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# New Consensus on Merger Procedure and Analysis: the ICN's 2017 Recommended Practices

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ICN in 2016, the Merger Working Group (MWG) of the International Competition Network began an ambitious project to reassess and update its Recommended Practices approved many years ago.[1] As aspirational recommendations for all members, Recommended Practices are the ICN's highest-level work product, and the Merger Recommended Practices are among the ICN's most prominent and influential work, having inspired dozens of member agencies to make changes to their rules and practices.

This project marks the first time the ICN has taken on the complex challenge of reopening approved consensus Recommended Practices for improvements and updates to reflect new perspectives and years of experience with the existing Recommended Practices. After comprehensive working group dialogue over several drafts of each Recommended Practice during the year, in May 2017 the ICN adopted two new Recommended Practices: one on the definition of covered transactions and one on the role of efficiencies in merger analysis; and amended two Recommended Practices: one on nexus and notification thresholds and one on merger remedies. This article describes the highlights of the new and revised Recommended Practices.

### *New recommendations on jurisdiction and notification*

The new Recommended Practice on definition of a merger states that merger provisions of competition laws should apply only to transactions that result in a durable combination of previously independent entities or assets that are likely to materially change market structure, and not, for example, intra-person restructuring. Similarly, the new Recommended Practice provides that merger review provisions should not be applied to acquisitions of a minority interest if they are unlikely to be competitively significant. The Practice also outlines a framework for defining the scope of transactions, whether through numerical thresholds or broader concepts, such as the acquisition of "control" or of a "competitively significant influence," and advocates clear guidance and criteria for determining what transactions are covered.

The original recommendations on nexus and thresholds stated that jurisdiction should be asserted only over transactions that have a nexus with the jurisdiction concerned that meets an appropriate standard of materiality, based on activity within that jurisdiction. Notification thresholds should be clear and understandable, based on objectively quantifiable criteria (such as sales or assets, rather than market share), and based on information that is readily accessible to the merging parties.

The amended Recommended Practice on nexus and thresholds provides for a consistent focus on the need to limit merger review to transactions that have a "material nexus to the reviewing jurisdiction." It defines "material nexus" as a "significant and direct economic connection to the jurisdiction." The Practice continues to require that at least two parties to a transaction have significant local activities (normally sales or assets) to trigger a notification obligation. If, however, a jurisdiction relies on only the acquired party's activities, the Practices state that the thresholds should be set "at a substantially higher level" to ensure that there is a material nexus. A significant change to the Recommended Practices is that the activities of the acquiring party alone are no longer sufficient to meet the "material nexus" requirement.

The Practices continue to emphasize that the sales and assets of the selling party/selling group that are not being transferred to the acquiring party should not be included in the calculation of

[1] The ICN has two sets of Recommended Practices on mergers: the Recommended Practices for Merger Notification and Review Procedures and the Recommended Practices for Merger Analysis.

notification thresholds. The Practices also clarify that the joint venture should be one of the two parties in the "each of at least two parties" notification thresholds, in order ensure that only transactions with a material local nexus are notifiable.

The updated Recommended Practices now discuss elements specific to voluntary notification regimes. They also introduce the concept of residual jurisdiction, where an agency's jurisdiction extends beyond the transactions subject to notification. The need to take steps to address the desire of merging parties for certainty is noted in connection with systems that have residual jurisdiction and voluntary notification regimes.

The Recommended Practice contains renewed emphasis on periodic review of merger notification thresholds and on the importance of providing guidance for parties on the application of merger notification thresholds.

### *New recommendations on remedies*

In revising the 2005 Recommended Practices related to merger remedies, the Merger Working Group was informed by substantial agency experience and the 2015 ICN Merger Remedies Guide. The basic framework of the Recommended Practice and its advice remains the same: proper remedies should address identified competitive harm; agencies should be transparent about their approach to remedies; remedies should be effective and easily administrable; and remedies should be backed by procedures to ensure implementation, compliance and enforcement. At the heart of its recommendations, the Practice advises agencies to tailor merger remedies to the likely competitive harm and not seek to improve upon premerger competition.

The Recommended Practice contains significant new details about remedies and their procedures derived from agency experiences and perspectives. The two basic forms of merger remedies – structural and non-structural – are explained in more detail, with a statement recognizing some of the advantages of structural remedies in their ability to restore the competitive structure of markets and their need for less monitoring and administrative attention. The new Recommended Practice catalogues different forms of structural remedies, expressing a preference for the divestiture of an ongoing, stand-alone business unit. The Practice also devotes new attention to the identity of the purchaser of divested assets, with advice on the scrutiny of financial strength, managerial expertise, operational capabilities, and independence. In two significant additions related to procedures, the Recommended Practice advocates that agencies [can?] consider requiring approval of a pre-identified purchaser in appropriate situations and articulates the consensus that remedies should specify end dates or have termination provisions. On enforcement and compliance, the Recommended Practice introduces new details about the need for and value of hold separate or asset preservation provisions as well as the role and characteristics of independent trustees used to oversee a remedy.

### *New recommendations on efficiencies*

The Merger Working Group also added to its set of Recommended Practices for Merger Analysis with a new piece on the assessment of efficiencies. This addition completes the set of 'traditional' merger guidelines factors joining other Recommended Practices on market definition, use of market shares, effects, entry, and failing firm.

The Recommended Practice begins with noting that the assessment of efficiencies should be part of an agency's framework for merger analysis and that they should be open to assessing appropriate claims made during investigations. The Practice recognizes that mergers can produce significant efficiencies for the merged firm and that such efficiencies may counteract the potential for anti-competitive effects. To do so, it emphasizes that efficiencies need to enhance the ability and economic incentive of the merged firm to compete, leading to benefits such as lower prices or gains in innovation that lead to new or improved products. The Practice urges agencies to provide transparency with respect to their approach to efficiencies, including the weight placed on efficiency claims, the types of efficiencies taken into account, and any evidentiary requirements for substantiating efficiencies.

The new Recommended Practice also identifies three factors that agencies should use to assess efficiencies. These factors are 1) whether the efficiencies are merger specific (i.e., of direct consequence of the merger), 2) a measure of sufficiency to ensure that the efficiencies counteract the potential harm and are likely to be passed on to consumers, and 3) proper substantiation or verification of the claims. The Recommended Practice recognizes the difficulty in assessing and verifying efficiency claims and that important information about potential efficiencies is normally in the merging parties' possession. Therefore, the Practice notes that merging parties should be required to present evidence regarding the type, likelihood, size, and timing of any claimed efficiencies, and urges such discussions to take place very early in the process.

### *Conclusion*

The 2017 Merger Working Group work product represents a significant accomplishment for the ICN. Member agencies followed through on a commitment to review and revise the ICN's top recommendations related to merger enforcement, informed by enforcement experience and policy learning. The dedication to revisit and advance ICN guidance in exercises such as this reflect the forward-looking nature of the network and bode well for its future. Through the refreshing of the ICN's flagship merger best practice recommendations, it is hoped that the ICN's work in this area will continue to further international convergence, the reduction of unnecessary costs and burdens, and enhanced effectiveness of the merger review laws and policies.

The Notification and Procedures Recommended Practices are here. (See new RP I on Definition of a Merger Transaction, revised RP II on Nexus to Reviewing Jurisdiction, and revised RP XI on Remedies.)

The Merger Analysis Recommended Practices are here. (See new RP VIII on Efficiencies.)