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ICN Best Practice: Soft Law, Concrete Results

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I. INTRODUCTION

Cross-border mergers and acquisitions need approval from an increasing number of competition agencies. Today more than 90 jurisdictions actively engage in merger review, an increase from approximately 60 jurisdictions in 2000, and fewer than a dozen jurisdictions in 1990. As the volume of cross-border transactions increases and with merger filings again on the rise, reducing the unnecessary costs and burdens of merger review is as important today, if not more so, than it was when the International Competition Network was formed in 2001.²

The costs of merger control fall both on agencies and businesses. For business, for example, the International Chamber of Commerce recently noted, “Compliance with merger control has become a major factor in mergers and acquisitions, in terms of both cost and time. Even relatively small transactions may be subject to merger control in ten or more jurisdictions.”³ For many agencies, a significant portion of their budget is dedicated to merger review, and only a tiny percentage of the reviewed transactions are potentially problematic. In a 2008 ICN survey on agency effectiveness, ICN member agencies cited resource constraints due to review of mandatory notifications as *the principal reason* they could not proactively determine their enforcement and advocacy priorities.⁴

II. REDUCING THE BURDENS OF MERGER NOTIFICATION AND REVIEW

Over the past decade, the ICN work on merger notification and review procedures has helped agencies reduce notification and speed review of non-problematic transactions, easing the burdens and costs of unnecessary preparation and review of merger filings. Between 2003 and 2006, the ICN adopted 13 recommended practices on merger notification and review procedures (“Recommended Practices”).⁵ Designed to accommodate different legal traditions and stages of

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² The ICN’s initial focus was on mergers and advocacy, and one of the first projects was to develop principles and practices that would streamline procedural issues in multijurisdictional mergers.

³ The International Chamber of Commerce, Presentation by Jeffrey I. Zuckerman, Curtis, Mallet-Prevost, Colt & Mosle LLP (February 14, 2011). Mr. Zuckerman continued, “To the extent that merger control regimes unnecessarily impose costs, they penalize society as a whole, and the international business community in particular. The ICN Recommended Practices for Merger Notification Procedures represent an international consensus as to appropriate merger control procedures. The ICC should try to persuade governments to make their merger control regimes consistent with the ICN Recommended Practices.”

⁴ See International Competition Network, *Agency Effectiveness Project* at 6 (April 2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc367.pdf>.

⁵ The Recommended Practices are available in English, French, and Spanish on the ICN’s website. See <http://www.internationalcompetitionnetwork.org/working-groups/current/merger/notification-procedures.aspx>. The ICN has also adopted recommended practices about substantive merger analysis, the assessment of dominance/substantial market power unilateral conduct laws, and the treatment of state-created monopolies, and has developed best practices for, inter alia, anti-cartel enforcement.

development, the recommendations consist of short “black letter” statements followed by explanatory comments.

Although the Practices are non-binding, reaching agreement on them was an impressive achievement. ICN members adopted the Practices even though many of their own merger laws and practices did not conform to the recommendations.⁶ Members’ willingness to adopt practices at odds with many of their own merger review procedures, together with a legitimacy gained from close public-private partnership in drafting the Practices, resulted in the Recommended Practices quickly becoming an important baseline throughout the world for sound merger notification and review policy.⁷

Having achieved consensus on some important principles, a key challenge remained to have members implement them. Over the past ten years, more than two-thirds of the ICN’s 87 members with merger control have made changes that bring their merger regimes into greater conformity with the Practices, and more than half of these have indicated that the Recommended Practices played a role in their reforms. In the area of merger thresholds, for example, 39 ICN members are in full conformity with the ICN best practice that prescribes notification only for transactions where at least two parties to the transaction or the target company have material local sales or assets. Eighteen of these 39 jurisdictions conform because of reforms made in the past decade.

III. ROLE OF RECOMMENDED PRACTICES IN MERGER REFORM

For these threshold reforms and merger procedure reform more generally, over the past decade the ICN Recommended Practices have been used to identify areas for reform, to build support for reform, and as drivers of reform. Most frequently, the Recommended Practices are used as a benchmark. Comparing their systems to the Recommended Practices has allowed agencies to evaluate and identify specific areas for improvement.⁸ In other cases, bar associations and business groups have used the Recommended Practices to highlight for the agency or legislature those areas of their merger regime that would benefit from reform. Written comments from bar associations, business groups, or other agencies on proposed laws or amendments regularly cite the Recommended Practices in suggesting areas for change.

ICN members have also used the Recommended Practices to support their reforms—as a stamp of legitimacy for changes the agency wanted to make. Agencies have used the

⁶ The Recommended Practices were drafted by the ICN’s Merger Notification and Procedures Subgroup. Many of the key players in that group, including Germany, Italy, Korea, and Spain, at that time had laws or procedures that did not reflect the Practices.

⁷ ICN work has influenced other international standards, such as the OECD’s Council Recommendation Concerning Merger Review (*available at www.oecd.org/competition*). ICN Recommended Practices remain a key indicator of achievement in activities such as peer reviews conducted within OECD and UNCTAD.

