IMPLEMENTATION OF THE INTERNATIONAL COMPETITION NETWORK'S

RECOMMENDED PRACTICES (IV-VII) FOR MERGER NOTIFICATION PROCEDURES

April 2004

Preliminary Report on a Survey Commissioned by

The Merger Streamlining Group

Alcan Inc.	**Compaq Computer Corporation**	**NERA**
British Telecom	**General Electric Company**	**Rio Tinto plc**
Charles River Associates	**Goldman Sachs International**	**Vodafone Group plc**

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IMPLEMENTATION OF THE ICN'S *RECOMMENDED PRACTICES (IV-VII) FOR MERGER NOTIFICATION PROCEDURES* — PRELIMINARY REPORT

Executive Summary*

Following its successful 2003 survey of the ICN's initial three *Recommended Practices for Merger Notification Procedures*,[1] in early 2004 the Merger Streamlining Group ("MSG")[2] again commissioned a survey of competition agencies and private law firms in all ICN member jurisdictions. The 2004 survey was designed 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 Provisions) in each ICN jurisdiction.

This Preliminary Report provides an initial summary and assessment of responses to the 2004 survey. Responses were received from the competition law agencies and / or the private law firm surveyed in 59 (*i.e.* 80%) of the 74 ICN member jurisdictions.

Table 1 summarizes the extent of consistency of each jurisdiction with the major elements of each of the four *Recommended Practices*:

TABLE 1
OVERALL CONSISTENCY WITH *RECOMMENDED PRACTICES IV-VII*

Jurisdiction	IV Review Periods	V Requirements for Initial Notification	VI Transparency	VII Review of Merger Control Provisions	Total	
					#	%
MAXIMUM SCORE[3]	**5, 6 or 7**	**8**	**7 or 8**	**2**	**25**	**100**
Germany	7/7	7/7	7.5/8	2/2	23.5/24	98

* For a copy of the entire Preliminary Report, along with its Appendices, please visit: <http://www.mcmillanbinch.com/streamline>.

[1] Available online, at: <www.internationalcompetitionnetwork.org/2003_practices.pdf> [hereinafter, the *Recommended Practices*]. The initial three practices related to Jurisdictional Nexus, Notification Thresholds and Timing of Notification.

[2] 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). The assistance of Casey Halladay and Todd Prendergast of McMillan Binch LLP in the implementation of the survey and preparation of this report is gratefully acknowledged.

[3] 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 (*e.g.* suspensive vs. non-suspensive, single phase vs. two phase, no mandatory notification of proposed mergers, *etc.*).

TABLE 1
OVERALL CONSISTENCY WITH *RECOMMENDED PRACTICES IV-VII*

Jurisdiction	IV Review Periods	V Requirements for Initial Notification	VI Transparency	VII Review of Merger Control Provisions	Total	
					#	%
Zambia	7/7	6.5/8	8/8	2/2	23.5/25	94
Mexico	5/5	8/8	6.5/7	1/2	20.5/22	93
Lithuania	6/7	7/8	7/7	2/2	22/24	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
Malta	5/7	7/7	6/7	2/2	20/23	87
Canada	6/6	5/7	6/7	2/2	19/22	86
Taiwan	5/7	8/8	7.5/8	1/2	21.5/25	86
United Kingdom	3/5	7/7	8/8	1/2	19/22	86
Norway	5/7	8/8	5.5/7	2/2	20.5/24	85
Australia	5/5	4/6	6.5/7	1/2	16.5/20	83
Czech Republic	6/7	6.5/8	6.5/7	1/2	20/24	83
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
Hungary	3/5	6.5/8	6/7	2/2	17.5/22	80
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

TABLE 1
OVERALL CONSISTENCY WITH *RECOMMENDED PRACTICES IV-VII*

Jurisdiction	IV Review Periods	V Requirements for Initial Notification	VI Transparency	VII Review of Merger Control Provisions	Total	
					#	%
Switzerland	5/7	7/8	6/7	1/2	19/24	75
Italy	5/5	4/8	5.5/7	1/2	15.5/22	70
United States	6/7	3/8	6.5/7	1/2	16.5/24	69
Portugal	6/7	4/8	6/8	1/2	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
Austria	3/7	7.5/8	5/8	1/2	16.5/25	66
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
Estonia	4/7	6.5/8	7/7	2/2	19.5/24	65
Latvia	3/5	5/8	6/8	1/2	15/23	65
Poland	4/7	3/8	6.5/8	2/2	15.5/25	62
Ukraine	5/7	4/8	4.5/8	1/2	14.525	58
Turkey	5/7	2/8	6.5/7	0/2	13.5/24	56
Macedonia	3/7	4/8	4.5/7	2/2	13.5/24	56
Argentina	4/7	6/8	3/7	0/2	13/24	54
Spain	4/7	2.5/8	6.5/7	0/2	13/24	54
Armenia	2/6	3/8	4.5/7	2/2	11.5/23	50
Iceland	4/5	2.5/7	4.5/8	0/2	11/22	50
Russia	2/7	5.5/8	4/7	1/2	12.5/24	50

