed from CHF 130 per billing-hour to CHF 100-400 per billing-hour.

the impact of globalization.³⁵ It was recognized that filing fees had to be adjusted to reflect the Competition Service's and Competition Court's workload more accurately.³⁶

Since it introduced merger filing fees in 1973, Germany has revised them only once. Because inflation had decreased the real value of the fee, the upper limit was doubled in 1989 to the current level. The Bundeskartellamt continuously tracks its filing fee decisions and analyzes these data periodically. Whenever the Act against Restraints of Competition ("ARC") is amended, there is a public consultation process, with formal hearings, which covers all aspects of the ARC including filing fees.³⁷ Apart from this general consultation process, there is no specific consultation process on filing fees. Neither requiring filing fees nor the fee level was controversial during the consultation process, as it is common for a government agency to charge fees for its services according to the so-called "equivalency principle," found in almost all German administrative procedures.

VI. PRIVATE PARTY CONCERNS

Private parties have raised concerns about the increasing cost of merger filing fees that apply to multinational transactions. Filing fees are just one of the many costs that merging parties incur as part of the notification process. A recent study of 28 multijurisdictional mergers suggests that these other external costs attributable to merger review (such as costs associated with legal, economic, and other external advisors, and translation fees) substantially outweigh filing fees.³⁸ Nevertheless, in some transactions, filing fees may represent a substantial portion of the external costs associated with the merger review process,³⁹ and some private

³⁵ Royal Decree Act 6/1999 imposed compulsory merger notification if the merger exceeds specific thresholds. Royal Decree Act 6/2000 imposed suspension of the merger until the National Competition Authority clears the transaction.

³⁶ Act 24/2001 of December 27th regarding Tax, Administrative and Social Measures revised Article 57.6 of Competition Act 16/1989 of July 17th in regard to the filing fee by introducing a fourth filing fee bracket for large mergers with revenues exceeding € 3 billion.

³⁷ See Regierungsbegründung zu dem Entwurf eines Fünften Gesetzes zur Änderung des GWB, BT-Drucks. 11/4610 (Government's statement of reasons for the draft of a fifth amendment of the Act against Restraints of Competition, BT-Drucks.11/4610).

³⁸ PriceWaterhouseCoopers, *A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews* (June 2003) (study commissioned by the American Bar Association and International Bar Association) (the "PWC Study").

³⁹ For example, the PWC Study also found that although legal costs were by far the greatest component of external costs, filing fees were the second most significant, accounting for an average of 19% of external costs. *Id.* at para. 3.2.2.

parties have indicated that filing fees may be disproportionately high for transactions that raise few or no competitive concerns.

In a submission to the US-EU Working Group on Best Practices for Merger Review, the Merger Streamlining Group⁴⁰ recommended against merger filing fees based on the understanding that merger review is a public good:

*Filing fees should be discouraged. Since the primary objective of merger review is to maintain competitive prices and product offerings for customers, the cost of agency review processes is appropriately borne by the public treasury. A general tax on merger transactions is inappropriate because most are non-problematic (and it is not feasible or appropriate to link fees which are ultimately determined to be anti-competitive).*⁴¹

Several Survey Respondents, however, commented that filing fees are usually small in comparison to the size of a transaction or the legal fees spent on a transaction.⁴² Survey Respondents did not identify any instances in which filing fees were a consideration leading parties to restructure a deal to avoid filing fees.⁴³

VII. CONCLUSION

This Report reviews the different types of filing fees, their rationale, and their relationship to agency budgets. Many jurisdictions that do not impose filing fees have considered the issue before making a decision not to charge fees. Of the countries that charge fees, there is a substantial range in the methods used to assess fees and the amount of the fee. In most cases, filing fees are paid directly to the treasury or finance department of a government, rather than to the competition agency. However, the primary rationale for imposing, and basis for determining the amount of, filing fees is the recoupment of the cost of merger review.

⁴⁰ *Supra* n. 23.

⁴¹ *Id.*

⁴² For example, in Mexico, filing fees are quite small (approx. US\$ 10,000) in comparison to the monetary value of transactions that would meet the notification threshold (approx. US\$ 20 million). The Canadian Bureau was informed, during public consultations in December 2002, that the Bureau's filing fees are inconsequential when parties are planning a transaction.

⁴³ However, the Canadian Competition Bureau has received some complaints in the past three years regarding the fairness of the flat fee system. Some small companies requested that fees be based on transaction size, arguing that the current fee is excessive for small and non-problematic transactions, and that fees in those cases subsidize review of complex transactions. Some have also suggested that the Bureau should consider charging lower fees for certain industry sectors in which transactions rarely raise competition issues.

