

MERGER REVIEW: CONVERGENCE AND IMPLEMENTATION OF THE INTERNATIONAL COMPETITION NETWORK'S RECOMMENDED PRACTICES

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The strength of any competition law system is in its transparent, predictable, and consistent enforcement. Merger review is a significant part of any competition law system, and, to be effective, it must also be applied consistently, predictably, and transparently. International competition organizations support these goals and, most notably in the past decade, have promoted and achieved convergence in merger review regimes around the world. The International Competition Network (ICN)'s recommendations have been a driving force in promoting the convergence of merger review laws, policies, and procedures among the ICN's nearly 100 members with merger laws.

Convergence begins when agencies discuss issues and learn from each other's experiences, and it continues as they reach consensus and develop common principles and practices that reflect how best to enforce antitrust laws. Convergence is furthered as jurisdictions amend their laws and policies to conform to these principles and practices. Convergence has helped reduce, and in some cases eliminate, the "fundamental inconsistencies"² in regulatory systems that early competition law enforcement exposed. However, there is still work to be done.

The ICN has been a catalyst for convergence. It provides a forum for agencies to share their experiences and learn from one another, and it has

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² "The Interface of Competition and Consumer Protection," Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, October 31, 2002, at p. 8, available at <http://www.ftc.gov/speeches/muris/021031fordham.pdf>.

developed two sets of Recommended Practices (RPs) related to merger review: the Recommended Practices for Merger Notification and Review Procedures³ and the Recommended Practices for Merger Analysis.⁴ ICN members have reported that the RPs have influenced amendments to merger review laws and policies in their jurisdictions, and amendments in the past ten years have often brought these laws into greater conformity with the RPs.⁵

The reach of the ICN grows each year, as systems converge and implementation of the RPs continues. Some newer members already have merger regimes in place, while others are developing the laws and policies to conduct merger review. In the past two years alone, ICN has welcomed new members with merger laws including: Ecuador, the Faroe Islands, The Gambia, Guernsey, Kosovo, Malawi, Papua New Guinea, and Zimbabwe. Recent changes in these and other jurisdictions show the impact of the ICN's work.

I. Convergence in Merger Notification and Review Procedures

The ICN Merger Working Group's first set of Recommended Practices, the Recommended Practices for Merger Notification and Review Procedures, was drafted and adopted between 2002 and 2005. The N&P RPs address: the nexus between the merger's effects and the reviewing jurisdiction; clear and objective

³ Recommended Practices for Merger Notification and Review Procedures ["N&P RP"], available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. The N&P RPs are available in English, French, and Spanish.

⁴ Recommended Practices for Merger Analysis ["Merger Analysis RPs"], available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>.

⁵ See, e.g., Case study of Belgium in "Setting Notification Thresholds for Merger Review" Annex C, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf> and Maria Coppola and Cynthia Lagdameo, "Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures" in *The International Competition Network at Ten* (Paul Lugard, editor) (2011) ["Taking Stock and Taking Root"], page 308, available at <http://www.ftc.gov/oia/speeches/coppolaLagdameoicn.pdf> ("About 60% of the respondents indicated that the Recommended Practices had already contributed to change in their merger review regimes.").

notification thresholds; timing of merger notification; merger review periods; requirements for initial notification; conduct of merger investigations; procedural fairness; transparency; confidentiality; interagency coordination; remedies; competition agency powers; and review of merger review provisions.⁶ Notably, these recommendations were drafted and adopted by ICN members whose own laws and policies did not conform to the RPs. In fact, “almost half of the key participants in the group that drafted these practices – including the competition agencies of the European Commission, Germany, Italy, Korea, Poland, and Taiwan at that time had laws or procedures that did not reflect the Practices.”⁷

In the decade since the first N&P RPs were adopted, some ICN members have amended their laws and policies to conform with the N&P RPs.⁸ Importantly, when these members have made changes, they amended their laws to remain consistent with these practices.⁹ While measuring conformity can be a challenge, there is a metric to determine conformity with the N&P RPs on nexus and thresholds.¹⁰

The ICN N&P RP on nexus state, “[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.”¹¹ The nexus to the jurisdiction should be “based on activity within that jurisdiction, as measured by reference to the activities of at least two parties

⁶ N&P RPs.

