

The ICN five years on

Ahead of the ICN's sixth annual conference in Moscow this May, William Rowley QC and Omar Wakil, partners at McMillan Binch Mendelsohn LLP in Toronto, ask whether the ICN is delivering, and emphasise the role of the private sector

The International Competition Network grew out of a widely recognised need to foster dialogue directed toward greater convergence of competition laws and culture. The idea for a project-oriented, result-driven virtual network of competition law stakeholders was initially given life by the challenge of dealing with the spiralling costs associated with the explosive growth of national merger review systems.

When, in June 2004, *Global Competition Review* considered whether the ICN was fulfilling its mission, it considered first and foremost whether the ICN's early, and highly successful, work on recommended practices on merger notification and review was actually improving global merger processes – or whether that work was simply being ignored.

The ICN has just turned five and has clearly delivered as a forum to exchange ideas and encourage soft convergence. Although difficult to quantify, or for non-enforcers to gauge fully, the dissemination of knowledge on enforcement techniques in cartels and merger investigations is another obvious strong point. In fact, what the ICN has done is quite remarkable if you contrast the level of international enforcer-to-enforcer interaction of today with that of 20, or even 10, years ago.

But the ICN's recent move into the (relatively) uncharted territory of unilateral conduct could prove to be a more difficult nut to crack. As Tad Lipsky suggested after the 2004 Seoul conference, it is likely to present a more profound challenge for the organisation in the light of the substantially different views in the US and EU as to the dangers associated with single-firm conduct. Nevertheless, the ICN has achieved a great following from virtually all of the world's enforcement agencies, and there is no question that it is now the pre-eminent venue for process and policy convergence dialogue.

But it is fair to ask whether it is living up to its full potential. As one well informed commentator put it a few years ago: “[The ICN] could go a while longer just thriving on

talk and face-to-face interaction. Eventually, though, it must produce real-world results to remain vibrant.” When these comments were made, most observers were optimistic that real improvements could be made, particularly with merger review processes. And although we remain hopeful on the merger front, more can – and should – be done to

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help the ICN achieve its goals, and those real-world results. And the private sector urgently needs to lend a helping hand.

RECOMMENDED PRACTICES FOR MERGER REVIEW

As is well known, the ICN has sought to address the challenges of divergent merger review processes in a multi-jurisdictional

context by adopting 11 ‘recommended practices’ for merger notification and review. After a false start, when some felt that it should not concern itself with implementation, the ICN has worked reasonably hard to encourage their adoption. At the ICN's meeting in Bonn in June 2005, the merger notification and procedures subgroup issued a report on the Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures.

Its message was helpfully action oriented:

- “Starting with changes that agencies can implement themselves can improve their merger review system without expending significant effort and resources, and may help build support for more extensive reform;
- The Recommended Practices are most persuasive when they are used as a complement to other internationally accepted models and work on best practice;
- Building consensus among interested constituencies throughout the reform process facilitates enactment and acceptance of reforms; and
- All stakeholders, including agency officials, private practitioners, and academics, can play an important role in effecting change.”

PUBLIC UPDATES ON PROGRESS WOULD BE HELPFUL

The Bonn report was a welcome development. But to advance matters, a greater focus on and sense of urgency about implementation is now required. It would be helpful, for example, if the ICN, or perhaps another stakeholder, were to prepare an annual report on implementation which is frank about achievements and failures in equal measure. The ICN's 2005 report was an excellent effort as a first step, but follow-up is now needed.

If the ICN does not take up the challenge, GCR might consider making compliance with recommended practices a new factor to be assessed as part of its annual review of national competition enforcers and their respective regimes.

WASHINGTON IMPLEMENTATION WORKSHOP

In March 2006, the merger notification and procedures subgroup held a two-day

workshop in Washington to promote implementation of the guiding principles and recommended practices. Topics included setting notification thresholds, initial information requirements, review periods as well as transparency, confidentiality and procedural fairness. To further facilitate implementation, the subgroup has also created an Implementation Handbook containing examples of legislative text, rules and practices that conform to selected principles and practices. The workshop and handbook have provided agencies with practical resources to use when seeking to implement change.