There are advantages and drawbacks to each filing fee system. For the most part, total filing fees collected are not very large in absolute terms (for example, total fees in Mexico, New Zealand, Spain, Switzerland, UK, and Zambia are each less than US\$ 2 million), and most transactions subject to filing fees do not involve extended competition review.⁴⁴ Nevertheless, private parties have concerns regarding the growing costs of filing fees, particularly in the context of global transactions that entail multiple merger review filings.

⁴⁴ See Appendix D, which shows by jurisdiction for the past three years the total filing fees collected, the number of transactions notified, and the percentage of those transactions that were subject to second-stage review or were identified as raising substantive issues.

Appendix A Filing Fees Project Group

NAME	AFFILIATION
Filing Fees Project Leaders: George Addy, Julie Soloway (Davies Ward Phillips & Vineberg LLP)	International Chamber of Commerce (ICC)
Member Participants: Daniel Campagna	Competition Bureau, Canada
Malcolm Catt Elizabeth Kraus Randolph Tritell	US Federal Trade Commission
Cynthia Lagdameo Jack Sidorov	US Department of Justice
Mary Loughran Dan Sjöblom	DG-Competition, European Commission
Jérémie Pellet	DGCCRF, France
Arno Rasek	Bundeskartellamt, Germany
Tetsuji Yokote	Japan Fair Trade Commission
Non-governmental Advisors: Michael Reynolds, David Anderson (Allen & Overy)	International Bar Association
William Blumenthal (King & Spalding/FTC) Joseph Krauss (Hogan & Hartson) Robert Schlossberg (Freshfields Bruckhaus Deringer LLP)	American Bar Association
Kenneth Ewing (Steptoe & Johnson)	US Non-governmental Advisor
Kevin Ackhurst (Osler, Hoskin & Harcourt LLP) Gail Jaffe	Canadian Non-governmental Advisors

Appendix B Agency Survey Questions

International Competition Network Merger Working Group Notification and Procedures Subgroup Filing Fees Project

A. For agencies that do not require filing fees:

1. Did your agency ever consider the introduction of filing fees? If so, what factors were considered in the decision not to introduce filing fees?
2. Did your agency ever collect filing fees? If so, what factors led to the decision to rescind the requirement that filing fees be paid?
3. Does your agency plan to consider the introduction of filing fees in the future? If so, what information would your agency consider useful in that analysis?

B. For agencies that do require filing fees:

1. What were the main factors that led to your jurisdiction's decision to impose filing fees (*e.g.*, full or partial cost recovery, etc.)?
2. What method was used to establish the size of your competition agency's merger filing fee?
 - (a) For example, was it based on the analysis of the costs involved in the merger review process or other operations of your competition agency and, if so, what type of costs were included in that calculation?
 - (b) Do you periodically review that analysis? What type of information would be helpful for that review?
3. How are the principal reasons for charging fees reflected in the filing fee tests employed by your competition agency and the filing fees levied?
4. What process was followed in order to implement filing fees? (For example, was a study undertaken? Were there any public consultations or were formal hearings held? Was another jurisdiction influential in the decision to impose filing fees?)
5. What is the relationship between the filing fees collected by your agency and your agency's budget? (In particular, please specify whether the competition agency receives all or part of filing fees collected. If the competition agency does receive filing fees, what percentage of your agency's budget is funded by filing fees and what happens during periods of low merger activity when the fees collected are less than the operating costs of the agency?)
6. For each of the past three years:
 - (a) How many mergers were notified to your competition agency and what percentage of those mergers went to second-phase review?

- (b) What was the total amount of all merger filing fees collected? (If applicable, what percentage of those fees were additional fees charged for second-phase review?)
7. If your competition agency imposes filing fees that vary according to criteria other than fixed criteria (such as the complexity or the economic significance of the proposed merger):
- (a) What is the basis for calculating the filing fee?
 - (b) To what extent does your agency have any discretion regarding the imposition of filing fees?
 - (c) Have you received complaints about your determination of the applicable fees? If so, how many complaints did you receive in the past three years?
 - (d) What are the principal reasons for complaints received?
 - (e) How are disagreements between your competition agency and filing parties resolved? For example, are fee determinations made at the sole discretion of the competition agency or are there negotiations with filing parties? Is there an appeal/dispute resolution mechanism?
8. Is a second fee charged if a notification is withdrawn and re-filed? Does it depend on the amount of time that has elapsed between withdrawal of the notification and re-filing?
9. Since the time filing fees were introduced, have you observed any impact on (a) the number of transactions notified; or (b) the point in time at which a transaction is notified (*e.g.*, early or later in the deal timetable) that could be attributable to the introduction of fees or an increase in fees? (If possible, please provide any data or anecdotes to support your answer, and discuss any additional factors that may have affected the number of transactions notified, such as an increase in notification thresholds.)

