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## One network's effect: The rise and future of the ICN

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## Abstract

*In the first decade of its existence the International Competition Network (ICN) has advanced to frontrunner position among international organizations that address competition policy. As the ICN looks to its next decade, and governmental belt-tightening forces most competition agencies to rethink resource allocation, a key question is whether the ICN's success is attributable to the Network's relevance and competence, or timing and luck? The ICN has reached the top by furthering international cooperation and coordination, influencing domestic policies, and building capacity of its members. Many of its very achievements, however, also pose the greatest risks for a free fall.*

*Le Réseau International de Concurrence (ICN) est devenu en dix ans une organisation internationale de premier rang en matière de politique de concurrence. A l'heure où les restrictions gouvernementales contraignent la plupart des autorités de concurrence à revoir l'allocation de leurs ressources, la question se pose de savoir si le succès de l'ICN tient à son efficacité et à sa compétence ou bien à la chance et à un bon timing. En favorisant la coopération et la coordination internationales, l'ICN est parvenu à influencer les politiques nationales et à renforcer les capacités de ses membres. La plupart de ses succès sont cependant également porteurs de risques susceptibles de conduire à sa chute.*

# One network's effect: The rise and future of the ICN

1. In the world of competition policy, the decade of the 1980s was notable for a rapid increase in the frequency of cross-border mergers and acquisitions, the 1990s for exponential growth in the number of jurisdictions with competition laws, and the first decade of 2000 for the establishment of the International Competition Network (ICN), a transgovernmental network of domestic and regional competition agencies. In the first decade of its existence, the ICN has skyrocketed to top position among the organizations that address international competition policy. This article evaluates the ICN's journey to the top, and speculates about what the ICN might do to remain in that position.

## Introduction

2. In October 2001, 15 competition agencies formed the International Competition Network to address “antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.”<sup>1</sup> The first projects addressed merger review and advocacy. A decade later, the ICN has 117 member agencies from 103 jurisdictions, making it the most extensive network of competition authorities worldwide. Its agenda has expanded to include virtually all areas of antitrust law and policy, and its prolific work product has been described as a “treasure trove.”<sup>2</sup> This tremendous body of ICN work product (e.g., best practices, enforcement manuals, templates on rules and legislation in member jurisdictions, reports, workshops, webinars) is valuable as evidenced by its use and influence with members' enforcement and advocacy activities.

3. The creation and growth of the ICN reflect a broader trend in international relations toward the use of transgovernmental networks (TGNs) as a preferred method of governments “doing business” across borders. The “transnationality of many contemporary policy issues has fundamentally altered the separation between domestic and international policymaking,”<sup>3</sup> and these international networks of domestic officials are being established to address these complex transnational issues. Proponents of TGNs suggest that they expand the state's capacity to confront transnational issues, increasing the efficiency of international coordination by bringing together officials responsible for a certain policy area. Collaboration among regulators, advocates suggest, has a dual effect on domestic policy, by advancing convergence of rules and regulations, and developing domestic regulatory capacity through experience sharing, training, and technical assistance.<sup>4</sup>

4. Critics of TGNs allege that these networks are simply “talking shops”, ineffective, and a waste of resources. At the other extreme, critics fear TGNs might accomplish too much, that is, TGNs can provide a platform for unchecked technocratic rule-making, bringing together “agencies on the loose, unrestrained by democratic accountability”<sup>5</sup>, and possibly serve as just another means for regulatory export from stronger to weaker states.<sup>6</sup>

1 ICN's Operational Framework, at <http://www.internationalcompetitionnetwork.org/about/operational-framework.aspx>.  
2 See John Fingleton, “Closing speech to International Competition Network (ICN) conference”, June 2009, citing Eleanor Fox, available at: <http://www.internationalcompetitionnetwork.org/uploads/closing09.pdf>.  
3 Anne-Marie Slaughter and Thomas Hale, “Transgovernmental Networks and Multilevel Governance” in David Hand and Thomas Hale (eds.) Handbook of Transnational Governance, Polity Press, Cambridge, UK.  
4 See David Bach and Abraham Newman, “Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation” International Organization 64, Summer 2010, 505–28. This article presents recent empirical work in the securities area that demonstrates transgovernmental networks have an independent and measurable association with participants' domestic policies.  
5 Anne-Marie Slaughter, A New World Order, Princeton, N.J.: Princeton University Press, 2004, at 48.  
6 Kal Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 Va. J. Int'l L. 1 (2002).

\* Maria Coppola is counsel for international antitrust at the U.S. Federal Trade Commission. She is responsible for the FTC's participation in the International Competition Network, and has been active in the ICN since 2003. Section three of this article is based on an earlier article, Coppola and Lagdameo, “Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices”, in Paul Lugard (ed.) “The International Competition Network at Ten”, Intersentia Press (2011). The views expressed here are the author's alone and do not necessarily represent the views of the Federal Trade Commission, any individual Commissioner, or the ICN.

