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Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress

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Over the course of four years, beginning at the International Competition Network's (ICN) first conference in Naples in 2002, ICN members have embraced a growing set of best practices for the design and operation of merger review regimes.[1] Implementation of these Recommended Practices has now been recognized as the greatest challenge for the ICN's merger work program.[2] To assess and encourage progress, the Merger Streamlining Group (MSG)[3] commissioned two surveys of competition agencies and private law firms in all ICN member jurisdictions. The first, carried out in 2003, found very mixed levels of compliance with the ICN's initial three Recommended Practices for Merger Notification Procedures.[4] In 2004, a second survey was undertaken to measure implementation of the ICN's next four Recommended Practices relating to Review Periods, Requirements for Initial Notification, Transparency, and Review of Merger Control Provi-

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[1] ICN, Recommended Practices for Merger Notification Procedures, http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf [hereinafter Recommended Practices].

[2] Initially, the ICN leadership questioned the appropriateness of the organization taking an active role in seeking the implementation of its Recommended Practices. *See, e.g.*, Konrad von Finckenstein, *International Antitrust Policy and the International Competition Network*, 2002 FORDHAM CORP. L. INST. 37, 46 (B. Hawk ed., 2003). This debate has been resolved squarely in favor of seeking to help the implementation process. Indeed, the Mission Statement that was part of the ICN's conference materials for its 2005 meeting in Bonn makes it clear that the valuable written work product of the organization should be viewed only as an "intermediate step," and that actual achievements for the ICN are to be measured by real world changes for the better in practice. *See* International Competition Network: A Statement of Mission and Achievements Up Until May 2005, http://www.internationalcompetitionnetwork.org/bonn/Work_Plans/achievements/ICN_Mission_and_Achievements_Statement.pdf.

[3] The members of the Group that commissioned the study are Alcan Inc., British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Goldman Sachs International, NERA, Rio Tinto plc, and Vodafone Group plc. The MSG is assisted by a project team consisting of Janet McDavid (Hogan & Hartson LLP), Phillip Proger (Jones Day), Michael Reynolds (Allen & Overy LLP), and J. William Rowley QC and Neil Campbell (McMillan Binch Mendelsohn LLP). In addition to the *2003 Report*, *infra* note 4, the MSG has previously published the following documents: *Best Practices for the Review of International Mergers*, GLOBAL COMPETITION REV. 27 (Oct./Nov. 2001); Merger Streamlining Group Response to the European Commission's Green Paper on the Review of the Merger Regulation (European Council Regulation 4064/89) (Mar. 2002), http://www.europa.eu.int/comm/competition/mergers/review/comments/ref088_mergerstreamlinegroup.pdf; Best Practices for Merger Review: Analysis and Recommendations for Review Process in the United States and the European Union (November 2002) (on file with authors); Letter from Merger Streamlining Group to Philip Lowe, Director General, DG Competition, European Commission (Apr. 15, 2003) (on file with authors); Comments on Ann III: Draft Form RS Published for Public Consultation by the European Commission (Mar. 11, 2004), http://www.europa.eu.int/comm/competition/mergers/contributions/merger_legislation/029_merger_streamlining_group_en.pdf. All of these documents are available at http://www.mbmlex.com/streamline.

[4] The initial three practices related to Jurisdictional Nexus, Notification Thresholds, and Timing of Notification. *See* Recommended Practices for Merger Notification Procedures (2002), http://www.internationalcompetitionnetwork.org/2002_RPs.pdf. For the results of the 2003 survey, see J. William Rowley & A. Neil Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report*, 5 BUS. L. INT'L 110 (2004) [hereinafter *2003 Report*].

sions.[5] This article summarizes and assesses the results of the 2004 survey, which found that much work remains to be done.

Summary of Key Findings

Responses were received from the competition law agencies and/or the private law firms surveyed in 65 (i.e., 88 percent) of the 74 ICN member jurisdictions.[6] At the aggregate level, a 66 percent compliance with Recommended Practices IV–VII was reported.[7] There was also relatively little variation between the weakest (Review Periods—60 percent), and strongest (Transparency—73 percent) areas, with Requirements for Initial Notification and Review of Merger Control Provisions falling in the middle (65 percent and 72 percent, respectively).