TABLE 1
OVERALL CONSISTENCY WITH *RECOMMENDED PRACTICES IV-VII*

Jurisdiction	IV Review Periods	V Requirements for Initial Notification	VI Transparency	VII Review of Merger Control Provisions	Total	
					#	%
Brazil	1/5	4/8	4/7	2/2	11/22	44
Croatia	2/7	3/8	5/8	1/2	11/25	44
Denmark	3/7	3/8	5/8	0/2	11/25	44
India	3/7	3/8	5/8	0/2	11/25	44
Uzbekistan	3/7	4/8	3/7	0/2	10/24	42
Kazakhstan	2/6	3/8	3/7	1/2	9/23	39
Tunisia	1/5	4.5/8	3/7	0/2	8.5/22	39
Peru	1/7	2/8	5/7	1/2	9/24	38
Venezuela	1/4	2/8	3/7	2/2	8/21	35
Kyrgyzstan	2/7	3/8	3/7	0/2	8/24	33
Azerbaijan	3/7	2/8	2.5/7	0/2	7.5/24	31
Kenya	2/6	2/7	2/8	1/2	7/23	30
Thailand	0/4	1/3	2/6	0/2	3/15	20
Indonesia	0/4	n/a	2/8	0/2	2/14	14
Philippines	1/4	1/7	0/7	0/2	2/20	10
Average						63

Highlights emerging from the overall analysis include:

- The average score of 63% indicates that a considerable level of consistency with these *Recommended Practices* already exists, but that there is also significant room for further convergence towards these *Recommended Practices*;

- Germany achieved the highest level of overall compliance with the four *Recommended Practices*, with the European Union, Finland, Korea, Lithuania, Mexico, and Zambia also reporting consistency of 90% or greater; and

- There were 16 (*i.e.* 29%) of jurisdictions with scores below 50%, including two which achieved less than 15% consistency.

Some of the most notable findings within specific *Recommended Practices* are summarized below:

- Review Periods — 61% of responding jurisdictions have procedures for expediting the review of transactions that do not present material competition concerns. While 92% 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% achieve the benchmark of six-week initial waiting or review periods for transactions not warranting extended review (and 39% 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 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, ranging as high as 43% refusing to accept responsive ordinary course of business information as an alternative to formal filing requirements, and 37% lacking any general flexibility mechanisms relating to the notification requirements for the initial review of a transaction.

- Transparency — 86% of responding jurisdictions have extensive transparency with respect to the scope of their jurisdiction, and 71% make available sufficient information about the major elements of merger procedure. However, only 45% are consistent with the *Recommended Practice* regarding transparency of substantive principles / criteria, and 30% of those utilizing non-competition factors in merger reviews have not provided transparency respecting how these factors interface with other substantive aspects of the merger review regime.

- Review of Merger Control Provisions — 80% of responding jurisdictions have plans to review their merger regime, and 64% indicated an intention to pursue reforms that promote convergence with recognized best practices. However, 20% of jurisdictions have not reviewed their merger regime since the initial ICN meeting in Naples (September 2002) and have no plans to undertake any review in the future.

The survey concluded by updating information regarding the level of government policy activity as the ICN enters its third year:[4]

- Public Statements — Governments in 24% of jurisdictions have made supportive statements regarding implementation of the ICN's *Guiding Principles for Merger Notification and Review*[5] and / or the *Recommended Practices*.

- Implementation of Reforms — 38% 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*. An additional 15% of jurisdictions indicated that such changes are under consideration.[6] In all, 63% of jurisdictions indicated that they intend to enact reforms to their merger control laws and procedures that promote convergence towards recognized best practices.[7]

[4] The survey also collected merger caseload data which enables some comparisons of activity levels, review periods and the use of remedies between ICN jurisdictions. This information has not yet been tabulated and will be analyzed in a Final Report to be published later in 2004.

[5] Available online, at: <www.internationalcompetitionnetwork.org/icnnpguidingprin.htm> [hereinafter, the *Guiding Principles*].

[6] It is possible that in jurisdictions where only local counsel responded such changes are in fact planned but the respondent was simply unaware.

[7] These numbers are even more encouraging when consideration is given to the several jurisdictions that noted their merger regime already substantially conforms to the *Guiding Principles* and/or *Recommended Practices*, thus they have not needed to implement amendments or establish plans for convergence.