5. This article evaluates the ICN by applying these arguments in support of and against TGNs. The first section looks at how the ICN has furthered international cooperation and coordination. The second section uses the ICN best practices for merger notification and review procedure to evaluate the ICN's influence on domestic policy. The third section looks at domestic capacity building – is the ICN a vehicle for capacity building and technical assistance? These three sections also address the criticisms of TGNs and look to whether the allegations – that they are unproductive and inefficient, unaccountable, and engage in regulatory export from stronger to weaker states – are at play within the ICN.

## I. International cooperation

6. In 1999, a US Federal Trade Commission official observed, “the more we deal with other agencies, the more we deepen the relationships with our counterparts and broaden the institutional relationships through making the acquaintance of more and more of the investigative staff members, supervising officials, and decision makers.”<sup>7</sup> Over the past decade, many of these relationships among enforcers have developed as a direct result of ICN projects, workshops, and conferences.

7. The chair of the ICN's Steering Group described how the ICN facilitates international cooperation: “one of the key benefits of the ICN is the way in which it fosters personal relationships between competition enforcers around the world, both among front line staff as well as between agency heads. These relationships make closer and more effective case cooperation more likely. The ICN's convergence work also leads to a platform for greater case cooperation, through its promotion of shared standards and procedures.”<sup>8</sup>

8. As a virtual organization, most of ICN's work is conducted via conference calls, e-mails, and the web. However, members and Non-governmental Advisors (NGAs) meet face-to-face annually at a conference.<sup>9</sup> Attendance at these conferences has grown faster than membership<sup>10</sup>: in 2004, 50 of 87 jurisdictions participated in the annual conference. In 2011, 92 of the 103 jurisdictions participated. At the staff level, members and NGAs meet at workshops for case handlers, including an annual cartel workshop, and workshops on mergers and unilateral conduct. This “live” contact reinforces the relationships built in virtual spaces.

9. Has this cooperation gone beyond a “talking shop”?<sup>11</sup> While cooperation within the ICN on specific cases was not contemplated, nonetheless, personal relationships developed within the ICN have reduced barriers to cooperation and serve as a point of contact for initiating case cooperation.<sup>12</sup> ICN work product also facilitates coordination and cooperation on specific cases. For example, the ICN has developed a Recommended Practice on cooperation in merger investigations, and a model waiver of confidentiality that has been used by many ICN members in actual cases.

10. One of ICN's major achievements in promoting international coordination is the development and implementation of a Recommended Practice on timing and review of mergers. As described in the next section, more than a third of ICN members have made changes that facilitate multijurisdictional merger review by better aligning time tables for notification and review. Similarly, the Good Practices for Anti-cartel Enforcement address coordination with other agencies, including obtaining waivers for common leniency applicants and coordinating searches and dawn raids.

## II. Convergence

11. The majority of the ICN's work is aimed at promoting convergence toward best practice. The ICN does this by creating and distributing work product such as case manuals and handbooks, as well as more directly through the creation of “soft law” in the form of recommended practices.<sup>13</sup> The ICN has adopted “Recommended Practices” in the area of merger procedure and substantive merger analysis, the assessment of dominance/substantial market power unilateral conduct laws, and the treatment of state-created monopolies. This section looks to evaluate the ICN's success promoting convergence around its best practices, relying on member experience with the ICN's Recommended Practices

7 John J. Parisi, “Enforcement Cooperation Among Antitrust Authorities”, *European Competition Law Review*, March 1999.

8 John Fingleton, “The ICN's Vision for Its Second Decade”, presented at the 10th annual conference of the ICN, The Hague, Netherlands, May 18, 2011, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>.

9 NGAs are non-governmental experts, including private practitioners, economists, academics, representatives of international organizations, and industry and consumer groups, who participate in the ICN alongside members.

10 Membership too has increased at an astounding rate. ICN's inclusive approach explains this growth from an initial 15 in 2001, to 80 by 2003 and to 117 members in 2011, and still growing. Members from newly established agencies, in particular, welcome the simple application and (usually) quick approval process.

11 See also David Lewis “Some Reflections on the ICN”, in Paul Lugard (ed.) “The International Competition Network at Ten”, Intersentia Press (2011), at 205, 215. David, former Chairperson of the South African Competition Tribunal and former Chair of the ICN Steering Group, argues that engaging in discussion, “to persuade, to learn to appreciate the basis for divergence, to network, is often pejoratively labeled a ‘talk shop’, especially when contrasted with activities that lead to ‘hard convergence’ . . . . Certainly, the South African competition authorities have gained more, have become better competition enforcers and advocate, all from ‘talking’ in networks like the ICN and OECD” David concludes saying “[ICN] has become a dense network, not merely of competition agencies, but of deeply committed individuals – and if that is to be regarded a ‘talk shop’ then I can only conclude that the world needs more of them.”