These averages mask much more extensive variations amongst individual jurisdictions. For example:

At the aggregate level, a 66 percent compliance with Recommended Practices IV–VII was reported.

- Germany and Mexico achieved almost complete overall compliance with these four Recommended Practices.
- The European Union, Finland, France, Korea, Lithuania, Mexico, Taiwan, the United Kingdom, the United States, and Zambia also have compliance levels of 90 percent or greater.
- There were 17 jurisdictions (i.e., 27 percent of respondents) with scores below 50 percent, including Indonesia and the Philippines at less than 25 percent.

The most notable findings relating to Recommended Practices IV–VII are summarized below:

Review Periods. 65 percent of responding jurisdictions have procedures for expediting the review of transactions that do not present material competition concerns. While 92 percent of responding jurisdictions have formal time limits or normally complete reviews within the ICN's six-month standard for transactions requiring extended reviews, only 73 percent achieve the benchmark of six-week initial waiting or review periods for transactions not warranting extended review (and 35 percent do not have procedures for expediting the review of non-problematic mergers).

Requirements for Initial Notification. With the exception of translation (where there are approximately equal numbers of fully consistent, partially consistent, and inconsistent jurisdictions), a majority of responding jurisdictions comply with each component of this Recommended Practice. However, there are also a considerable number of non-compliant jurisdictions in each case. For example, 42 percent refuse to accept responsive ordinary course of business information as an alternative to formal filing requirements, 32 percent require personal authentication of the notification by senior officers, and a further 32 percent lack any general flexibility mechanisms relating to the notification requirements for the initial review of a transaction.

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[5] Four additional Recommended Practices were adopted at the 2004 Annual ICN Conference in Seoul (Conduct of Merger Investigations, Procedural Fairness, Confidentiality, and Interagency Coordination). *See* ICN Subgroup on Merger Notification and Procedures Final Subgroup Draft (2004), http://www.internationalcompetitionnetwork.org/rps1.pdf. Two others were adopted at the 2005 Conference in Bonn (Merger Remedies and Agency Powers). An untitled paper setting forth these recommended practices is available at http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG1_Notification_Procedures/RPs_XI_and_XII.pdf. It was decided in Bonn that the ICN's merger work focus going forward will be on implementation of the 13 Recommended Practices adopted to date. At least in the short term, it is not expected that additional Recommended Practices will be adopted.

[6] Five additional jurisdictions have joined the ICN since the survey was conducted.

[7] The survey was conducted before a renumbering process for the recommendations. For the purposes of this paper the Recommended Practices will be referred to by their original numbers, IV–VII. After the 2004 additions, the Recommended Practices regarding Transparency and Merger Control Provisions were renumbered (from VI to VIII and from VII to XI respectively).

Transparency. 85 percent of responding ICN members have extensive transparency with respect to the scope of their jurisdiction, and 74 percent make available sufficient information about the major elements of merger review procedure. However, only 46 percent are consistent with the Recommended Practice regarding transparency of substantive principles and criteria, and 42 percent of those utilizing non-competition factors do not transparently indicate how these factors interface with other substantive aspects of the merger review regime.

Review of Merger Control Provisions. As of Spring 2004, 84 percent of responding jurisdictions had either reviewed their merger regime since the initial ICN meeting in Naples (September 2002) or had plans to do so, and 64 percent indicated an intention to pursue reforms that promote convergence with recognized best practices.

Objectives and Process

ICN members indicated after the endorsement of the Guiding Principles for Merger Notification and Review[8] and the initial three Recommended Practices at their first annual meeting in Naples that implementation issues would be left to the initiative of individual jurisdictions.[9] While this approach was replaced by an explicit commitment of ICN members at the third and fourth annual meetings in Seoul and Bonn to address implementation as a priority issue,[10] private sector participants have also been encouraged to take an active role in promoting such implementation. The Merger Streamlining Group's 2004 survey was one response to that request.

Following the process established in 2003, surveys were developed to obtain information from both competition law enforcement agencies and private law firms that are regularly involved in merger reviews. The surveys were designed to gather information that is as objective as possible in order to allow an assessment of the level of implementation of each Recommended Practice in each ICN jurisdiction.