Background and Objectives

ICN members indicated after the endorsement of the *Guiding Principles* and the initial three *Recommended Practices* that implementation would be left to the initiative of individual jurisdictions. The former Chairman of the ICN and other senior officials from member agencies have encouraged private sector participants to take an active role in promoting such implementation.[8]

This survey and report is one response to that request. It builds upon a similar survey and report commissioned by the MSG in 2003,[9] which was presented to the ICN members at the ICN's second annual meeting in Mérida in June 2003, and subsequently expanded for publication in *Business Law International* in January 2004.[10] The *2003 Report* received a very positive response from competition agencies and local antitrust counsel in ICN member jurisdictions, with completed surveys received from 81% of jurisdictions.

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 *Recommended Practices #IV-VII* in ICN member jurisdictions.

This Preliminary Report, prepared for the April 2004 ICN meeting in Seoul, provides an initial analysis of the degree of implementation of *Recommended Practices IV-VII*. It is based upon surveys received by April 7, 2004. An expanded Final Report on the survey data, incorporating survey responses received after this deadline and additional analysis, will be prepared and published in the summer of 2004.

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[8] See, for example, Konrad Von Finckenstein's remarks to The 2003 Antitrust Conference: Antitrust Issues in Today's Economy, New York, March 19, 2003: "All that being said, there is certainly a role for NGAs in advocating that members adopt the *Recommended Practices* and marshal support for their implementation. For example, I believe there will be questions about conformity to ICN recommendations in the next Global Competition Review survey." For additional discussion of the role of private sector stakeholders, see J.W. Rowley QC, "Merger Reform Needs Words and Actions," 6 *Global Competition Review* (no.7, July 2003) 18 at 21.

[9] In addition to the *2003 Report*, the MSG has previously published: *Best Practices for the Review of International Mergers*, *Global Competition Review* (October/November 2001) 27; submitted a response to the European Commission's *Green Paper on the Review of the Merger Regulation* (unpublished, March 2002); provided the US-EU Bilateral Merger Working Group with a report entitled *Best Practices for Merger Review: Analysis and Recommendations for Review Processes in the United States and the European Union* (unpublished, November 2002); commented on aspects of the proposed new EU Merger Regulation (unpublished, April 2003); and most recently provided a submission to the EU entitled "Comments on Annex III: Draft Form RS Published for Public Consultation by the European Commission 18 February 2004" (unpublished, March 2004). All of these documents are available online, at: <http://www.mcmillanbinch.com/streamline>.

[10] J. William Rowley, QC and A. Neil Campbell, "Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report", 5 *Business Law International* (No. 1, (2004)) 110 [hereinafter, the "*2003 Report*"].

Survey Process

While all ICN *Recommended Practices* comprise multiple elements, *Recommended Practices IV-VI* have a particularly extensive level of detail. As a result, the 2004 survey was lengthy. It consisted of 34 questions relating to components of the individual *Recommended Practices*, including companion narrative commentaries by the ICN Working Group, as well as certain statistical data and general information about past and anticipated future governmental activities related to implementation. Advance copies of the draft survey were shared with the Chairman of the ICN as well as with the Canadian Competition Bureau (in its Vice-Chair capacity), which kindly provided feedback on the survey questions. A copy of the agency survey (the law firm version was not materially different) is attached for reference at Appendix A to this report.

The survey was sent to the head of each ICN member agency, and to a local law firm in each jurisdiction, in late February and early March 2004, with a request for responses within approximately four weeks.[11] A copy of the explanatory cover letter to agencies (the law firm version was not materially different) is reproduced at Appendix B. Follow-up reminder e-mails were sent to agencies and law firms that had not responded as the initial deadline approached. Responses were received and tabulated until April 7, 2004 for this Preliminary Report.

The list of the 74 competition law agency contacts was compiled primarily from the ICN website[12] and supplemented from other sources. Local counsel survey recipients with merger review expertise in these same jurisdictions (one per country) were compiled primarily from the firms that contributed to the *2003 Report* (who, in turn, had been chosen from the chapter authors of *International Mergers: The Antitrust Process*[13]), and supplemented by various other firms as needed. The jurisdictions surveyed and the responding agencies and firms are listed in Appendix C.

Response Rates

The response level in respect of surveys sent to competition agencies is summarized in Table 2:

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[11] Jurisdictions from which no response was received in the 2003 survey round were also provided with a somewhat streamlined version of the 2003 survey and invited to provide responses regarding *Recommended Practices I-III*. Further information about the nature of these responses will be provided in the 2004 Final Report.

[12] See <www.internationalcompetitionnetwork.org/members.html>.

[13] J.W. Rowley QC and Donald I. Baker, *International Mergers: The Antitrust Process*, 3rd ed., looseleaf (London: Sweet & Maxwell, 2000).