12 One example of ICN relationships fostering specific case cooperation is provided by John Fingleton in “The International Competition Network: Planning for the Second Decade”, presentation for the ICN's 9th Annual Conference in Istanbul, Turkey, 27-29 April 2010, at 3.

13 For a fuller discussion about the development and use of ICN work product, see ICN's 2011 Statement of Achievements, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc757.pdf>.

for Merger Notification and Review Procedures to do so.<sup>14</sup> It also examines questions of accountability and influence.<sup>15</sup>

#### Recommended Practices for Merger Notification and Review Procedures

12. Between 2002 and 2006, the ICN adopted 13 recommended practices on merger notification and review procedures. Designed to accommodate different legal traditions and stages of development, they consist of short, “black letter” statements followed by explanatory comments. The Practices are non-binding; it is left to governments and agencies to implement them, through legislative reform or changes to internal agency practice, as appropriate.

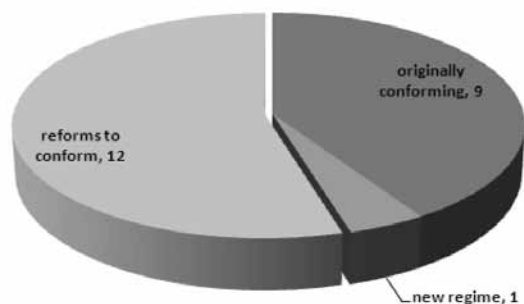
13. Although the Practices are non-binding, reaching agreement on them was an impressive achievement. ICN members adopted the Practices even though many of their own merger laws and practices did not conform to the recommendations.<sup>16</sup> The members’ willingness to adopt practices at odds with 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.<sup>17</sup>

14. In adopting the Recommended Practices, ICN members recognize them as an international standard of good practice. Despite their non-binding nature, the expectation is that ICN members will implement them, as appropriate.<sup>18</sup>

According to a 2010 survey of ICN members,<sup>19</sup> over 75% of the 54 responding agencies used or are using the Practices to, among others, identify areas for change, provide conforming language, and build support for change, and nearly 80% intend to use the Practices in the near future.<sup>20</sup> About 60% of the respondents indicated that these Recommended Practices had already contributed to change in their merger review regimes.<sup>21</sup>

15. As shown in Figure 1, 22 of the ICN’s 87 members with merger control regimes are in full conformity with Recommended Practices I-IV. Of these 22 jurisdictions, 9 initially conformed to the Recommended Practices, 12 jurisdictions introduced reforms that brought their regimes into full compliance with the Practices, and one jurisdiction’s merger control regime was in conformity when it was established after adoption of the RPs.

Fig 1. A Decade of Reforms: jurisdictions compliant with RPs I-IV



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14 The Recommended Practices for Merger Notification and Review Procedures address: (1) nexus between the merger’s effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) interagency coordination; (11) review of merger control provisions; (12) remedies; and (13) competition agency powers. See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. This article presents detailed data only on four of the thirteen Recommended Practices for Merger Notification and Review Procedures: nexus between the merger’s effects and the reviewing jurisdiction; objective criteria for notification thresholds; timing of notification; and merger review periods. The Recommended Practices on thresholds are arguably among the most important of the Practices, since the notification of transactions that have little or no effect in the reviewing jurisdiction is a clear waste of agency and private resources. The Practices on timing and review periods are particularly important to streamlining multijurisdictional merger review. Most importantly, however, all four of these Practices lend themselves to a mostly objective evaluation of whether or not agencies conform to them.

15 Members’ convergence around the Recommended Practices is not the only or the best way to judge the ICN’s success—the breadth of the ICN’s work is far greater than these Recommended Practices and other work product such as the ICN’s Anti-Cartel Manual are enormously influential in shaping domestic policies. Aspects other than influence on policy, such as the relationships among members, are also recognized as important indicia to evaluate success. Most observers and participants nonetheless agree that implementation of the ICN’s Recommended Practices is one important indicator of the Network’s success.

16 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.

17 The ICN work influenced other international standards, such as the OECD’s Council Recommendation Concerning Merger Review (available at [www.oecd.org/competition](http://www.oecd.org/competition)). The ICN Recommended Practices remain a key benchmark in activities such as the peer reviews conducted within OECD and UNCTAD.

18 Recognizing that there is no perfect “one size fits all” legal standard for the world, some ICN members, after careful consideration, have decided that some aspects of the Practices are not appropriate for their jurisdiction.