The survey was lengthy, primarily because Recommended Practices IV–VI have numerous components and are supplemented by extensive commentaries from the ICN's Merger Working Group. Nevertheless, the response rates were strong: 54 percent of agencies and 73 percent of law firms surveyed provided responses that were substantially complete.[11] While it was disappointing not to receive responses from all ICN member agencies and law firms that were contacted, when overlapping agency and private sector responses are consolidated, there were only nine jurisdictions without a response.[12] With the exception of certain relatively subjective questions, responses from the competition agency and law firm for a particular jurisdiction were generally consistent.

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[8] ICN, Guiding Principles for Merger Notification and Review (Sept. 2002), http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm [hereinafter Guiding Principles].

[9] *See, e.g.*, Konrad Von Finckenstein, Comm'n of Competition, Competition Bureau, Canada, Address to the Conference Board Antitrust Conference: Antitrust Issues in Today's Economy (Mar. 2003).

[10] *See, e.g.*, ICN, Implementation of the ICN Recommended Practices For Merger Notification and Review Procedures (Apr. 2005), http://www.internationalcompetitionnetwork.org/050505Merger_NP_ImplementationRpt.pdf.

[11] The higher private sector response rate may reflect resource availability (although efforts were made to keep the survey as simple as possible) and/or possible self-selection biases. Agencies which are not committed to implementation of Recommended Practices may have been less inclined to respond, while private law firms were presumably not subject to the same disincentive and may have welcomed the opportunity for visible participation in the public policy process.

[12] No response was received from the agency or the local counsel contacted in Barbados, Colombia, Costa Rica, Morocco, Panama, Sri Lanka, or Sweden, and no response was received from the Andean Community or the EFTA Surveillance Authority agencies (for which there are no local counsel counterparts).

Each of the Recommended Practices has multiple components. The survey questionnaire attempted to gather information regarding the major elements of each Recommended Practice, as set out in the text of the practice itself and as explained by the accompanying comments of the ICN Notification and Procedures Working Group. In the absence of any objective basis for weighting the relative importance of particular components, an overall measure of compliance with a Recommended Practice was calculated by assigning a score of one for each element where a jurisdiction was fully consistent, a score of zero for areas of clear inconsistency, and, where applicable, a score of one-half for partial consistency. Because not all components of each Reviewable Practice are applicable to every jurisdiction,[13] the total potential score varied between 14–25 across the four Recommended Practices. Results have been converted to percentages for ease of comparison.

[I]t is troubling that over one-third (35 percent) of responding jurisdictions lack processes for expediting the review of transactions that do not raise significant competitive issues.

Review Periods

The Recommended Practice relating to Review Periods was divided into seven major elements:

Expedited Review Procedures. The survey results indicated that about half (49 percent) of ICN jurisdictions have adopted formal two-phase structures and an additional 16 percent employ other practices for expediting review of non-problematic transactions. However, it is troubling that over one-third (35 percent) of responding jurisdictions lack processes for expediting the review of transactions that do not raise significant competitive issues. This continues to be a major source of unnecessary burden resulting from merger review processes.

Time Frame for Initial Reviews. The ICN recommends a maximum six-week time period for initial waiting/review periods. The results in this area were encouraging, with most suspensive jurisdictions (those that impose a waiting period) (80 percent) and a majority of non-suspensive jurisdictions (56 percent) operating within the recommendation. Unfortunately, there was a considerable disparity between the level of compliance in suspensive versus non-suspensive jurisdictions and it was disconcerting to learn that fully one-third of non-suspensive jurisdictions are lacking any clear rules, policies, or practices with respect to initial review periods.

Time Frame for Extended Reviews. For cases requiring an in-depth review, an encouraging 82 percent of suspensive jurisdictions and 71 percent of non-suspensive jurisdictions have formal time frames which meet the ICN's six-month maximum standard. In addition, 13 percent of suspensive jurisdictions comply with the ICN's alternative standard of a waiting period determinable by the parties and usually capable of completion within six months, and 12 percent of non-suspensive jurisdictions comply with the alternative standard of a non-binding policy of completing reviews within six months. This brings the overall levels of compliance to impressive levels of 96 percent for suspensive and 82 percent for non-suspensive jurisdictions.[14] The only three reporting jurisdictions that reported formal waiting periods or time limits in excess of six months were Croatia, Greece, and the United Kingdom.[15] Chile and Pakistan were the only two jurisdictions

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[13] For example, questions with respect to early termination of waiting periods are not applicable to jurisdictions that do not have a waiting period following notification during which the transaction cannot be consummated (non-supsensive regimes), and questions regarding the transparency of non-competition factors are not applicable in jurisdictions where such factors are not considered.

