

# The role that the European Competition Network could play

**J WILLIAM ROWLEY QC** and **A NEIL CAMPBELL**, McMillan Binch LLP suggest that the ECN should start a programme to assess member state compliance with best practices in merger control

Europe is a microcosm for the complexities that arise when multiple jurisdictions operate merger control regimes. The European Competition Network has an opportunity to use the Recommended Practices for Merger Notification Procedures of the International Competition Network as a catalyst for implementing improvements to member state merger control regimes.

Such improvements are needed because the high thresholds for the European Commission's one-stop shop and complex upward and downward referral procedures leave many transactions subject to multiple member state regimes that depart in significant ways from each other and from the ICN Recommended Practices. Changes that promote convergence towards best practices and reduce unnecessary differences between member states would greatly improve the effectiveness and efficiency of multi-jurisdictional merger reviews in Europe.

## Coverage of the Recommended Practices

Eleven Recommended Practices have been adopted by consensus of the ICN's 70-plus member jurisdictions (which include 24 of the 25 members of the European Community, the sole exception being Luxembourg). They address a wide range of issues: jurisdictional nexus, notification thresholds, timing of notification, review periods, initial notification requirements, conduct of merger investigations, procedural fairness, transparency, confidentiality, inter-agency coordination and periodic review of merger control provisions.

Collectively, these Recommended Practices provide a model which would allow the ECN and its member states to operate state-of-the-art merger control regimes and reduce compliance burdens without jeopardising domestic sovereignty.

## Current state of play

The European Commission's recent reforms to the Merger Regulation and related

policies have moved the EU system close to full compliance with the major elements of the Recommended Practices. However, the level of consistency of member states' regimes is uneven.

For example, a 2003 survey commissioned by the Merger Streamline Group (report available on-line at <http://www.mcmillanbinch.com/Merger-StreamliningGroup.html>) found that ECN jurisdictions had very mixed conformity with the initial three Recommended Practices adopted in 2002:

- **Jurisdictional nexus:** about half (12 of the 22) of the responding European countries were 'substantially consistent' with this crucial Recommended Practice. The two most common reasons for a 'partially consistent' finding were asserting of jurisdiction where the acquiree did not have material assets or sales in the relevant jurisdiction, and including of the assets or sales of businesses being retained by a vendor in the application of review thresholds.
- **Notification thresholds:** 13 of the 22 responding countries were 'substantially consistent' with the various components of this Recommended Practice. The use of market share tests in notification thresholds was the most important source of uncertainty in those jurisdictions that were only 'partially consistent'.
- **Timing of notifications:** only five of 22 responding countries were 'substantially consistent' with the Recommended Practices relating to the earliest and latest dates for filing notifications. Many jurisdictions precluded filings before a definitive merger agreement was signed, or imposed deadlines for filing after conclusion of such an agreement that were unnecessary because of a mandatory suspensive period that exists pending clearance (both of these deadlines were removed in the modernisation of the European Merger Regulation).

Similarly, a 2004 survey by the Merger Streamline Group (preliminary report available on-line) has identified significant divergences from the second batch of Recommended Practices adopted by the ICN during the preceding year:

- **Review periods:** the 23 responding countries achieved an average score of 72 per cent (range: 57 per cent to 100 per cent) across the seven major elements of this Recommended Practice. Most jurisdictions were consistent with the basic requirements for a two-phase or other process for expediting non-problematic transactions and were operating with time periods that met the ICN standards. However, few provided for limited extensions of time periods with the consent of the merging parties and many did not offer accelerated processes for dealing with take-over bids or financial distress transactions.
- **Initial notification requirements:** the average score of the 23 responding countries was 72 per cent for the eight components of this Recommended Practice, but the scores ranged from 31 per cent to 100 per cent. Pre-notification guidance was available from most agencies on a confidential basis. While many jurisdictions also displayed some flexibility with respect to the requirements for initial filings, several fell short on specific components of this Recommended Practice. In addition, translation requirements in numerous jurisdictions were more onerous than the Recommended Practice and several countries required unnecessary personal authentications from senior corporate officers.
- **Transparency:** this was an area of relative strength, with an average score of 86 per cent (range: 50 per cent to 100 per cent) for the 23 responding jurisdictions on the eight major elements of this Recommended Practice. However, there were a handful of European jurisdictions with

room for improvement in making laws and policies readily available, and nearly half were weak on communication about decisions in specific cases.