TABLE 2 COMPETITION AGENCY RESPONSE RATE		
RESPONSE	**#**	**%**
Substantially Complete	33	45
Declined to Participate	0	0
Incomplete (no mandatory merger notification regime)	3	4
No Response	38	51
Total Agencies Surveyed	74	100

The response data for surveys sent to a local counsel law firm in each ICN jurisdiction is summarized in Table 3:

TABLE 3 LAW FIRM RESPONSE RATE		
RESPONSE	**#**	**%**
Substantially Complete	43	60
Declined to Participate	0	0
Incomplete (no mandatory merger notification regime)	1	1
No Response	28	39
Total Law Firms Surveyed	72[14]	100

While it was disappointing not to receive responses from all ICN member agencies and law firms that were contacted, the 49% and 61% rates of response provide a sizeable profile of the current state of implementation of *Recommended Practices IV-VII*.[15] Indeed, when jurisdictions with overlapping agency and private sector responses are consolidated, jurisdictions from which there was neither a governmental nor a private sector response amounted to only 20% of jurisdictions surveyed. Thus the response levels to date are generally comparable to the 2003 survey, although it is hoped that additional responses will be

[14] Only 72 law firm surveys were sent as there was no local counsel counterpart for the Andean Community or EFTA Surveillance Authority agencies.

[15] The slightly 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.

received[16] after the Seoul meeting that will allow the 2004 Final Report to get closer to complete coverage.

For ease of analysis, the results are reported by jurisdiction without segregation between agency and law firm respondents, with the exception of certain relatively subjective questions in which there appeared to be potentially significant differences. With these few areas of exception, responses from the competition agency and a law firm for a particular jurisdiction were generally congruent.[17]

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 particular components more or less importantly, we attempted to provide our overall measure of the level of consistency with a *Recommended Practice* 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 ½ for partial consistency.[18] The total potential score for each *Recommended Practice* therefore varies according to its scope.

Findings

1. Review Periods *(Recommended Practice #IV)*

The *Recommended Practice* related to Review Periods was divided into seven major elements: (i) expedited review procedures (Q1); (ii) a 6 week time frame for initial reviews (Q2/Q3); (iii) a 6 month time frame for extended reviews (Q4/Q5); (iv) early termination powers (where suspensive periods exist) (Q7); (v) availability of limited extensions of time limits with consent of merger parties (Q8); and specially expedited/tailored procedures for (vi) non-consensual transactions such as take-over bids (Q9) as well as (vii) financial distress transactions (Q10).

As a result, the maximum score for a jurisdiction with suspensive periods that is consistent with all the components is 7 (5 for non-suspensive jurisdictions). Appendix D summarizes the actual levels of consistency, by component, for each individual jurisdiction (in

[16] Competition agencies in several jurisdictions have communicated their intention to complete the survey later in April.

[17] Where differences arose, the agency response was normally employed in lieu of the law firm response.

[18] This represents a more objective alternative to the "Substantial Consistency", "Partial Consistency" and "Inconsistency" classifications used in the *2003 Report* because such classifications would be more difficult to operationalize for *Recommended Practices* with more than three components.

percentage terms to provide a common basis for comparing suspensive and non-suspensive jurisdictions).

The overall level of consistency with each of the seven components of this *Recommended Practice* is summarized in Table 4:

TABLE 4
COMPONENTS OF *RECOMMENDED PRACTICE IV*: REVIEW PERIODS

Component	% of Responding Jurisdictions		
	Fully Consistent	**Partially Consistent**	**Inconsistent**
1. Procedures for Expedited Review of Transactions Where No Competition Concerns (Q1)	61		39
2. Initial Waiting / Review Period Less Than 6 Weeks (Q2/Q3)	73		27
3. Extended Waiting / Review Period Less than 6 Months (Q4/Q5)	92		8
4. Authority May Grant Early Termination of Waiting Period (Q7)	78	12	10
5. Authority May Extend Waiting Period on Consent (Q8)	13		87
6. Special Procedures For Non-Consensual Transactions (Q9)	47		53
7. Special Procedures for Financial Distress Transactions (Q10)	56		44

The top priority which emerges from this overview is that nearly 40% of responding jurisdictions do not have processes for expediting the review of transactions that do not raise significant competitive issues. The six-month standard for extended reviews is met by almost all jurisdictions with somewhat lesser performance on the six-week benchmark for initial reviews. Greater flexibility around early terminations and especially consent extensions of waiting periods would also be desirable.

(a) Availability of Expedited Reviews

Table 5 summarizes the extent to which merger review systems have been structured to encourage expedited review of transactions that do not raise material competition concerns:

TABLE 5
AVAILABILITY OF EXPEDITED REVIEW
FOR STRAIGHT-FORWARD TRANSACTIONS

Question 1 Expedited Review Responses	**#**	**%**
Formal 2-phase regime	25	45
Policy or practice for expedited review	9	16
Subtotal: Consistent with *Recommended Practice*	34	61
Not available or unclear	22	39
Total	55	100

These data indicate that the majority of ICN jurisdictions have adopted either formal two-phase structures or other practices for expediting review of non-problematic transactions.[19] However, a sizeable minority have not addressed this important issue.