Are you aware of any transactions in your country that have been structured in order to avoid paying filing fees? Can you speculate as to whether an increase in fees increases the rate of avoidance of merger notification?

APPENDIX C
Summary of Filing Fee Requirements Worldwide¹

	Jurisdictions with Filing Fees	Jurisdictions with No Filing Fees	Other²
1.	Austria	Albania	Azerbaijan
2.	Barbados	Algeria	Belarus
3.	Brazil	Argentina	Ivory Coast
4.	Bulgaria	Armenia	Kazakhstan
5.	Canada	Australia	Moldova
6.	Croatia	Belgium	Tunisia
7.	Czech Republic	Chile	
8.	Estonia	China	
9.	Germany	Colombia	
10.	Greece	Cyprus	
11.	Hungary	Denmark	
12.	India	EFTA Surveillance Authority	
13.	Ireland	European Union	
14.	Macedonia	Finland	
15.	Mexico	France	
16.	New Zealand	Iceland	
17.	Pakistan	Indonesia	
18.	Poland	Israel	
19.	Portugal	Italy	
20.	Romania	Japan	
21.	Russia	Kenya	
22.	Slovak Republic	Korea (South)	
23.	Slovenia	Latvia	
24.	South Africa	Lithuania	
25.	Spain	Luxembourg	
26.	Ukraine	Malta	
27.	United Kingdom	Netherlands	
28.	United States	Norway	
29.	Venezuela	Panama	
30.	Zambia	Serbia	
31.	Zimbabwe	Sweden	

¹ Each jurisdiction listed in this chart has a merger notification regime. Source: Global Competition Review, *Merger Control 2004* (London: Law Business Research Ltd., 2003); White & Case LLP, *Worldwide Antitrust Merger Notification Requirements*, 2003-2004 ed. (Washington, D.C. 2003); ICN merger templates, available at: <http://www.internationalcompetitionnetwork.org/mergercontrollaws.html>.

² The project group has not been able to confirm whether there are filing fees; it is assuming for purposes of this project that there are not.

	Jurisdictions with Filing Fees	Jurisdictions with No Filing Fees	Other²
32.		Switzerland	
33.		Taiwan	
34.		Thailand	
35.		Turkey	
36.		Uzbekistan	
Total	31 jurisdictions	36 jurisdictions	6 jurisdictions

Appendix D
Filing Fee Revenues and Number of Notified Mergers ¹

COUNTRY	YEAR	TOTAL FEES COLLECTED	MERGER DECISIONS	
			NO. OF MERGERS NOTIFIED ²	2 ND PHASE REVIEW/ COMPLEX DESIGNATION
Canada	2004	C\$ 8.8 million	181	11%
	2003	C\$ 6.3 million	252	9%
	2002	C\$ 7.5 million	302	14%
Germany	2004	€ 9 million*	1408	2.8%
	2003	€ 9 million*	1366	3.1%
	2002	€ 9 million* *estimated	1584	4.4%
Mexico	2004	US\$ 1,214,239	125	10%*
	2003	US\$ 1,279,459	165	10%*
	2002	US\$ 1,708,199	127	10%* *approximate
New Zealand	2002-04	NZ\$ 112,000	47	2.1%
Spain	2004	€ 624,780	94	5.3%
	2003	€ 786,620	79	6.3%
	2002	€ 984,965	100	9.0%

¹ The information in this chart is based on information provided by the Survey Respondents.

² Of Survey Respondents without filing fees: in Israel, 129 mergers were notified in 2004, 112 in 2003, and 133 in 2002; in Taiwan, 5,811 mergers were notified in 2001.

COUNTRY	YEAR	TOTAL FEES COLLECTED	MERGER DECISIONS	
			NO. OF MERGERS NOTIFIED ²	2 ND PHASE REVIEW/ COMPLEX DESIGNATION
Switzerland	2004	CHF 115,000 (52% of fees for 2 nd phase reviews)	21	29%
	2003	CHF 130,000 (only 2 nd phase reviews)	30	17%
	2002	CHF 138,000 (only 2 nd phase reviews)	42	10%
United Kingdom	2004	£ 1,365,000	192	8.3%
	2003	£ 1,250,000	162	9.9%
	2002	£ 1,840,000	244	5.7%
United States	2003	US\$ 111,873,000	968	3.6%
	2002	US\$ 135,890,000	1,142	4.3%
	2001	US\$ 172,680,000	2,237	3.1%
Zambia	2004	US\$ 26,455 (96% from 2 nd phase review)	22	91%
	2003		20	95%
	2002		17	100%