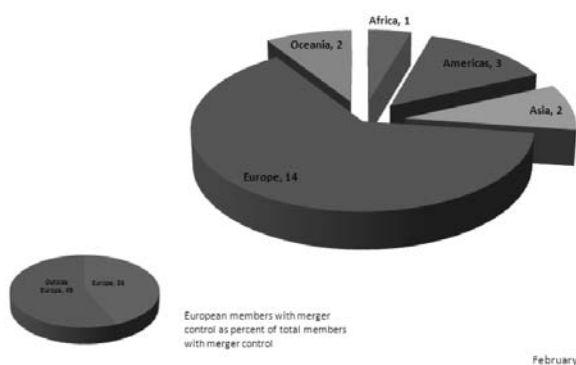
19 In the fall of 2010, the Merger Working Group conducted a survey of ICN members to assess MWG work product and future needs [hereinafter “2010 ICN Survey”]. Fifty four ICN members responded to the survey. A report on the survey is available here: <http://www.internationalcompetitionnetwork.org/uploads/merger%20wg/mwg%20comprehensive%20assessment%20report%20-%20final%20with%20appendices.pdf>. These responses are similar to a general survey conducted in 2008, in which 77% of the 53 respondents indicated that they used the ICN Recommended Practices, with nearly all of these respondents pro-actively working towards applying the Practices [hereinafter “2008 ICN Survey”]. For the 2008 survey report, see: <http://www.internationalcompetitionnetwork.org/uploads/library/doc390.pdf>

20 2010 ICN Survey.

21 Experience suggests that the 80 percent of respondents that “intend” to use the Recommended Practices means that many, if not most, of these members will undertake some type of reform. However, reforms may cover only some of the Recommended Practices: in some instances changes bring a jurisdiction into greater conformity in one area but not necessarily into compliance with all aspects of the Recommended Practices. Also, members may determine that a particular Practice is not appropriate for their jurisdiction. The Israeli agency, for example, carefully reviewed the Recommended Practice on objectivity of thresholds, conducted a multi-year retrospective study of their own experience, and concluded that too many potentially problematic transactions would have escaped notification absent the market share threshold. Since the agency lacked jurisdiction to review non-notifiable transactions, it retained its market share threshold.

16. Evaluated by geographic origin (see Figure 2), most of the conforming members are from European jurisdictions. This begs the question of whether the ICN was in fact the impetus for reform. However, three factors may explain the high European numbers: first, European members account for 45% of ICN members with merger control, and second, many of the European members have had a longer history with merger control than in other parts of the world, allowing for more time to experiment with and then change the system. A third factor is that many of the European agencies may have introduced reforms following the 2004 European Commission Merger Regulation, which is compliant with the ICN Recommended Practices.

Fig 2. Geographic distribution of jurisdictions compliant with RPs I-IV



17. One aspect many of the ICN-compliant jurisdictions share is relatively more experience and a large GDP.<sup>22</sup> Does this suggest that these recommended practices are simply another tool for the leading competition authorities – e.g., European Commission, United States – to export their regulatory regimes? It may be no coincidence that the Recommended Practices are written in such a way that all aspects of the U.S. and E.C. merger regime are in conformity. But these jurisdictions also have a long history of merger enforcement and considerably more experience experimenting with merger procedure and review than other ICN members. An early incident with the Recommended Practices suggests that ICN’s consensus-based organization may mitigate risks of domination by the larger, more mature agencies. As described elsewhere, one ICN member from a smaller agency objected to proposed language when the Practices were put to the membership for adoption, with the result that the Recommended Practices were not adopted at that time, and amended the following year to address that member’s concern.<sup>23</sup>

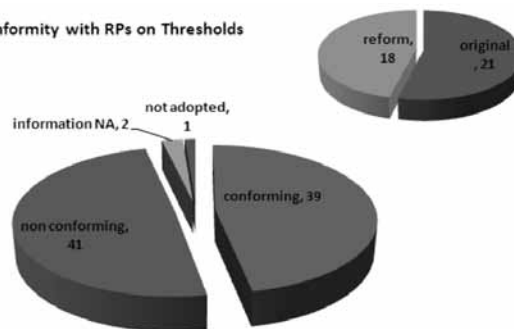
18. Regarding the Recommended Practices on Thresholds, approximately half of ICN members with merger regimes conform, as demonstrated in Figure 3. About a quarter of

<sup>22</sup> For detailed list of who conforms to the Recommended Practices, see Maria Coppola and Cynthia Lagdameo, “Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices”, in Paul Lugard (ed.) “The International Competition Network at Ten”, Intersentia Press (2011), Annex B [hereafter “Intersentia article”].