CONVERTING WORDS TO ACTIONS IS NO EASY TASK

As a result of encouragement, from both the ICN and a number of interested private sector players, tangible change appears to be occurring. In its Statement of Mission and Achievements Up Until May 2006, the ICN cited examples of reform efforts motivated at least in part on the recommended practices in Europe, Brazil, Poland and the US. Similarly, regulators and legislators in Belgium, the Czech Republic, Estonia, Finland and Greece have amended or reinterpreted merger notification thresholds and processes to conform in whole or part with the recommended practices.

The work plan is also encouraging. One of its objectives for 2006–07 is to “continue to promote conformity with the Guiding Principles and Recommended Practices, including through working with competition agencies, discussion of the Recommended Practices at merger workshops and on conference panels, speeches and articles, dissemination through international organizations involved in competition activities, leading by example, and encouraging private sector advocacy.”

As noted above, however, the implementation effort to date has not found sufficient traction to make a material difference with many of those agencies or regimes where implementation is most needed. The reality is that the merger review provisions of a considerable number of ICN member regimes do not conform with, and even fall below, the ICN’s recommended practices. And it is particularly troubling to see jurisdictions implementing new laws that are non-compliant. Indeed, this is the case even for those recommended practices that many consider to be the simplest and most fundamental – such as jurisdictional nexus and notification thresholds.

The reasons for this are not always easy to discern, but lack of awareness and failure to view compliance as a reform priority seem to be playing a part. Clearly, there is a need for more effective advocacy by those with an interest in change.

At the 2005 ICN Bonn conference, General Electric’s Ron Stern called for the legal and business community to partner with ICN member agencies to foster legislative changes and assist the ICN in building political support for reforms. His call needs to be heeded. It should also be more widely understood that a relatively modest investment of time and effort by the business community will almost certainly see a rapid payback in terms of reduced filing costs and greater process efficiencies.

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THE ROLE OF THE PRIVATE SECTOR

From its earliest days, the private sector has provided committed support for the work of the ICN. In late 2001, the Merger Streamlining Group, which consists of multi-national corporations with a common interest in promoting the efficient and effective review of international merger transactions, proposed a set of 45 Best Practices for the Review of International Mergers. Shortly thereafter, the Business and Industry Advisory Committee to the OECD also issued a Recommended Framework for Best Practices in International Merger Control Procedures. The carrot which led the private sector to invest in the design of merger review best practices was the possibility that the ICN would use the work as a building block in its Merger Working Group.

It did, and these two sets of best practices became the foundation for the development of the ICN’s recommended practices.

This early work was supplemented by a PricewaterhouseCoopers study sponsored by the IBA and the ABA on merger review costs. The Merger Streamlining Group later promoted the implementation of the ICN’s recommended practices by conducting two major surveys (on a country-by-country basis) of consistency of ICN member regimes with the first two sets of recommended practices. Although the Merger Streamline Group has stayed active, its efforts could be helpfully supplemented by further business community participation, both institutional and individual, in the process.

A SUGGESTED WORK PLAN

Perhaps the most obvious recommended practice on which to focus initial private-sector efforts is the Nexus to Reviewing Jurisdiction recommended practice. Here, compliance can be assessed in a reasonably objective manner. Moreover, regime change directed at consistency with the nexus recommended practice would have a dramatic impact on the number of filings made worldwide on merger transactions.

Based on an analysis of one company’s European merger filings between 2002 and 2004, Tony Reeves and Russell Hunter of Clifford Chance pointed out that the number of notifications would have been cut almost in half if ICN compliant thresholds had been applied to require at least two parties to have a minimum turnover in a jurisdiction. Reeves and Hunter’s conclusion was based on an assumption of a very low national threshold of €500,000. More important, a still modest national threshold (assets or turnover) of €10 million would have reduced filings by almost 80 per cent (see ‘European merger thresholds v the ICN’ in *Global Competition Review*, May 2005).

The payoff for the agencies implementing such changes is to free up scarce resources for more important priorities. The payoff for merging parties is lower costs.

THE ACCEPTED CONCEPT OF JURISDICTIONAL NEXUS

The ICN’s nexus recommended practice is based on the now broadly accepted principle that “jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned” (Recommended Practice I A). This is further clarified to mean that:

- Merger notification thresholds should incorporate appropriate standards of materiality as to the level of ‘local nexus’ required for merger notification (Recommended Practice I B).