- **Review of merger regimes:** all but one country indicated that it had or was planning to review its merger regime, and 19 of the 23 had plans to pursue some convergence towards the ICN Recommended Practices. Although no systematic tracking of follow-through has yet been undertaken, it appears that many of these ambitious statements of intention have not yet been realised. Indeed, thus far the Recommended Practices do not appear to have catalysed change in many countries, although they have influenced the direction of some jurisdictions which have embarked on re-examinations of their regimes.

The Merger Streamline Group has not surveyed the third batch of Recommended Practices which were established last year. Nor has there yet been an assessment of the fourth batch of Recommended Practices (regarding remedies and competition agency powers) which will be submitted for approval at the ICN's 2005 annual meeting in Bonn. However, based on the foregoing, the degree of consistency of existing merger control regimes across these important additional areas would also be likely to vary substantially. It would be a useful step forward for ECN jurisdictions to self-assess their systems relative to such Recommended Practices.

### Upgrading the ECN to Best Practices

The ECN is a natural forum in which countries could examine the extent to which their merger regimes differ from the Recommended Practices. Moreover, there is an obvious opportunity to reduce burdens by removing unnecessary differences between European jurisdictions without impinging on matters of substantive local concern. For example, individual countries may well have local policy reasons for preferring relatively higher or lower notification thresholds. However, it would be desirable to explore the use of common structure/methodologies for filing thresholds (eg turnover within individual countries calculated using common rules, time periods, etc, so that companies and their advisers can gather one set of consistent data to analyse all filing requirements).

Ideally, the ECN could adopt a work programme which assesses each country's current laws and practices relative to (i) each Recommended Practice, (ii) the Merger Regulation and European Commission practice, and (iii) the other member states' systems. We expect that this would identify numerous

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opportunities for change that would reduce unnecessary differences within Europe as well as demonstrating to other jurisdictions the feasibility of implementing the Recommended Practices. Leadership from Europe in the crucial area of implementation could also help to motivate similar efforts elsewhere in the world.

For purposes of encouraging such a process, the following nine areas should be considered as early priorities:

- Ensuring that every ECN country requires a meaningful level of local turnover from at least two parties before asserting jurisdiction.
- Removing seller-retained businesses from threshold calculations.

- Eliminating market share tests from notification thresholds and standardising the methodologies for turnover threshold calculations.
- Allowing filings to be made prior to the signing of definitive transaction agreements.
- Removing filing deadlines (unless a country does not impose suspensive periods).
- Providing for limited extensions of time periods for review processes where the merging parties consent.
- Reducing unnecessary translation requirements.
- Eliminating personal officer authentication requirements.
- Publishing reasons for decisions in significant 'no-challenge' cases as well as those involving challenges and/or remedies.

The levels at which thresholds are set should also be addressed. While the ICN does not prescribe specific benchmarks, it does indicate that "merger notification thresholds should incorporate appropriate standards of materiality as to the level of 'local nexus' required, such as material sales or assets levels within the territory of the jurisdiction concerned".

Many jurisdictions in Europe use thresholds to establish jurisdiction, rather than simply as a demarcation point for pre-merger notification. As countries such as the United States and Canada have demonstrated, much higher thresholds can safely be used for pre-notification when the authorities retain jurisdiction to review and remedy non-notifiable transactions that prove to be anti-competitive. The risk that problematic small transactions will pass by unnoticed is also quite low given that affected customers and suppliers will normally have the ability to draw such issues to the attention of their local enforcement agency.

As indicated in the survey conducted by PricewaterhouseCoopers on behalf of the IBA and ABA (published in 2003) and the report of the International Competition Policy Advisory Committee to the US Department of Justice, much of the burden of merger review results from the fact that the vast majority of notifiable transactions give rise to no competition concerns whatsoever. (It is widely accepted that well over 95 per cent of transactions notified in most systems are not anti-competitive.) Thus, the opportunities to reduce burdens (on agencies as well as parties) by employing higher thresholds are substantial (see 'European merger thresholds vs the ICN', on p 24) and comparatively risk free. The ECN is ideally placed to help Europe tackle this problem and to provide needed implementation leadership for the broader ICN network. ■