(b) Length of Initial Waiting / Review Periods

The extent to which suspensive periods, or initial review periods in non-suspensive jurisdictions, meet the ICN standard of six weeks or less is tabulated in Table 6:

TABLE 6
TIME PERIOD FOR INITIAL REVIEW

Initial Time Period Responses for Suspensive (Question 2) and Non-Suspensive (Question 3) Jurisdictions	**Suspensive Jurisdictions**		**Non-Suspensive Jurisdictions**	
	#	**%**	**#**	**%**
≤ 6 weeks	32	76	10	67

[19] One additional jurisdiction (Israel) noted that it is in the process of completing reforms that will enable an expedited review and clearance where no material competitive concerns are present.

TABLE 6 TIME PERIOD FOR INITIAL REVIEW				
Initial Time Period Responses for Suspensive (Question 2) and Non-Suspensive (Question 3) Jurisdictions	**Suspensive Jurisdictions**		**Non-Suspensive Jurisdictions**	
	#	**%**	**#**	**%**
> 6 weeks	10	24	1	7
No clear rules, policy or practice	[redacted]		4	26
Total[20]	42	100	15	100

These results are encouraging, with a strong majority of both suspensive and non-suspensive jurisdictions operating within the recommended six week time period for initial waiting / review periods.

(c) Length of Extended or Waiting / Review Periods

Table 7 contains a similar analysis of the time periods (formal or normal actual) for cases requiring an extended review, relative to the ICN's six month standard, in suspensive and non-suspensive jurisdictions:

TABLE 7 TIME PERIOD FOR EXTENDED REVIEWS				
Extended Review Time Period Responses for Suspensive (Question 4) and Non-Suspensive (Question 5) Jurisdictions	**Suspensive Jurisdictions**		**Non-Suspensive Jurisdictions**	
	#	**%**	**#**	**%**
Waiting period(s) or formal time limit ≤ 6 months	32	80	9	69
Waiting period determinable by parties and normally capable of completion in ≤ 6 months	6	15	[redacted]	
Non-binding policy ≤ 6 months	[redacted]		2	15

[20] The higher denominator of 57 stems from a combination of the survey responses for Russia and Kazakhstan, which indicated that those jurisdictions employ a dual suspensive / non-suspensive merger regime, and the Venezuelan competition agency response, which provided an answer of "n/a" for both Questions 2 and 3.

TABLE 7 TIME PERIOD FOR EXTENDED REVIEWS				
No formal time limit or policy, but normally completed in ≤ 6 months			0	0
Subtotal: Consistent with *Recommended Practice*	36	95	11	84
Waiting period(s) or formal time limit > 6 months	2	5	1	8
Waiting period not determinable by parties or not normally capable of completion in ≤ 6 months	0	0		
Non-binding policy > 6 months			0	0
No formal time limit or policy, and only rarely or sometimes completed in ≤ 6 months			1	8
Total	40[21]	100	13	100

About 80% of suspensive and 70% of non-suspensive jurisdictions have formal time frames which comply with the ICN standard. Another 15% of jurisdictions comply with alternative ICN Working Group standards for suspensive or non-suspensive systems.[22] The three jurisdictions which have formal waiting periods or time limits that exceed six months are Croatia, Greece[23] and the United Kingdom**,** while Brazil was identified as a jurisdiction without clear time limits where, in practice, reviews are only rarely or sometimes completed within the six-month *Recommended Practice*.

(d) Early Termination of Waiting Periods and Extension of Waiting / Review Periods

The ability of competition agencies to terminate suspensive periods ahead of the formal expiration date is described in Table 8:

[21] Survey respondents in two suspensive jurisdictions (Denmark and India) did not provide a response to Question 4, while survey respondents in Indonesia, Philippines and Thailand provided answers of "n/a" (as they apparently do not employ two-phase review systems) to Question 5. Survey respondents in Russia and Kazakhstan indicated that those jurisdictions employ a dual suspensive / non-suspensive merger regime (both of which are within the ≤ 6 week / 6 month recommended standards), and thus have been counted in both columns of Table 7.

[22] Although 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) which in practice do extend beyond 6 months.

[23] 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.

TABLE 8 AUTHORITY TO GRANT EARLY TERMINATION OF WAITING PERIODS		
Question 7 Early Termination Responses	**#**	**%**
Yes	33	78
Sometimes	5	12
No	4	10
Total	42[24]	100

These results are somewhat surprising. It would seem uncontroversial to allow an agency to terminate a suspensive period as soon as it is satisfied that a transaction is not anti-competitive. Yet almost one-quarter of agencies cannot do so at all or only have such powers in limited circumstances. This represents an area in which simple and non-prejudicial changes could make a particularly significant practical contribution to the streamlining of merger review processes.