TABLE 1: NOTIFICATION THRESHOLDS AT ODDS WITH ICN NEXUS RECOMMENDED PRACTICE

| Jurisdiction | Notification thresholds | Commentary |
|-----------------|--|--|
| Austria | Combined worldwide turnover of €300 million, and combined Austrian turnover of €30 million, and at least two parties each have a worldwide turnover of €5 million | Local nexus could be met by acquirer alone (RP No. IC) and is arguably not based on a suitable standard of materiality (€30 million may be too low) (RP No. IB) |
| Brazil | (i) Combined market share of 20 per cent; or (ii) combined Brazilian turnover of approx €140 million | The notification threshold test in (i) is not an objectively quantifiable criteria (RP No. IIB) and the local nexus test in (ii) references could be met by acquirer alone (RP No. IC) |
| Germany | Combined worldwide turnover of €500 million and one party has German turnover of €25 million | Local nexus could be met by acquirer alone (RP No. IC) and is not based on a suitable standard of materiality (€25 million is too low for this economy) (RP No. IB) |
| Ireland | Combined worldwide turnover of €40 million, at least two parties “carry on business in Ireland”, and one party has Irish turnover of €40 million. In addition, any media merger must be notified | Local nexus references the activities of only one party (could be acquirer) to a transaction (RP No. IB). Media mergers are broadly defined and catch many non-Irish transactions |
| Italy | (i) Combined Italian turnover of €43 million; or (ii) the target has Italian turnover of €43 million | Local nexus in test (i) could be met by acquirer alone (RP No. IC) |
| Korea | Combined worldwide assets or turnover of approximately US\$95 million, and at least two parties have Korean assets or turnover of approximately US\$3 million. | Local nexus references the activities of two parties to a transaction but is not based on a suitable standard of materiality (US\$3 million is too low) (RP No. IB) |
| Latvia | (i) Combined Latvian turnover of approx €36 million; or (ii) 40 per cent market share | Local nexus in test (i) could be met by acquirer alone (RP No. IC) and notification threshold in test (ii) is not an objectively quantifiable criteria (RP No. IIB) |
| Lithuania | Combined Lithuanian turnover of approx €9 million and at least two parties each have Lithuanian turnover of approx €1.5 million | Local nexus references the activities of two parties to a transaction but is not based on a suitable standard of materiality (€1.5 million is too low) (RP No. IB) |
| Norway | Concentrations that have an effect in Norway are notifiable unless the undertakings concerned have a combined annual turnover in Norway of less than approximately €2.4 million or if only one of the undertakings concerned has an annual turnover exceeding approximately €600,000 | Local nexus references the activities of two parties to a transaction but is not based on a suitable standard of materiality (RP No. IB) |
| Portugal | (i) Combined Portuguese turnover of €150 million and at least two parties each have Portuguese turnover of €2 million; or (ii) 30 per cent market share | Notification threshold in test (ii) is not an objectively quantifiable criteria (RP No. IIB) It is also questionable whether the local nexus references are based on a suitable standard of materiality (RP No. IB) |
| Slovak Republic | (i) Combined worldwide turnover of approximately €30 million and at least two parties each have Slovak turnover of approx €9 million; or (ii) one party has Slovak turnover of approx €12.5 million and one other party has worldwide turnover of approx €30 million | Local nexus in test (ii) could be met by acquirer alone (RP No. IC). It is also questionable whether the local nexus references are based on a suitable standard of materiality (RP No. IB) |
| Slovenia | (i) Combined Slovenian turnover of approx €33 million for each of the last two years; or (ii) 40 per cent market share | Notification threshold in test (ii) is not an objectively quantifiable criteria (RP No. IIB). It is also questionable whether the local nexus references are based on a suitable standard of materiality (RP No. IB) |
| Spain | (i) Combined Spanish turnover of €240.4 million and at least two parties each have Spanish turnover of €60.1 million; or (ii) 25 per cent market share | Notification threshold in test (ii) is not an objectively quantifiable criteria (RP No. IIB). Also, recent proposed amendments would increase the market share threshold to 30 per cent, but the test remains non-objective. |

- Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory or by reference to the activities of the acquired business in the local territory (Recommended Practice I C).