[14] It is important to note that there are a non-trivial number of cases in some of these jurisdictions (e.g., Canada and the United States) that in practice do extend beyond six months.

[15] Both the agency and private law firm respondents from Greece indicated that, despite the prescribed three-month time limit, the review period usually lasts an additional three to six months.

without clear time limits where, in practice, reviews were reported to be only rarely or sometimes completed within the six-month Recommended Practice.

Early Termination of Suspensive Periods. Most competition agencies (80 percent) are able to terminate suspensive periods ahead of the formal expiration date. However, it is surprising that some agencies only have this power in limited circumstances (11 percent) or cannot do so at all (9 percent). It would seem uncontroversial to allow an agency to terminate a suspensive period as soon as it is satisfied that a transaction is not anticompetitive. This is an area in which simple and non-prejudicial changes could make a significant practical contribution to the streamlining of merger review processes.

Time Limit Extensions on Consent. The survey examined the ability of competition agencies to extend suspensive or review periods with the consent of the merging parties on a limited basis (appropriate) or without consent (inappropriate). The picture which emerges in this area is disappointing. Nearly half (43 percent) of agencies do not have the flexibility to avoid the initiation of Phase II proceedings and/or an adverse enforcement decision where such a result might be obviated by a time-limited extension. Moreover, very few (12 percent) of the agencies that have extension powers are required to obtain the consent of the merging parties, which is an important safeguard against the unwarranted use of extension powers where they do exist.

The vast majority (81 percent) of agencies perceived that their initial notifications did not contain unnecessary information requirements, whereas considerably fewer law firms (67 percent) view filing requirements in this manner.

Tailored Procedures for Take-Over Bid and Financial Distress Transactions. The ICN Working Group recommends that one or more appropriate procedures be identified for facilitating expeditious review of particularly time-sensitive transactions.[16] Roughly half of jurisdictions have taken one or more steps to adapt normal review procedures to the distinctive characteristics of take-over bids (47 percent) and transactions involving financially distressed entities (55 percent), although only about one-third of jurisdictions have adopted special procedures for both categories of transactions. Interestingly, a formal shortening of the waiting or review period is rarely the special procedure of choice, being available in only about 15 percent of jurisdictions for non-consensual transactions and 10 percent of jurisdictions in financial distress cases.

Requirements for Notification

The Recommended Practice relating to Review Periods was segmented into eight major components:

Limiting Initial Notifications to Necessary Information. A subjective, rather than objective, assessment was called for with respect to whether initial notification requirements require only such information as is necessary to determine whether an in-depth review is needed. The vast majority (81 percent) of agencies perceived that their initial notifications did not contain unnecessary information requirements, whereas considerably fewer law firms (67 percent) view filing requirements in this manner. "Necessity" may be in the eye of the beholders, since in seven of the ten cases where the agency and law firm within a jurisdiction differed, it was the agency that perceived that none of the required information was unnecessary. Hopefully, this Recommended Practice will stimulate informed debate regarding the extent to which various specific filing requirements could be reduced without prejudicing effective initial review processes.

Flexibility Mechanisms to Reduce Initial Notification Burdens. Over two-thirds of jurisdictions (68 percent) employ at least one of the four types of mechanisms listed by the ICN Working

[16] Options noted in the commentary to this Recommended Practice include shortened waiting/review periods, requiring the initial filing in take-overs from the acquiror only, discretionary information waivers, and a "failing firm" factor or defense.

Group[17] or some other flexibility mechanism for reducing unnecessary burdens relating to initial notification requirements and/or additional information requests during the initial review period. However, the remaining 32 percent represent a sizeable minority that have not adopted any of these useful burden-reducing techniques.