⁸ Examples include agencies from the Czech Republic, Sweden, Colombia, Costa Rica, and many others. The use of the Recommended Practices as a benchmark extends beyond ICN members. For example, when a draft Chinese antimonopoly bill was circulated, many agencies and bar associations urged the Chinese government to adopt merger rules consistent with the ICN Practices. Changes in successive drafts of the antimonopoly law reflected many of these comments.

Recommended Practices to convince legislative bodies of the soundness of proposed reforms, because they conform to international standards.⁹

Increasingly, the ICN Recommended Practices are the drivers of reform, as agencies appear to view their reputational value as linked to conformity with the Recommended Practices.¹⁰ At this year's annual conference, responding to an external review of conformity with the Recommended Practices, the head of a prominent European agency declared in the hallway of a conference "you'll see—we're going to introduce reforms that are in line with the Recommended Practices."

Similarly, the ICN itself appears more willing to directly advocate the adoption of reforms that implement its recommendations, as in India (as described in Campbell & O'Carroll's article in this issue),¹¹ and in Brazil. At the invitation of the Brazilian competition agencies, ICN representatives supported the merger review provisions in the pending amendments to the Brazilian competition law, first through an in-country visit in 2008, and in 2010 through a formal letter of support.

IV. BARRIERS TO IMPLEMENTATION

Despite all of the convergence around the ICN recommendations, a significant number of ICN members do not conform to the Recommended Practices. There are many barriers to implementation, most notably, that reforms often require legislative amendments and resource implications are unclear.¹² At the most recent annual conference, members expressed uncertainty about the resource implications of implementation of the ICN Recommended Practices. While existing data does suggest significant resource savings, agencies that have implemented ICN-compliant reforms have not, in general, made public data concerning the agency's costs savings as a result of the reforms.¹³

⁹ For example, in Germany, the Practices are cited in official documents for the legislature as a rationale for change. In Ireland, the Competition Authority cited the ICN Recommended Practices in a consultation document on proposed reforms, saying the reforms would make the Irish regime consistent with international standards. In recent months, the competition authority from Jersey issued a consultation document that went on at length about the Recommended Practices. Many other agencies, such as those in Belgium, Brazil, Finland, and Portugal have used the Recommended Practices to promote their reforms with the legislature. These and other agencies (e.g., Zambian Competition Commission) have used the Recommended Practices to build support with the private sector as well, by showing how proposed changes would measure up to best practice.

¹⁰ For example, a Korean Fair Trade Commission delegate at the ICN's 8th annual conference in Zurich said the KFTC significantly increased the materiality of their notification thresholds "responding directly to recommendations from the ICN." In another example, a delegate from the Polish competition authority explained that they had eliminated their market-share threshold because they wanted to conform to the ICN Recommended Practices. These and other examples suggest that the ICN Recommended Practices have become the "industry standard."

¹¹ Neil Campbell & Sorcha O'Carroll, *Merger Control in India: Partial Implementation of the ICN Recommended Practices*, 7(1) CPI ANTITRUST CHRON. (July, 2011).

¹² ICN members have indicated that the most significant barrier to implementation is legislative, with resources the second most commonly cited barrier. Other barriers include opposition from within the competition community, the complexity of some of the Practices, and language.

¹³ For example, the changes to the notification thresholds in the Czech Republic translated into a reduction of notified transactions from 239 in 2003 to 56 in 2005. See Martin Pecina, *Implementing the ICN Recommended Practices for Merger Notification and Review*, Remarks at International Competition Network's 6th Annual Conference, Moscow, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc425.pdf>. In Brazil, according to the International Law Office, the 2005 CADE interpretation of the merger notification thresholds as applying to

One infrequent but notable barrier is that for some ICN members, not every aspect of a Practice is necessarily appropriate for their jurisdiction. For example, some members have raised concern about the use of objective thresholds. At this year's annual conference there was a small group session dedicated to the Recommended Practice on merger thresholds and participants debated the role and utility of market share thresholds. Some participants expressed a reluctance to eliminate their thresholds based on market share out of fear of not capturing potentially problematic transactions. To the extent market share thresholds are retained, these members were encouraged to interpret them to require an increase in share in a horizontal merger and to couple them with a significant local sales or asset test.

V. NEXT STEPS

ICN members' use of the Recommended Practices is impressive, and the Network should be lauded for developing the industry standard. The ICN should facilitate continued progress in this direction, through direct advocacy efforts (when invited to do so by the member agency) and by encouraging members to maintain data on the costs and benefits of actual reform. At the same time, however, a degree of caution is needed. A founding principle of the ICN was "soft" convergence. There was a clear vision that the Network would not be a law-making institution. With ICN practices now the industry standard, as it enters its second decade the ICN needs to carefully consider how it balances respect for diversity with its goal of promoting convergence.

domestic turnover contributed to a 75 percent drop in the volume of notified mergers, with similar reductions in the length of SDE investigations. *See*, <http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=13875&i=1084305>).