

Paradise lost or regained?

A report on implementation of the ICN's Recommended Practices on Merger Notification, by J William Rowley QC and A Neil Campbell, McMillan Binch LLP, Toronto, Canada

Following its successful 2003 survey of the ICN's initial three Recommended Practices for Merger Notification Procedures, in early 2004 the Merger Streamlining Group¹ ('MSG') again commissioned a survey of competition agencies and private law firms in all ICN member jurisdictions. The 2004 survey was designed to measure the implementation of the ICN's second batch of Recommended Practices (relating to review periods, requirements for initial notification, transparency and review of merger control provisions) in each jurisdiction.

Responses were received from the competition law agencies and/or the private law firms surveyed in 65 of the 74 ICN member jurisdictions (ie, 88 per cent). While it is disappointing not to have complete coverage, the survey provides an extremely comprehensive picture of these aspects of merger review practices around the world.

Each of the Recommended Practices has multiple elements. For survey purposes, individual questions were posed to assess each significant component. This led to a maximum score of 25 points for a jurisdiction whose regime involves all the elements of these four Recommended Practices. To adjust for the fact that some components are not applicable to certain regimes (eg, non-suspensive or single phase regimes), the country scores were converted to percentages.

Table 1 summarises the extent of consistency of each jurisdiction with the major elements of each of the four Recommended Practices. Analysis shows a very high degree of variation between jurisdictions.

The average score of 66 per cent indicates that a considerable level of consistency with these Recommended Practices already exists, but that there is also significant room for further convergence.

Germany and Mexico achieved the highest level of overall compliance with the four Recommended Practices. The European Union, Finland, France, Korea, Lithuania, Mexico, Taiwan, the United Kingdom, the United States and Zambia also reported consistency levels of at least 90 per cent.

However, there were 17 jurisdictions (ie, 27 per cent of respondents) with scores below

50 per cent, including three which achieved less than 25 per cent consistency.

Several notable findings also emerge from a more detailed assessment of the individual Recommended Practices.

Review periods

65 per cent of responding jurisdictions have procedures for expediting the review of transactions that do not present material competition concerns. While 92 per cent 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 per cent achieve the benchmark of six-week initial waiting or review periods for transactions not warranting extended review (and 35 per cent 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 are consistent with each component of this Recommended Practice. However, there are also a considerable number of inconsistent jurisdictions in each case: 42 per cent refuse to accept responsive ordinary-course-of-business information as an alternative to formal filing requirements; 32 per cent require personal authentication of notifications by senior officers; and a further 32 per cent lack any general flexibility mechanisms relating to the notification requirements for the initial review of a transaction.

Transparency

85 per cent of responding jurisdictions have extensive transparency with respect to the scope of their jurisdiction, and 74 per cent make available sufficient information about the major elements of merger procedure. However, only 46 per cent are consistent with the Recommended Practice for transparency of substantive principles/criteria, and 42 per cent of those utilising non-competition factors in merger reviews have not provided transparency regarding the interface between such factors

and other substantive aspects of the merger review regime.

Review of merger control provisions

As of spring 2004, 84 per cent of responding jurisdictions had reviewed their merger regimes since the initial ICN meeting in Naples (September 2002) or had plans to do so, and 64 per cent indicated an intention to pursue reforms that promote convergence with recognised best practices. However, 11 per cent of jurisdictions had not reviewed their merger regime since the Naples meeting and had no definite plans to undertake any review in the future.

The survey concluded by updating information regarding the all important level of government policy/implementation activity as the ICN entered its third year. The results in Table 1 show there is considerable room for actual progress on convergence towards the second group of Recommended Practices.

Public statements

Governments in only 21 per cent of jurisdictions have made supportive statements regarding implementation of the ICN's 'Guiding Principles for Merger Notification and Review' and/or the Recommended Practices.

Implementation of reforms

Forty-two per cent of jurisdictions have made or are in the process of making changes to laws/regulations/guidelines to implement elements of the Guiding Principles and/or Recommended Practices. A recent noteworthy example is Australia, where the ACCC has indicated that the ICN Recommended Practices will underpin proposals to reform its merger regime. An additional 13 per cent of jurisdictions indicated that such changes are under consideration.

It is possible that in jurisdictions where only local counsel responded such changes are in fact planned but the respondent was simply unaware. It is also important to recognise that these results do not take into account those jurisdictions whose merger regimes already conform substantially to the Guiding Principles and Recommended Practices. Nevertheless, it is clear from this survey that implementation remains the major challenge facing the ICN's ambitious programme for improving merger review practices.

Notes

- The members of the group 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), and J William Rowley QC and Neil Campbell (McMillan Binch LLP).