Willingness to Accept Readily Available Alternatives to Formal Filing Requirements. Two survey questions were designed to probe the ICN Working Group's recommendations concerning acceptance of readily available information in lieu of formal notification requirements where strict compliance with those requirements may be burdensome. Surprisingly, 58 percent of jurisdictions will accept ordinary course of business information, and over two-thirds of jurisdictions will accept substantially responsive information in other formats (e.g., merger filings from other jurisdictions) in all (55 percent) or limited (12 percent) circumstances. It is encouraging that a clear majority of ICN jurisdictions are generally open to "substance over form." However, a significant minority remain unable or unwilling to depart from formal notification requirements in favour of less burdensome substitute forms of information.

Pre-Filing Guidance. The Recommended Practices focus on the availability of confidential pre-notification guidance from competition agencies in two key areas: legal/jurisdictional/factual issues related to notification obligations, and the information requirements in the notification form itself. It is good news that both these useful types of guidance are always available in two-thirds of responding jurisdictions (66 percent each) and sometimes available in half of the remaining jurisdictions (19 percent with respect to notifiability, and 17 percent with respect to information requirements). Because both competition agencies and merging parties benefit from early resolution of notifiability and information requirement issues, it would be desirable and should not be difficult for all jurisdictions to make this type of guidance fully available.

Translation Requirements. There were noticeable differences between agency and law firm responses regarding translation requirements, perhaps because translation of supporting documents is often a matter of agency discretion rather than specific rules. Agencies claimed that full translation of transaction documents is required in 52 percent of jurisdictions and full translation of annual reports and filings is required in 24 percent of jurisdictions. The law firm responses indicated that translations are required in a substantially greater number of jurisdictions—61 percent and 35 percent, respectively. Thus, there appears to be some uncertainty as to when translated summaries of such documents will be sufficient. Given the time and cost of translating large and complex legal documents, summaries are a middle ground that deserves further attention by jurisdictions that are not prepared to proceed without any translation of transaction or other documents.

Personal Officer Authentications. It is gratifying to see that the flexible approaches advocated by the ICN Working Group (such as simple signatures from company personnel or representations by counsel) are more than twice as common as cumbersome formal requirements for personal authentication by senior officers (68 percent versus 32 percent). This is another easy opportunity for improvement in the nearly one-third of responding jurisdictions where personal authentication is still required.

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[17] The flexibility mechanisms identified by the ICN Working Group are: (1) advance ruling certificates, (2) short form notifications, (3) other reduced filing requirements (with or without the agency's discretion to seek additional information), (4) discretionary waivers of information requirements; and (5) any other mechanism(s) that allow for flexibility in the context of the initial notification and/or initial phase of the review.

Transparency

The Recommended Practice relating to Transparency was divided into eight major items:

Publicly Available Laws and Related Materials. The survey sought information on the extent to which each of the laws, regulations, policies, case decisions, and other materials relevant to merger review were made readily available to the public in a timely manner. Encouragingly, no jurisdiction reported complete unavailability or lack of timeliness. However, it was disappointing to find that less than half (48 percent) of the responding jurisdictions made such materials fully available on a timely basis. Given the ease with which transparency can be achieved using Internet Web sites, this surely is a priority area where implementation of the ICN Recommended Practices could generate significant benefits quickly and at low cost.

Jurisdictional Scope. The survey examined whether three attributes of jurisdictional scope were readily determinable from publicly available materials.[18] An overwhelming majority of jurisdictions (85 percent) achieved full transparency on all the elements and an additional 10 percent reported partial transparency. Indonesia, Kenya, and the Philippines were the only jurisdictions where public information does not allow for ready determination of the three jurisdictional scope elements.

[N]early half of jurisdictions (46 percent) provide extensive information regarding decision-making principles and criteria, but 20 percent offer minimal or no guidance about agency practices on such important matters and 34 percent provide only partial information.

Merger Review Procedures. The survey also canvassed the transparency of 12 key aspects of merger review procedures.[19] The results in this area are also very positive. Nearly three-quarters of jurisdictions (74 percent) display transparency on all twelve of the listed procedural matters, with another 24 percent reporting partial transparency. The Philippines was the sole jurisdiction not seen as providing readily determinable information about any of the merger review procedure items.