⁷ “International Best Practice: ICN’s Role in Creating and Diffusing Norms,” Remarks by Eduardo Perez Motta at the International Bar Association’s 16th Annual Competition Conference, September 15, 2012 [“International Best Practice”], pages 2-3, available at <http://internationalcompetitionnetwork.org/uploads/library/doc837.pdf>.

⁸ See Taking Stock and Taking Root.

⁹ See International Best Practice.

¹⁰ See Taking Stock and Taking Root.

¹¹ N&P RP I.A, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> and N&P RP I.B (“Merger notification thresholds should incorporate appropriate standards of materiality as to the level of ‘local nexus’ required for merger notification.”).

to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.”¹²

The N&P RPs support notification thresholds that are “clear” and “based on objectively quantifiable criteria.”¹³ One-party nexus and subjective thresholds may not conform to the N&P RPs.¹⁴ Agencies and merging parties alike benefit from thresholds that are clear and based on objectively quantifiable criteria because they permit agencies to screen out mergers that are not likely to harm competition significantly and reduce the costs and burdens on parties.

In the past two years, many ICN members have adopted, amended, or enforced merger laws and policies that conform or partially conform to the Recommended Practices on nexus and thresholds. For example, in 2011 and 2012, Brazil overhauled its merger review system. Amendments replaced a one-party subjective threshold with a two-party, gross-revenue-based threshold, in conformity with the N&P RPs.¹⁵ India’s merger review procedures require parties to notify a transaction based on both parties’ assets or turnover in India.¹⁶ Others are amending their laws in ways that continue to comply with the Recommended Practices related to nexus and thresholds. For example, Turkey’s recent amendments conform to the RPs.¹⁷

¹² N&P RP I.C.

¹³ N&P RP II.A and B.

¹⁴ See Taking Stock and Taking Root, Appendix B.

¹⁵ Ron Knox, “Brazil raises merger thresholds under new antitrust law,” May 30, 2012, available at <http://www.globalcompetitionreview.com/news/article/31896/brazil-raises-merger-thresholds-new-antitrust-law/>.

¹⁶ Competition Act, 2002, as amended, Competition (Amendment) Act, 2007, § 2 (y) available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=18.

¹⁷ Nicholas Hirst and Cihan Tutluoglu, “Turkey’s merger control system to benefit from higher thresholds and streamlined test – lawyers” *Financial Times*. January 9, 2013, available at <http://www.ft.com/cms/s/2/9f2e3cca-5a74-11e2-a02e-00144feab49a.html#ixzz2Na3NuSkc>.

Smaller ICN members with newer laws are also following the N&P RPs. Guernsey implemented its competition law in 2012 and requires a local nexus by analyzing “turnover arising in Guernsey” for certain transactions.¹⁸ Similarly, The Faroe Islands competition law, amended in 2012, considers “aggregate annual turnover in The Faroe Islands”¹⁹ in some notifiable transactions. Namibia adopted its first thresholds in 2012, and considers assets or turnover in Namibia.²⁰ To further the goals of transparency and predictability, Namibia also issued guidance on how it would calculate assets and turnover.

While progress and steps toward conformity with the N&P RPs should be applauded, many jurisdictions require notification of transactions based on subjective thresholds, such as those based on market share or sales, or on the assets of the acquiring firm alone. More advocacy work is needed to encourage jurisdictions to adopt notification rules that conform to the N&P RPs and require notification only when “the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned.”²¹

II. Convergence in Merger Analysis

As convergence in notifications and review procedures has continued, there has also been convergence in the analysis of horizontal mergers. Since the ICN Merger Working Group completed the Recommended Practices for Merger Analysis (Merger Analysis RPs)²² three years ago, many competition agencies have adopted or amended guidelines for horizontal merger analysis. In many

¹⁸ The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, Section 13(1) 2012, available at <http://cicra.gg/files/Guernsey%20M%20and%20A%20Regulations.pdf>.