<sup>23</sup> A detailed description of this event is available in Eleanor Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, 43 International Lawyer 151 (2009) [hereafter “Linked-In”]. Professor Fox also offers examples of compromise and change in the area of unilateral conduct.

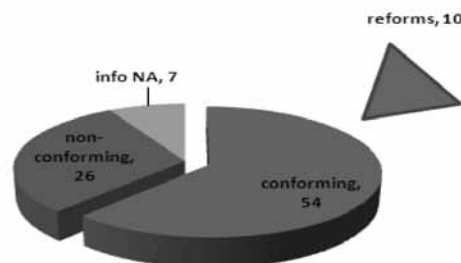
total members have made changes in the past decade that brought them into conformity with the Practices. Only seven ICN members have had a major legislative overhaul to their merger control regime and maintained or added a non-conforming threshold. No members that had conforming thresholds made changes that would bring them out of conformity with the Recommended Practices.

Fig 3. Conformity with RPs on Thresholds



19. Reforms consistent with the ICN practice on timing of notification were introduced by 19 ICN members, as shown in Figure 4. However, while 6 jurisdictions abolished the requirement to notify only after a definitive agreement had been signed, and fourteen jurisdictions eliminated filing deadlines, only ten jurisdictions made changes that brought all aspects of timing into conformity with the Practices.

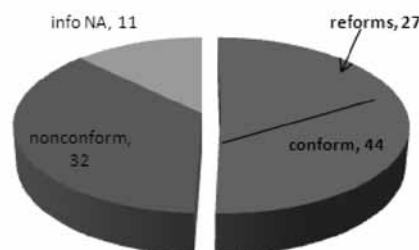
Fig 4. Conformity with RP on Timing



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20. As demonstrated in Figure 5, of the four Recommended Practices reviewed here, the one with the most traction was review periods. Over a relatively short period of time, dozens of members undertook reform designed to shorten overall review periods and “fast track” non-problematic transactions. In all, 27 members made conforming changes to review periods over the last ten years.

Fig. 5 Conformity with RP on Review Periods



21. The quantity and depth of reforms made in each area of these four Recommended Practices is remarkable. The ICN cannot, however, assume full credit for these changes – the factors influencing these reforms are many and multifaceted. The catalyst for reform in some jurisdictions was a need to rationalize resources in the face of increases in merger filings. In others, reform was prescribed or suggested by the European Commission or in OECD or UNCTAD peer reviews. Still other agencies initiated change to reflect international best practice, including the Recommended Practices. In many jurisdictions, a combination of these factors was influential.

22. In 2005, the ICN conducted a study to examine the forces driving merger reform. The study identified three principal factors: 1) a desire to bring the merger review regime into greater conformity with international best practice, including the Recommended Practices; 2) convergence toward the regimes of other jurisdictions, such as those with well-established merger review systems, a regional leader, or a close trading partner; and 3) recognition by stakeholders, in particular, the private bar, the business community, and the competition agency, that the merger review system was not as effective or efficient as it could be.<sup>24</sup> Examining the role of the Recommended Practices in effecting these reforms, the report concluded that:

23. “The Recommended Practices’ influence, while significant, is not always direct; their role depends on the agency, the level of support for merger reform, and the legal context. The Practices may be used in conjunction with other factors to build support for reforms and to shape the direction and content of such reforms.”<sup>25</sup>

24. This study found that other benchmarks, such as the OECD Council Recommendation Concerning Merger Review, played an important role in merger reform.<sup>26</sup>

25. More recent studies indicate that the influence of the ICN Recommended Practices is growing. A 2008 survey of ICN members found that the Recommended Practices for Merger Notification and Review Procedures were the most well known and most used ICN work product, with nearly eighty percent of respondents saying they used the Practices.<sup>27</sup> In a 2010 survey of ICN members, nearly 90% of the 54 responding agencies are very familiar with the Recommended Practices.<sup>28</sup>

26. ICN members are also working to implement these Practices. In the 2008 ICN study, for example, 70% of the 53 responding agencies had indicated they are working towards

applying ICN Recommended Practices.<sup>29</sup> In the 2010 study, over 75% of the 54 responding agencies indicated that they used or are using the Practices, and nearly 80% asserted that they intend to use the Practices in the near future. About 60% of the respondents indicated that the Recommended Practices had already contributed to change in their merger review regimes.<sup>30</sup>

27. ICN members’ use of the Recommended Practices can be divided into three categories: 1) to identify areas for reform; 2) to build support for reform; and 3) to drive reform.<sup>31</sup>