Guidance on Substantive Principles and Criteria. The level of substantive transparency varies dramatically: nearly half of jurisdictions (46 percent) provide extensive information regarding decision-making principles and criteria, but 20 percent offer minimal or no guidance about agency practices on such important matters and 34 percent provide only partial information. While agency guidelines may require considerable effort to develop, competition laws are so open-textured that attempts to provide greater clarity on substantive standards would be very welcome.

Interface Between Competition and Non-Competition Factors. While the Recommended Practices do not object to the consideration of non-competition factors in merger reviews, they urge transparency regarding the manner in which such considerations interact with competition-oriented criteria. Many jurisdictions (39 percent) employ non-competition factors in their merger review processes. A solid majority of these (58 percent) provide transparency that contributes to making the interface between these important decision-making factors understandable. However, eight jurisdictions (Croatia, Iceland, Indonesia, Kenya, Latvia, Pakistan, Slovenia, and Ukraine)

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[18] These were: (1) the types of transactions to which the merger control law applies, (2) any exemptions or exclusions from the merger control law; and (3) the precise tests or thresholds that govern whether the parties must notify the transaction or whether the competition agency has jurisdiction over a transaction.

[19] These were: (1) the identity and contact details of the competition agencies, (2) any filing deadlines, (3) notification procedures, including the information to be provided in the initial filing, (4) any filing fees, (5) review periods, (6) suspensive periods and any limits on implementing the transaction prior to clearance, (7) investigative procedures, (8) any deadlines that the merging parties, third parties, or the competition agencies must obey during the review period, (9) procedures and deadlines for appealing adverse decisions or for challenging a merger, (10) procedural rights of merging and third parties, (11) enforcement procedures pertaining to violations of the merger control laws (e.g., failure to notify) or merger review decisions (e.g., breach of conditions or obligations), and (12) measures for protecting confidential information.

have not done so, and two additional jurisdictions (Brazil and New Zealand) have only achieved partial transparency in this area.

Case Decisions. The practice on publication of decisions in key cases (at a minimum, those decisions which set a precedent or represent a shift in policy or practice) is evenly divided between agencies that regularly do and those that do not (44 percent and 40 percent respectively), with a small group (16 percent) varying on a case-by-case basis. This again suggests a significant opportunity to improve the public understanding of how merger review processes are applied in many countries.

Web Sites. The availability of reference materials on agency Web sites is very high: 93 percent of agencies maintain a Web site, and over 80 percent of those sites are reported to be complete and up-to-date. Of the three jurisdictions that do not have a current or planned Web site (Pakistan, Philippines, and Tunisia), at least two can be characterized as relatively new arrivals on the competition law scene. It is hoped that 100 percent of ICN jurisdictions will have comprehensive Web sites in the near future because this greatly facilitates the analysis of potential competition issues for parties involved in international transactions.

English Translations of Basic Materials. Notwithstanding the wide availability of laws, regulations, guidelines, and other reference materials on Web sites, English translations are less common. Only slightly more than half of the jurisdictions (53 percent) have provided such translations for all core materials, with another 31 percent making selected materials available in English. Again, it would be helpful to the international business and legal communities if the remaining jurisdictions were to make progress in this area as soon as resources permit.

Review of Merger Control Provisions

The Recommended Practice relating to Review of Merger Control Provisions contains two standards designed to encourage implementation of improved merger review process:

Periodic Reviews. An exemplary 84 percent of responding jurisdictions reported plans to review their merger regime (or had already done so since the ICN's initial meeting in Naples in September 2002).

Pursuing Convergence with Recommended Practices. A somewhat less impressive, but solid, 64 percent of jurisdictions indicated plans to pursue reforms that will result in increased convergence with recognized best practices (although this figure may be understated due to lack of information underlying the responses of private law firm respondents). It is discouraging that 6 percent have no plans for such improvements, despite having been among the jurisdictions that had adopted the Recommended Practices on a consensus basis.