Table 9 provides a similar profile regarding the ability of competition agencies to extend suspensive or review periods with the consent (appropriate) or without the consent (inappropriate) of the merging parties:

TABLE 9 TIME-LIMITED EXTENSION OF WAITING PERIODS		
Question 8 Waiting Period Extension Responses	**#**	**%**
Yes (with consent)	5	13
Yes (without consent)	15	40
No	18	47
Total	38[25]	100

[24] This question applied only to suspensive jurisdictions, hence the lower total number of responses.

[25] This question did not apply to non-suspensive jurisdictions, and there were 6 additional respondents who provided an answer of "n/a", hence the lower total number of responses.

The picture which emerges in this area is disappointing. Nearly half of agencies do not have the flexibility to avoid the initiation of Phase II proceedings and / or an adverse enforcement decision where such result might be avoided by a time-limited extension. Moreover, very few of the agencies that have extension powers require the consent of the merging parties, which is an important safeguard against the unwarranted use of such powers.

(e) Special Rules for Take-Over Bid and Financial Distress Transactions

The ICN Working Group's recommendation that one or more appropriate procedures be available to facilitate expeditious review of time-sensitive (*e.g.* take-over bid and financial distress) transactions is assessed in Table 10:

TABLE 10
SPECIAL PROCEDURES FOR TAKE-OVER BIDS AND FINANCIAL DISTRESS TRANSACTIONS

Responses Regarding Special Procedures for Non-Consensual (Question 9) and Financial Distress (Question 10) Transactions	**Take-Overs and Other Non-Consensual Transactions**		**Financial Distress Transactions**	
	#	**%**	**#**	**%**
One or more special procedures[26]	26	47	31	56
None	29	53	24	44
Total[27]	55	100	55	100

These data indicate that roughly half of jurisdictions have taken one or more steps to adapt normal review procedures to the distinctive characteristics of take-over bids and financial distress transactions (although notably, only slightly more than half of these 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% of jurisdictions for non-consensual transactions and 10% of jurisdictions in financial distress cases.

[26] For simplicity, the analysis have been undertaken on an aggregated basis instead of considering the incidence of each type of special procedure mentioned in the Working Group's Commentary. Examples of such procedures identified by the ICN Working Group include: shortened waiting / review periods; initial filing by acquiror only in take-overs; discretionary information waivers; substantive review standards for "failing firms"; *etc.*

[27] For each of Questions 9 and 10, there was one respondent that did not provide an answer.

2. Requirements for Initial Notification (*Recommended Practice #V*)

The *Recommended Practice* related to Review Periods was segmented into eight major elements: (i) limiting initial notifications to necessary information (Q11); (ii) flexibility mechanisms to minimize burdens during initial notifications / reviews (Q12); willingness to accept (iii) ordinary course of business information (Q13) and (iv) other substantially responsive materials (Q14) as substitutes for formal notification requirements; availability of confidential pre-filing guidance with respect to (v) legal / jurisdictional / factual issues related to notifications (Q15) and (vi) information required in such notifications (Q16); (vii) partial or no translation requirements (Q17); and (viii) ability to file notifications without personal officer authentications (Q18).

As a result, the maximum score for a jurisdiction that is consistent with all of the components is 8 (or less if certain questions are not applicable to the structure of a particular type of regime).[28] Appendix E reports the actual levels of consistency, by component, for each individual jurisdiction (in percentage terms to provide a common basis for comparisons).

A summary of the percentage of fully and partially consistent jurisdictions for each of the eight components of this *Recommended Practice* is provided in Table 11:

TABLE 11
COMPONENTS OF *RECOMMENDED PRACTICE V*:
REQUIREMENTS FOR INITIAL NOTIFICATION

Component	% of Responding Jurisdictions		
	Fully Consistent	**Partially Consistent**	**Inconsistent**
1. No Unnecessary Information Required in Initial Notification (Q11)	73	[redacted]	27
2. Flexibility Mechanisms for Notification and Information Requirements During Initial Review (Q12)	63		37
3. Acceptability of Alternate Sources of Information: Ordinary Course of Business information (Q13)	57		43

[28] Such answers have been excluded from the percentage calculation of the respective jurisdictions' consistency with the applicable components of the *Recommended Practice*.

4. Acceptability of Alternate Sources of Information: Substantially Responsive Information in Other Formats (Q14)	52	9	39
5. Availability of Confidential Pre-Notification Guidance re Notifiability of Transaction (Q15)	60	24	16
6. Availability of Confidential Pre-Notification Guidance re Information Required in Notification Form (Q16)	60	23	17
7. Full Translation of Supporting Documents Not Required (Q17)	34	34	32
8. Filing Does Not Require Personal Authentication by Senior Officers (Q18)	69	[redacted]	31

It was encouraging to see that a majority of jurisdictions are consistent with each of the components of this *Recommended Practice* with the exception of translation, where there is basically an equal split between consistent, partially consistent and inconsistent rules / practices. While translation is therefore an obvious priority for reducing unnecessary time and cost burdens, a sizable minority of jurisdictions is inconsistent with every other component of this *Recommended Practice*.