28. Perhaps most frequently, ICN members have used the Recommended Practices as a benchmark to review their own practices.<sup>32</sup> Comparing their systems to the Recommended Practices has allowed agencies to evaluate and identify specific areas for improvement. For example, the Czech agency has said it was directly inspired by the ICN Recommended Practices in reforming its merger thresholds. The Swedish agency used the Recommended Practice on local nexus to identify threshold reforms introduced in 2008. The Finnish agency also indicated that the Recommended Practice on nexus was influential, with a direct impact on the drafting of the law. In 2009, the Colombian agency used the Recommended Practices in creating a “fast-track” merger review procedure. In formulating its 2009 competition law reform, the Costa Rican agency worked with a consultant who, at the agency’s request, canvassed the ICN work. Once the amendments were drafted, the agency asked the ICN to review its proposed reforms to determine whether they conformed with the Recommended Practices. The Recommended Practices also appear to influence non-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.

29. In other cases, such as India and the Slovak Republic, bar associations and business groups have used the Recommended Practices to highlight for the agency or legislature areas of the merger regime that would benefit from reform. Written comments from bar associations, business groups, or other agencies on proposed laws or amendments often use the Recommended Practices to suggest areas for reform.

24 International Competition Network, “Report on the Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures” (April 2005) at 4 [hereinafter “2005 Implementation Report”], available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf>.

25 Ibid.

26 The 2005 ICN study found the ICN’s and OECD’s work have been mutually reinforcing in establishing benchmarks for multijurisdictional merger review. See 2005 Implementation Report.

27 2008 ICN Survey at 24-25.

28 2010 ICN Survey.

29 2008 ICN Survey at 24-25.

30 These responses are similar to the 2008 ICN Survey, in which 77% of the 53 respondents indicated that they used the ICN Recommended Practices, with nearly all of these respondents saying they are working towards applying the Practices. 2008 ICN Survey at 24-25.

31 In some cases, merger reform involved use of the Recommended Practices described in two or even three categories. For example, in Brazil the Recommended Practices informed design of the reforms, they were used as benchmarks in commentary by bar associations, and the agency relied on the Practices (including a letter from the Chair of the ICN’s Steering Group in support of the changes) to lobby the legislature and other stakeholders for reform. In the European Union, the Recommended Practices were used as a benchmark for changes, and as a means of persuading national competition authorities to endorse the changes. Mario Monti, “Quo Vadis?”, International Forum on European Competition Policy Brussels (April 2003) [hereinafter “Monti Quo Vadis”] available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/195&format=HTML&aged=0&language=EN&guiLanguage=en>.

32 For further details about and sources for each of the examples discussed here, see Intersentia article at 300-307.

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

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. 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.

The Recommended Practices often appear in agency press releases or speeches announcing change. For example, the 2003 EU merger reforms eliminating the definitive agreement requirement and the filing deadline explicitly referenced the ICN Recommended Practice on timing of notification. In 2004 the Australian Competition and Consumer Commission introduced indicative timelines for informal merger reviews, and in the press release explained that these changes were underpinned by the Recommended Practices.

**30.** Finally, some agencies have introduced reforms motivated principally by the desire to be viewed as in conformity with the Recommended Practices. For example, a Korean Fair Trade Commission delegate at the ICN’s 8<sup>th</sup> annual conference in Zurich said the KFTC significantly increased the materiality of their notification thresholds “responding directly to recommendations from the ICN.” More recently, 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.

**31.** The overwhelming support for the Recommended Practices, the tiny fraction of agencies who have made changes that do not conform to the Recommended Practices, and the fact that no agency has engaged in reforms that change an ICN-compliant regime to a non-compliant one, suggest that convergence around ICN’s best practices is unequivocally occurring. Allegations of ICN as a “talking shop” do not stand up in face of these statistics about convergence and anecdotes about influence. As far as efficiency is concerned, there is no question that convergence toward these internationally recognized best practices has made notification and review of both domestic and cross-border mergers more efficient and effective.

**32.** Charges that these Practices are another vehicle for regulatory export by larger and better resourced agencies may not be without a grain of truth. However, concerns about domination of the many by the few are mitigated by the consensus-based nature of Practices, and experience suggests a dissenting voice has considerable power.

**33.** The issue of ICN’s best practices being “non-binding” should similarly minimize or cancel out the idea that the ICN is engaged in unchecked technocratic rule-making – that the ICN is simply a group of agencies on the loose, not constrained by democratic accountability. If ICN best practice is non-binding, unaccountable rule-making seems a misplaced smear. But, the influence of the Recommended Practices suggest they are rapidly becoming the industry standard. At the same time, the ICN has become more proactive about promoting them. Recently, for example, the ICN has begun to directly advocate the adoption of reforms that implement its recommendations. Should the ICN’s approach to member use of the Practices change if they remain “non-binding” only in theory?