¹⁹ The Competition Act of The Faroe Islands. Consolidated Act. No 35 of 3 May 2007 as amended with Act. No 35 of the 27 April 2012, Part 4, Section 14, <http://www.kapping.fo/get.file?ID=10059>.

²⁰ Namibian Merger Control Thresholds, Government Gazette No. 288 of 2012.

²¹ N&P RP I.C., Comment 1.

²² *Supra* at note 4.

cases, amendments have moved jurisdictions closer to international standards reflected in these Recommended Practices.

The Merger Analysis RPs were adopted at the ICN's annual conferences in 2008-2010 and address: the Legal Framework for Competition Merger Analysis; Market Definition; the Use of Market Shares: Thresholds & Presumptions; Overview of Competitive Effects; Unilateral Effects Analysis; Coordinated Effects Analysis; Entry and Expansion; and Failing Firm/Exiting Assets.²³ As CFC Chairman and ICN Steering Group Chair Perez Motta noted in 2012, the ICN is developing a way to measure conformity with the Merger Analysis RPs and track implementation.²⁴ While it is not as easy to quantify conformity with the Merger Analysis RPs as the N&P RPs, ICN members continue to adopt merger analysis policies that uphold the international standards established in the Merger Analysis RPs.

Since 2010, there has been significant convergence in the analysis of competitive effects. Focusing on competitive effects complies with Merger Analysis RPs IV and I.C., Comment 1:

An agency's merger analysis should not be a mechanical application of a legal standard based on rigid presumptions, structural criteria, or formulaic concentration numbers. An agency should apply its merger analysis reasonably and flexibly on a case-by-case basis, recognizing the broad range of possible factual contexts and the specific competitive effects that may arise in different transactions.²⁵

As ICN members have revised their horizontal merger review guidelines, they have tended to follow these RPs. In many cases, members have moved away from

²³ *Id.*

²⁴ International Best Practice, p. 3.

²⁵ Merger Analysis RP I.C., Comment 1.

a checklist approach and focus on analyzing the competitive effects of a transaction.²⁶

Newer, smaller, more mature, and larger ICN members have adopted merger review procedures that comply with the Merger Analysis RPs in the past few years. For example, the Korean Fair Trade Commission updated its merger guidelines in 2011, and focused on economic tools and comprehensive analysis of anti-competitive effects.²⁷ Similarly, Finland,²⁸ Germany,²⁹ Singapore,³⁰ and Chile³¹ each amended their guidelines and their merger analysis focuses on analyzing competitive effects.

²⁶ See e.g., Chile's 2012 Guidelines, available at <http://www.fne.gob.cl/english/wp-content/uploads/2013/01/Guia-fusiones-traducida-final-2.pdf> and Chile's 2006 Guidelines, described in Chile's submission to the OECD entitled "Economic Evidence in Merger Analysis," February 15, 2011, available at http://www.fne.gob.cl/wp-content/uploads/2011/03/oecd_0002_2011.pdf.

²⁷ See Korea Fair Trade Commission, "Guidelines for the combination of enterprises review," December 28, 2011, available at http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20the%20combination%20of%20enterprises%20Review_mar%2014%202012.pdf.

²⁸ Finnish Competition Authority, "Guidelines on Merger Control," January 2011, available at <http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-1-2011-Yrityskauppavalvonta-EN.pdf>.

²⁹ Bundeskartellamt, "Guidance on Substantive Merger Control," March 29, 2012, available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf (increased focus on economics; Agency will take into account all relevant factors in its analysis).