It simply makes no sense not to know in good time which jurisdictions are looking to amend their merger provisions. The ICN is best suited to take up this task

The second of these two criteria is objective, since compliance can be assessed on a simple 'yes-no' basis after considering the requirements of the notification regime. The first criterion, that there be an appropriate standard of "materiality", is less easy to assess, given that the recommended practices do not define materiality. This could give rise to debate about compliance in cases where thresholds are not clearly on, or offside the recommended practice.

For example, Canada and the United States employ size-of-transaction tests of about US\$50 million. Is Canada's threshold inappropriately high given its economy and population are roughly 10 times smaller than that of the US? Probably not, but reasonable people can differ about compliance in cases like these.

Nevertheless, our own objective and in some cases subjective assessment of ICN member regimes suggests that there are numerous jurisdictions whose threshold tests are inconsistent with the nexus recommended practice. Table 1 identifies cases of

inconsistency and where corrective steps seem called for.

RECENT DEVELOPMENTS ON NEXUS REQUESTS

The authors of this article (assisted by colleagues) decided to sound out local stakeholders and agency staffers in a number of these 'non-compliant' jurisdictions to see what was happening on the ground. Here is what we discovered:

Germany

There appears to be some recognition of the widely felt concern that such an important jurisdiction is 'offside' the ICN nexus recommendations. But changes to the notification thresholds are not likely to be made in the short term. Even so, internal work is being done on the interpretation of the 'effects doctrine'. The idea is to lessen the scope of the effects doctrine, perhaps by excluding more foreign mergers from the need to notify. There may also be some progress on internal guidelines to provide more uniformity and, hopefully, a broader scope for saying that a particular transaction does not need to be filed in Germany. Although this internal work may be seen as mildly positive, it is hard to understand why one of the ICN's steering committee members is not prepared to strive for fast-track compliance with both components of the nexus recommended practice.

Ireland

Here the story is more positive. Ireland's agency has local nexus change, aimed at compliance, on its short-term work plan. But amendments will be difficult before the Irish election (in the spring). Changes under consideration could include restricting the interpretation of the term 'carrying on business in Ireland' (at present, very broad) and amending notification requirements for media mergers (again broadly defined), which now capture many transactions which have nothing or very little to do with Ireland. Whether the agency will be able to get reform on the legislative agenda of a new government is unclear.

Korea

The story is mixed. The KFTC has recently decided to increase the notification threshold for domestic mergers from approximately US\$3 million to US\$10 million in assets or sales – an improvement, but still far too low. Unfortunately, the present plan is to maintain the present notification threshold for international mergers (US\$3 million). Such a move is clearly inconsistent with the ICN's guiding principle of non-discrimination, which stipulates that "[i]n the merger review process, jurisdictions should not discriminate in the

application of competition laws and regulations on the basis of nationality." External input would be highly desirable.

Norway

The Ministry of Government Administration and Reform recently adopted a regulation that raised its two notification thresholds from 20 million to 50 million Norwegian krone (about €6 million) and 5 million to 20 million Norwegian krone (about €2.5 million) respectively. The amendment entered into force on 1 January 2007. Although a move in the right direction, these thresholds still remain very low, particularly when they are not jurisdiction-conferring. Some stakeholders reported that the agency favoured higher thresholds but that the government resisted.

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Portugal

The agency is said to be supportive of changes that would implement the local nexus and other recommended practices, but it is unclear whether reform will be a government priority. Although initial soundings are

positive, it is too early to tell if or when the agency, and then the government, will move forward with reform. The agency's initiative will require external support.

Spain

This is something of a bad news story. Legislative amendments that would increase, but maintain, a market share-based notification threshold (25 per cent to 30 per cent) are too far advanced for third parties to continue to play any meaningful role. This is unfortunate, and it is surprising and disheartening that a major jurisdiction such as Spain would proceed with changes that are clearly offside the ICN's recommended practices. Given that the Spanish thresholds are jurisdiction-conferring, the agency may have been concerned about losing the ability to review small but problematic transactions. There are of course ICN-compliant solutions to this dilemma. Indeed, numerous ICN member regimes separate jurisdiction over mergers from notification requirements and can thus afford to use objective standards.