### III. Building capacity and technical assistance<sup>33</sup>

**34.** The ICN is unique because it is the only international body devoted exclusively to competition law enforcement; the Network is also unique among international organizations with a competition policy component in that the driving force behind almost all of the ICN’s work is a desire to focus on the practical – to develop practical recommendations and other practical tools such as handbooks and manuals on best practices, investigative techniques, and analytical frameworks.<sup>34</sup>

**35.** ICN members and non-members alike rely on ICN work product as training tools for their agencies.<sup>35</sup> Members and NGAs have used the unilateral conduct workshop materials for in-house training of staff and more than a third of ICN members, for example, have indicated that they have used the Anti-cartel Enforcement Manual in their domestic programs – including to draft and implement effective leniency programs, and to develop digital evidence gathering techniques. As described above, the use and influence of ICN best practices in designing and implementing merger reforms is even more widespread.<sup>36</sup> In addition to the content of the work product, many members have indicated that some of the highest value has actually been the process of creating the work product – the exchange, understanding, and learning that comes from creating the work product side-by-side (in cyberspace). The work is usually done in small, consensus-based project teams with considerable debate and review.

**36.** However, not all of ICN work products are created equal. While some products are used frequently, a significant portion of ICN work product goes unused – it collects virtual

<sup>33</sup> The ICN has done considerable work about the delivery of technical assistance (see, e.g., ICN’s Findings Related to Technical Assistance, a study of what constitutes effective technical assistance, including lessons learned about the design of a technical assistance program, the mix of activities employed, the absorptive capacity of the agency, and the types of advisors used), but that is not discussed here.

<sup>34</sup> Links and descriptions to most ICN work products are available here: <http://www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf>.

<sup>35</sup> This process is facilitated by the Advocacy and Implementation Network Support Program, established in 2008. Through AISUP, ICN members can seek advice about specific ICN work product or receive assistance on how ICN recommendations and other guidance documents might be used within their jurisdiction. See [http://www.internationalcompetitionnetwork.org/uploads/aisup\\_flyer\\_ver.2010.pdf](http://www.internationalcompetitionnetwork.org/uploads/aisup_flyer_ver.2010.pdf).

<sup>36</sup> See 2011 Statement of Achievements for further detail.

dust on the ICN website. One explanation for lack of use is that some work product, while well-intentioned, turned out to be less useful. Another reason is that the ICN may be better at producing work product than disseminating it. A lack of a formal Secretariat may exacerbate this problem, since there are no dedicated marketing and outreach staff, no formal website technicians, etc. The ICN should do more to identify opportunities for dissemination of the materials, such as through regional networks and regional centers. Language is also a factor: while the Recommended Practices on Merger Notification and Review Procedures and the Unilateral Conduct recommendations are translated into French and Spanish, few other ICN work products have been translated, and many case handlers and investigators are not fluent in English. In these instances, the ICN work product reaches the agency's international department, and it stops there.

**37.** Unused work product calls into question the efficiency of the ICN. To some extent, poor quality or less relevant work product has been mitigated by greater ICN Steering Group oversight of project plans and work product and the formation of a working group chairs group to share experience among the working group, though more remains to be done in the area of quality control. A larger, looming question, however, is resources. At what point does the informal, virtual approach reach its tipping point?

**38.** Resources are an issue in an ambitious new project – perhaps its next flagship project – the ICN launched in 2010 to create a virtual university. Relying on existing ICN work product as a guide, the ICN's "Curriculum Project" has training modules, consisting of video lectures and accompanying materials from a diverse group of international academics and practitioners, that provide an on-line interactive educational center (free of charge) for competition authorities from around the world. The training incorporates theory and implementation – for example, the market definition module covers principles of market definition as well as the information agencies should try to obtain and techniques to obtain it. During its first year, the Curriculum Project team created four modules: 1) the origins and aims of competition policy, 2) major characteristics of competition policy, 3) market definition, and 4) market power.<sup>37</sup> In the coming year, the Project team plans to produce six more modules. Sustainability is an issue: production is expensive, and member and NGA willingness to pay may be constrained by the global belt-tightening.

**39.** In addition to work product, a significant source of domestic capacity building stems from the experience sharing and exchanges among members, from repeated interaction and exposure to each other, and how agencies go about enforcement, advocacy, and operational activities. The most direct examples of this exchange occur in training-style workshops and seminars. There have been over 20 ICN workshops dedicated to specific substantive areas of competition law enforcement, often focused on training exercised for new or less experienced case handlers.

<sup>37</sup> The modules are available online at: <http://www.internationalcompetitionnetwork.org/working-groups/vice-chair/outreach/icncurriculum.aspx>.

In addition, ICN holds frequent teleseminars, webinars, and enforcer discussion calls to exchange experiences and discuss policy issues.