Government Statements and Actions

The 2004 survey concluded by soliciting information about government statements and actions in relation to implementation of the Guiding Principles as well as the Recommended Practices. Only 13 jurisdictions (21 percent) reported that positive statements have been made by their government regarding the Guiding Principles, with the same number reporting positive statements regarding the Recommended Practices (there was some overlap, but not complete). These numbers are virtually unchanged from similar questions posed in the *2003 Report*.[20] Although seven

[20] *See 2003 Report*, *supra* note 4, at 131–33, noting that 14 jurisdictions had made public statements supporting the Guiding Principles and 13 had made statements regarding the Recommended Practices.

additional jurisdictions reported neutral government statements about the Guiding Principles and six regarding the Recommended Practices, the absence of publicly visible support from over three-quarters of ICN members is alarming.

The responses regarding implementation of the Guiding Principles and Recommended Practices suggest a slightly more positive trend. The *2003 Report* indicated that only 10 percent of responding jurisdictions had or were planning to implement aspects of the Recommended Practices, while a further 20 percent of jurisdictions had such changes under consideration.[21] These numbers have since increased to 39 percent and 13 percent, respectively, but are still difficult to reconcile with the more positive responses provided on the specific elements of Recommended Practice VII, as discussed above. Similarly, 36 percent of jurisdictions have implemented or are in the midst of implementing elements of the Guiding Principles (as compared with 14 percent in 2003), while the level of jurisdictions merely considering such changes remains relatively constant at 14 percent (16 percent in 2003).[22]

Conclusions

The ICN's Recommended Practices are an extremely important initiative for mitigating the spiralling scope, complexity, and costs of international merger review processes. It is hoped that objective assessments will provoke discussion and foster implementation of these unanimously adopted Recommended Practices by identifying areas where substantial progress has already been made and simultaneously highlighting those areas where further improvements could be targeted. The results of this survey, like its 2003 predecessor, indicate that significant opportunities for improvement exist in most jurisdictions.

While it is encouraging to see that some jurisdictions are implementing the Recommended Practices, a clear majority of jurisdictions have not yet made implementation a priority. Indeed, a recent ICN report[23] suggested that some reform efforts in Europe[24] and elsewhere, while positive, were motivated by a desire to conform to the EU Merger Regulation or other legislation and that authorities might not be particularly concerned with the Recommended Practices. More positively, the report pointed to a number of practical steps ICN members could take to facilitate implementation,[25] and a number of commentators have noted that focusing on a few core Recommended Practices, relating to issues such as Jurisdictional Nexus and Notification Thresholds, for instance, could significantly reduce unnecessarily burdensome filing requirements.[26]

Even within Europe, where the European Competition Network is well positioned to promote burden-reducing convergence, there continue to be many opportunities to enhance compliance

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[21] *Id.* at 133.

[22] *Id.*

[23] *See* ICN, Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures (Apr. 2005), http://www.internationalcompetitionnetwork.org/050505Merger_NP_ImplementationRpt.pdf.

[24] Specifically, in Croatia, Estonia, France, Latvia, Macedonia, the Netherlands, Norway, and Portugal.

[25] For example, the Report observed that if some Recommended Practices can be implemented relatively easily through administrative change at the agency level, members should consider making those changes first.

[26] *See, e.g.*, Ronald A. Stern, Vice President, Senior Antitrust Counsel, General Electric Co., Address to the Implementation Session, 4th Annual ICN Conference (June 8, 2005), http://www.internationalcompetitionnetwork.org/bonn/2005speeches/Ron_Stern_Slide01.pdf; *see also* Tony Reeves & Russell Hunter, *European Merger Thresholds vs. the ICN*, Global Competition Rev. 24 (May 2005).

with the Recommended Practices.[27] It is clear that achieving implementation will be a significant challenge, notwithstanding the consensus and momentum arising from their development and adoption.[28] Bridging this gap must be seen as a critical issue for ICN members and other interested stakeholders. ●

[27] J. William Rowley & Neil Campbell, *The Role that the European Competition Network Could Play*, GLOBAL COMPETITION REV. 22 (May 2005).

[28] There is a German proverb that may aptly sum up this situation: Kräht der Hahn auf dem Mist, ändert sich's Wetter oder's bleibt wie's ist. [If the cock crows on the muck heap, the weather will change, or it will stay the way it is.] In other words, it will take more than crowing about the Recommended Practices to get them implemented!