India

In December 2006, the Indian parliamentary committee charged with studying India's new, and shortly to be enacted, Competition Act recommended the introduction of a system of mandatory merger notification, using thresholds that could be triggered on the basis of worldwide assets or turnover. No local nexus of any sort seems necessary. But the legislation that had been proposed provided only for voluntary pre-notification. The Competition Amendment Bill will now be debated in both houses of the Indian parliament and it is unclear whether the government will support the recommendation. Again, external input is urgently required.

In all of these jurisdictions more work can be done to try to increase compliance with ICN recommended practices. This is particularly true in Korea and India, where changes are actually in the process of being made and the timely intervention of stakeholders could have a positive effect on the outcome of the process. In other jurisdictions, relatively modest, but thoughtful medium- and long-term efforts could have similar effects.

A CALENDAR OF PLANNED AMENDMENTS SHOULD BE COMPILED

By conducting our due diligence, two things stood out. First, in several cases, amendments (that did not adequately address nexus concerns) were in advanced stages or had been completed without international stakeholders – precisely the people affected by problematic nexus tests – being given sufficient opportunity to add their views.

A helpful fix for this would be for the ICN to canvass member agencies with a view to compiling a calendar of planned legislative amendments. If posted on the ICN's website, this calendar would provide timely notice of possible legislative and other change possibilities and allow private sector stakeholders to articulate views at early stages in reform processes. Although one needs to avoid “over-stressing” member agencies with information requests, it simply makes no sense not to know in good time which jurisdictions are looking to amend their merger provisions. The ICN is best suited to take up this task.

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Second, and more importantly, affecting change will not necessarily be easy, or occur quickly. Even where ICN member agencies are receptive, in principle, to change, necessary amendments can be difficult to achieve in the short -or medium-term owing to crowded legislative agendas and agency and legislative priorities. It is here in particular that the private sector could play a much greater role by helping to build momentum for positive change.

THE ICN NEEDS A WIDER AUDIENCE

For the ICN to remain vibrant, for it to achieve its action-oriented goals and to live up to its potential, it is generally accepted that it must produce real-world results. If one were to focus on its merger recommended practices as an example of what might be possible, this does not imply that every member needs to

act immediately to bring its regime ‘into line’. But, given that the merger working group's recommended practices have been adopted by the ICN membership as a whole, it does mean that something more than principled endorsement is required.

So, five years on, has the ICN met the action-oriented, make-a-difference benchmarks it set itself at its inception? The answer is probably ‘not quite’, but most objective observers would also say it has made a very good start. To get to the next level, however, the ICN now needs to be heard by a wider audience. The ICN, its members and its non-governmental advisers talk too much to each other and not nearly enough to other players who shape the wider world in which competition policy exists.

Following the ICN's 2004 Seoul conference, Michael Reynolds acknowledged the importance of the ICN's work product, but added that: “In the outside world, the ICN faces a challenge in communicating all of these achievements.” Sadly, what he said is as true today as it was three years ago.

For the ICN to maintain and build momentum, there is a particular need to broadcast its achievements. A lot of the work that this organisation is doing is broadcastable because it is important. Its 11 recommended practices for merger review are worthy of celebration and endorsement by a much wider audience. They are also worthy of a far greater effort by all concerned to raise the priority of their implementation. And this effort is far more likely to be undertaken if the merits, for all concerned, are more widely understood.

Against this backdrop, one of the most important challenges for the ICN, its new leader Sheridan Scott, and its competition-community stakeholders, must be to build its voice with other stakeholders. The ICN cannot afford not to make this investment. If its voice can be heard outside the confines of its working groups and annual meetings, then there is a far greater chance that business leaders, trade and professional associations and, above all, the media will take a more active role in publicly promoting and encouraging compliance with recommended practices through direct contact with agencies and politicians. If this happens, governments will begin to take notice.

The continuing work of the ICN and others is slowly reducing the burdens imposed on businesses engaged in multi-jurisdictional merger review. But much remains to be done. And until that work is finished, businesses and the agencies will each continue to face excessive and unnecessary costs and a degree of needless complexity as part-and-parcel of multi-jurisdictional merger reviews.