Table 1: Overall consistency with ICN Recommended Practices IV-VII

Jurisdiction	IV	V	VI	VII	Total	
	Review Periods	Requirements for Initial Notification	Transparency	Review of Merger Control Provisions	#	%
Maximum score*	4/7	4/8	7/8	2	25	100
Germany	7/7	7/7	7.5/8	2/2	23.5/24	98
Mexico	5/5	8/8	6.5/7	2/2	21.5/22	98
France	6/7	8/8	6.5/7	2/2	22.5/24	94
Zambia	7/7	6.5/8	8/8	2/2	23.5/25	94
Australia	5/5	4/5	6.5/7	2/2	17.5/19	92
Lithuania	6/7	7/8	7/7	2/2	22/24	92
United States	7/7	7.5/8	6.5/8	2/2	23/25	92
European Union	6/7	7/7	6/7	2/2	21/23	91
Finland	6/7	8/8	6.5/7	1/2	21.5/24	90
Korea	6/7	7.5/8	7/8	2/2	22.5/25	90
Taiwan	5/7	8/8	7.5/8	2/2	22.5/25	90
United Kingdom	3/5	6/6	8/8	2/2	19/21	90
Czech Republic	6/7	6.5/8	6.5/7	2/2	21/24	88
Malta	5/7	7/7	6/7	2/2	20/23	87
Denmark	6/7	7/8	5.5/7	2/2	20.5/24	85
Norway	5/7	8/8	5.5/7	2/2	20.5/24	85
Netherlands	6/7	6.5/8	6.5/7	1/2	20/24	83
Switzerland	5/7	7/8	6/7	2/2	20/24	83
Ireland	4/7	7/8	7.5/8	2/2	20.5/25	82
New Zealand	4/5	6/7	7/8	1/2	18/22	82
South Africa	5/7	6.5/8	8/8	1/2	20.5/25	82
Estonia	4/7	6.5/8	7/7	2/2	19.5/24	81
Hungary	3/5	6.5/8	6/7	2/2	17.5/22	80
Canada	6/7	5/8	6/7	2/2	19/24	79
Romania	5/7	7/8	5/7	2/2	19/24	79
Slovak Republic	4/7	6.5/8	6.5/7	2/2	19/24	79
Greece	5/7	6.5/8	6/7	1/2	18.5/24	77
Japan	5/7	6.5/8	6/7	1/2	18.5/24	77

* Although the maximum scores for Recommended Practices IV-VI were 7 / 8 / 8 respectively, responses of "n/a" were not counted against a jurisdiction's score — hence the existence of lower denominators for some jurisdictions. Such responses were almost always explained by the design of a particular jurisdiction's merger regime (eg suspensive vs non-suspensive, single phase vs two phase, no mandatory notification of proposed mergers, etc.).

Jurisdiction	IV	V	VI	VII	Total	
	Review Periods	Requirements for Initial Notification	Transparency	Review of Merger Control Provisions	#	%
Portugal	6/7	4/8	6/8	2/2	18/25	72
Austria	4/7	7.5/8	5/8	1/2	17.5/25	70
Italy	5/5	4/8	5.5/7	1/2	15.5/22	70
Latvia	3/5	5/8	6/8	2/2	16/23	70
Slovenia	5/7	6/8	4/8	2/2	17/25	68
Belgium	4/7	4.5/8	5.5/7	2/2	16/24	67
Cyprus	4/7	4/8	6/7	2/2	16/24	67
Bulgaria	4/7	4/8	6.5/8	2/2	16.5/25	66
Israel	4/7	6/8	5.5/8	1/2	16.5/25	66
Brazil	2/5	4.5/8	6/8	2/2	14.5/23	63
Spain	4/7	2.5/8	6.5/7	2/2	15/24	63
Poland	4/7	3/8	6.5/8	2/2	15.5/25	62
Ukraine	5/7	4/8	4.5/8	1/2	14.5/25	58
Macedonia	3/7	4/8	4.5/7	2/2	13.5/24	56
Turkey	5/7	2/8	6.5/7	0/2	13.5/24	56
Argentina	4/7	6/8	3/7	0/2	13/24	54
Russia	2/7	5.5/8	4/7	1/2	12.5/24	52
Iceland	4/5	2.5/7	4.5/8	0/2	11/22	50
Armenia	2/7	3/8	4.5/7	2/2	11.5/24	48
Croatia	2/7	3/8	5/8	1/2	11/25	44
India	3/7	3/8	5/8	0/2	11/25	44
Chile	0/6	1/4	6/7	1/2	8/19	42
Uzbekistan	3/7	3/8	3/7	1/2	10/24	42
Pakistan	0/5	4/7	2.5/8	2/2	8.5/22	39
Tunisia	1/5	4.5/8	3/7	0/2	8.5/22	39
Kazakhstan	2/7	3/8	3/7	1/2	9/24	38
Peru	1/7	2/8	5/7	1/2	9/24	38
Venezuela	1/4	2/8	3/7	2/2	8/21	38
Thailand	1/5	3/8	4/7	0/2	8/22	36
Azerbaijan	3/7	2/8	2.5/7	1/2	8.5/24	35
Kyrgyzstan	2/7	3/8	3/7	0/2	8/24	33
Kenya	2/7	2/7	2/8	1/2	7/24	29
Philippines	1/4	1/7	0/6	2/2	4/19	21
Albania	3/5	No response	No response	1/2	4/23	17
Indonesia	0/4	n/a	2/8	0/2	2/14	14
Average						66