## IV. The future of the ICN

**40.** The ICN's ascension to the top position of international organizations addressing competition policy was rapid and intense. A decade ago the ICN did not exist, and even five years ago many competition agency staff or practicing lawyers would be hard pressed to know the words forming this initialism. Today a Google search "International Competition Network" returns nearly 80,000 results. A search for "OECD Competition Committee" returns about half that number of results.

**41.** ICN's success has been impressive, and the Network shows no signs of resting on its laurels. But considerable work remains to be done: being the new kid or next new thing can propel someone or something into the top spot, but competence, relevance, and representation are needed to stay in that position. What are the Network's greatest risks for a free fall?

**42.** Membership. ICN membership has exploded, but many agencies in Africa are not yet members, and if ICN is to reflect global realities, a greater effort should be placed on recruiting new members from sub Saharan Africa.

**43.** Participation. Membership numbers are impressive, as well as attendance at annual conferences. But ICN needs to ask itself whether it is doing all it can to mitigate the practical aspects of the network that "may produce effective underrepresentation of developing countries, and (at least by default) greater voice of the two antitrust leading models in the world – the United States and the European Union."<sup>38</sup> Representation in leadership positions of ICN members from developing countries remains inexcusably low, though recent efforts to limit positions-for-life,<sup>39</sup> as well as the addition of Barbados Fair Trading Commission to the ICN Steering Group,<sup>40</sup> are good progress.

**44.** Consultation. In its early years, ICN carefully vetted its Recommended Practices with all members before they were presented at the annual conference for adoption. This process has deteriorated, and replaced with a standing assumption that members have read and agree with Recommended Practices put up for adoption. Query whether this process is too expedient to allow a voice for agencies that have not participated in the working group that developed the practices?

<sup>38</sup> Linked-In, at 126.

<sup>39</sup> The ICN's Operational Framework regarding leadership of working groups was revised in March 2011. Under the new system, three ICN member agencies will serve staggered three-year terms. Under the previous system there was two chairs, with no specified timing for stepping down from a leadership position, with the result that few chairs gave up their position. A driving force behind this change was to allow more agencies from developing countries to participate in leadership positions. Disappointingly, the new chairs are all from advanced economies: Sweden, Portugal, Japan, France, and Mexico. The French, Japanese, and Mexican agencies already hold leadership positions and are original (and continuing) members of the Steering Group.

<sup>40</sup> Other agencies from developing and newly industrialized economies have served on the Steering Group, including South Africa and Mexico (current members), and Zambia.



**45. Diversity.** As indicated by many observers and participants, ICN needs to carefully consider how it balances respect for diversity with its goal of reaching convergence, particularly in an environment where “soft law” is quickly becoming the industry standard. If members decide ICN’s best practices are not appropriate for their agency, can they say so freely? Will the ICN’s new virtual university present the diverse views exchanged en route to reaching consensus on best practices?

**46. Presbyopia.** In its first decade, ICN has been “all antitrust, all the time”. Recently, members have indicated a desire to expand beyond antitrust, and examine complimentary issues such as trade liberalization. Such an expansion can complicate member’s domestic relationships with other government departments and agencies, and risks limiting the wide room to maneuver that many members currently enjoy. The expansion would also redirect resources away from the ICN’s core mission.

**47. Resources.** As budgets are slashed, agencies’ abilities to engage in international activities and international travel will come under scrutiny. ICN members need to publicize how their participation in the ICN affects domestic work, including capturing statistics on use of ICN work product and cross-border case cooperation resulting from participation in the multilateral arena. Even more fundamentally, ICN needs to consider whether, as the network grows, the benefits of a “virtual” structure outweigh the benefits associated with lack of a formal secretariat.<sup>41</sup>

**48. Joint Efforts.** One reason for ICN’s success has been its adherence to subsidiarity. Going forward, this principle will mean focusing efforts for joint work with the new regional networks, including the African Competition Forum, and the new regional center for Latin America based at the Mexican Federal Competition Commission.

**49.** This is a long laundry list for an institution that does not have a washing machine. But the ICN has already demonstrated we can expect great things of the network. As a colleague once said, “the Network is virtual. The benefits are real.” ■

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<sup>41</sup> While a bricks-and-mortar establishment may not be necessary, ICN should consider expanding the current informal secretariat, asking ICN members to provide dedicated staff to address operational and administration matters. For a discussion of why the ICN should not have a formal secretariat, see Philip Marsden, “Acta Non Verba” in Paul Lugard (ed.) “The International Competition Network at Ten”, Intersentia Press (2011) at 136. Marsden writes, “[i]f the ICN had such a support structure of international bureaucrats I think it would become sclerotic, and certainly less agile and less effective.”

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