(a) Unnecessary Information in Merger Notification Filings

The ICN Working Group has recommended that initial notifications only require information that is "necessary" to determine whether an in-depth review is needed. Commenting on a jurisdiction's consistency with this recommendation necessarily involves a subjective, rather than objective, response and, recognizing this, Table 12 compiles the agency and law firm responses to this survey question separately:

TABLE 12 UNNECESSARY INFORMATION IN NOTIFICATION FILING				
Question 11 Responses Regarding Unnecessary Information in Initial Notifications	**Agency Responses**		**Law Firm Responses**	
	#	**%**	**#**	**%**
No	24	80	25	64
Yes	6	20	14	36
Total	30[29]	100	39[30]	100

Eighty percent of agencies perceived that their initial notifications did not contain unnecessary information requirements, whereas less than two-thirds of law firms view filing requirements in this manner. While the sample size is small, this differential suggests that necessity may be in the eye of the beholder. This is confirmed by an examination of the seven (14% of the 49 of jurisdictions responding to this question) cases in which the agency and law firm within a jurisdiction differed — in all but two cases, it was the agency which perceived that none of the information was unnecessary. Hopefully this *Recommended Practice* will stimulate informed debate within jurisdictions and internationally regarding the extent to which various specific filing requirements could be reduced without prejudicing effective initial review processes.

(b) Flexibility Mechanisms for Notifications and / or Information Requirements

Table 13 indicates the number of jurisdictions which reported one or more flexibility mechanisms[31] for reducing unnecessary burdens related to initial notification requirements and / or additional information requests during the initial review period:

[29] Three agencies did not respond to this question.

[30] Two law firms did not respond to Question 11, and two provided answers of "n/a".

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

TABLE 13 MECHANISMS PROVIDING FLEXIBILITY FOR NOTIFICATION AND ADDITIONAL INFORMATION REQUIREMENTS DURING INITIAL REVIEWS		
Question 12 Flexibility Mechanism Responses	**#**	**%**
Yes	34	63
No	20	37
Total[32]	54	100

A solid majority of jurisdictions employ at least one of the five types of mechanisms listed by the ICN Working Group or some other flexibility mechanism. However, there remains a sizeable minority which have not adopted any of these useful burden-reducing techniques.

(c) Willingness of Competition Agencies to Accept Alternative Sources of Information

Table 14 reports on the responses to two similar survey questions which probed ICN Working Group recommendations concerning the willingness of competition agencies to accept readily-available information in lieu of formal notification requirements (strict compliance with which may be burdensome).

TABLE 14 ACCEPTABILITY OF ALTERNATIVE SOURCES OF INFORMATION				
Responses Regarding Acceptability of Ordinary Business (Question 13) or Other Responsive (Question 14) Information	**Ordinary Course Of Business Information**		**Substantially Responsive Information In Other Formats**[33]	
	#	**%**	**#**	**%**
Yes	30	57	28	52
Limited circumstances	[redacted]		5	9
Subtotal: Consistent with *Recommended Practice*	30	57	33	61
No	23	43	21	39

[32] Two survey respondents provided answers of "n/a" for Question 12.

[33] Such information could consist of ordinary course of business information or information from merger filings in other jurisdictions.

Total[34]	53	100	54	100

As with flexibility mechanisms generally (see the discussion of Table 13 above), a clear majority of ICN jurisdictions are generally open to "substance over form". However, a significant minority are not able or willing to depart from formal notification requirements in favour of less burdensome substitute forms of information.

(d) Availability of Confidential Pre-Notification Guidance

The *Recommended Practices* focus on the availability of confidential pre-notification from competition agencies in two key areas: legal / jurisdictional / factual issues related to notification obligations, and the information requirements in the notification form itself. Table 15 compares the current practices in each area:

TABLE 15
CONFIDENTIAL PRE-NOTIFICATION GUIDANCE

Confidential Guidance Responses Relating to Notifiability (Question 15) and Notification Requirements (Question 16)	**Notifiability of Transaction**		**Notification Requirements**	
	#	**%**	**#**	**%**
Yes	33	60	32	60
Sometimes	13	24	12	23
No	9	16	9	17
Total[35]	55	100	53	100

(e) Translation of Supporting Documents

Perhaps because translation of supporting documents is often a matter of agency discretion rather than specific rules, there were noticeable differences between agency and law firm responses to this question. Tables 16A and 16B provide comparative responses:[36]

[34] Two survey respondents provided an answer of "n/a" to Question 13, while an additional survey respondent did not provide an answer at all. For Question 14, two survey respondents provided answers of "n/a".