³⁰ Competition Commission of Singapore, "CCS Guidelines on the Substantive Assessment of Mergers," effective July 1, 2012, available at http://www.ccs.gov.sg/content/dam/ccs/PDFs/Publications/AnnexA_Revised%20Merger%20Guidelines%20for%20publication%20_3_.pdf.

³¹ Fiscalía Nacional Económica, "Guía para el Análisis de Operaciones de Concentración," October 2012, available in Spanish at <http://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf>.

III. Continuing Convergence and Implementation

Agencies with decades of experience and newer agencies continue to strengthen and create transparent, predictable, and consistent merger control regimes that conform to the international standards set out in the RPs. Portugal¹ and France² currently have draft guidelines out for public comment that follow many aspects of the Merger Analysis RPs. The European Commission is also considering changes. This year, it intends to “fine-tune and improve” its merger review procedures to “further simplify merger procedures, in particular with respect to transactions that clearly pose no problems to competition,” furthering conformity with Merger Analysis RP I.³ The EC also plans to streamline the process and make reviews shorter in certain cases. Also, in 2013, Jersey plans to revise its thresholds,⁴ and these changes will increase conformity to the N&P RPs.⁵

The ICN encourages convergence and implementation by developing and promoting work product beyond the RPs. Self-assessment tools⁶ help agencies

¹ Autoridade da Concorrência, “Projeto de Linhas de Orientação para a Análise Económica de Operações de Concentração Horizontais,” February 1, 2013, available in Portuguese at http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201304.aspx?lst=1&Cat=2013.

² Autorité de la concurrence, “Guidelines on merger control: a two-month public consultation has been launched,” February 22, 2013, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2048.

³ “The role of competition policy in times of crisis,” Speech by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy to the American Chamber of Commerce on December 6, 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm.

⁴ 2012-2014 Strategic Plan and 2013 Work Programme.” at p. 13, available at <http://cicra.gg/files/2013%20work%20programme.pdf>.

⁵ See Simon Harms and Stephen C. Tupper, “EU Merger Control: reform With A Small 'r' (But Do Not Underestimate its Value),” posted March 2, 2013, available at <http://www.natlawreview.com/article/eu-merger-control-reform-small-r-do-not-underestimate-its-value>.

⁶ The Notification and Review Procedures Self-Assessment is available at <http://www.internationalcompetitionnetwork.org/uploads/templates/merger/self%20assessment%20tool.pdf>. The Merger Analysis Self-assessment tool is forthcoming and will be posted on the

identify aspects of their merger review laws and policies that do not conform to the Recommended Practices. Members and non-members alike can consult the Merger Working Group's Investigative Techniques Handbook for Merger Review,⁷ Merger Guidelines Workbook,⁸ the Merger Remedies Report,⁹ Setting Notification Thresholds,¹⁰ and Notification Information Requirements¹¹ for additional information on merger review procedures. Today, the ICN has 127 member agencies from 111 jurisdictions. As membership in the ICN continues to expand, the impact of its work product can be even greater.

Despite great progress, there are still challenges to achieving convergence and continued implementation. Differences in laws, their interpretation, merger policies, and economic analysis will remain. These differences will create challenges. The ICN and all competition agencies must continue to work to ensure predictable, transparent, and consistent merger review.

The nature of the ICN's work furthers these goals as it fosters convergence and implementation. Members create work plans and volunteer to draft collaborative reports and tools, and agencies learn directly from one another as they collaborate on these projects. Frequently, these projects lead to long-lasting relationships among agency staffs. Convergence and implementation is encouraged through bilateral and multilateral relationships that continue well after drafting is finished.

Merger Working Group's website, <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>.

⁷ "Investigative Techniques [Handbook for Merger Review](http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf)," available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>.

⁸ Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>.

⁹ Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>.

¹⁰ "Setting Notification Thresholds" Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>.

¹¹ [Notification Information Requirements](#).