[35] One survey respondent provided an answer of "n/a" to Question 15, while one survey respondent answered "n/a" and two others did not provide an answer for Question 16.

TABLE 16A
TRANSLATION OF SUPPORTING DOCUMENTS - AGENCY RESPONSES

Question 17 Translation Requirement Responses	Transaction Documents		Annual Reports & Securities Filings		Other Supporting Materials	
	#	%	#	%	#	%
Translation not required	6	25	11	42	11	42
Summary sufficient	5	21	9	35	8	31
Subtotal: Consistent with *Recommended Practice*	11	46	20	77	19	73
Full translation required[37]	13	54	6	23	7	27
Total	24	100	26	100	26	100

TABLE 16B
TRANSLATION OF SUPPORTING DOCUMENTS - LAW FIRM RESPONSES

Question 17 - Translation Requirement Responses	Transaction Documents		Annual Reports and Securities Filings		Other Supporting Materials	
	#	%	#	%	#	%
Translation not required	8	28	13	45	10	36
Summary sufficient	3	11	7	24	6	21
Subtotal: Consistent with *Recommended Practice*	11	39	20	69	16	57
Full translation required[38]	17	61	9	31	12	43

[36] As answers to Questions 17(ii) (annual reports & securities filings) and 17(iii) (other supporting materials) were generally the same among survey respondents, Question 17 was scored with a half-point alloted to each of 17(i) and (ii). This scoring method also had the salutary effect of avoiding cumbersome one-third marks for responses.

[37] It should be noted that 7 respondents (representing 21% of responding agencies) indicated that, while translation would normally be required, supporting documents would be accepted in english.

[38] It should be noted that 11 respondents (representing 26% of responding law firms) indicated that, while translation would normally be required, supporting documents would be accepted in english.

Total	28	100	29	100	28	100

The key finding from this question is that jurisdictions are much more likely to require full translation of transaction documents than annual reports and other supporting materials. Given the time and cost of translating large and complex documents, it is encouraging to see summaries emerging as a moderately popular middle ground that deserves further attention by jurisdictions which are not prepared to proceed without any translation of transaction or other documents.

(f) Authentication Requirements

The prevalence of requirements that initial notifications and / or supporting documentation be personally authenticated by senior officers is summarized in Table 17:

TABLE 17
PERSONAL AUTHENTICATION BY SENIOR OFFICERS NOT REQUIRED

Question 18 Personal Authentication Responses	**#**	**%**
Yes	35	69
No	16	31
Total[39]	51	100

These responses indicate that unnecessarily burdensome formal personal authentication requirements are widespread in comparison with the more flexible approaches (such as simple signatures from company personnel or representations by counsel) advocated by the ICN Working Group.

3. Transparency (*Recommended Practice #VI*)

The *Recommended Practice* related to Review Periods was disaggregated into nine major elements: (i) making all merger laws and other materials publicly available in a timely manner (Q19); ensuring that the aspects of (ii) jurisdictional scope (Q20) and (iii) merger review procedure (Q21) are readily determinable from public materials; (iv) providing guidance regarding substantive principles and criteria used in applying the law (Q22); (v) where non-competition factors are considered, ensuring that their interface with competition factors is transparent (Q23); (vi) publishing reasons for clearance decisions that set precedents or shift enforcement policies (Q24); (vii) publishing guidelines regarding enforcement policies /

[39] Four survey respondents did not provide answers to Question 18, while one additional respondent provided an answer of "n/a".

practices (Q26); (viii) making relevant materials available on a regularly updated website (Q27); and (ix) providing english translations of basic merger review materials (Q28).

As a result, the maximum score for a jurisdiction that is consistent with all the components is 8 (or 7, for those jurisdictions that answered "n/a" to question 23 because their respective merger review test does not include any non-competition factors). Appendix F lists the degree of consistency of each jurisdiction with each major element of this *Recommended Practice* (on a percentage basis to facilitate comparisons).

A summary of the extent of consistency of responding jurisdictions with each of the eight components of this *Recommended Practice* can be found in Table 18:

TABLE 18
COMPONENTS OF *RECOMMENDED PRACTICE VI*: TRANSPARENCY

Component	% of Responding Jurisdictions		
	Fully Consistent	**Partially Consistent**	**Inconsistent**
1. Timely Availability of Laws, Policies and Practices (Q19)	47	53	0
2. Public Information Regarding Jurisdictional Scope of Merger Laws (Q20)	86	7	7
3. Public Information Regarding Merger Review Procedures (Q21)	71	27	2
4. Transparency of Substantive Principles and Criteria (Q22)	45	35	20
5. Transparency of Non-Competition Factors in Merger Review (Q23)	65	5	30
6. Regular Publication of Reasons for Key Decisions (Q25)	41	18	41
7. Competition Agency Website Materials (Q27)	80	16	4
8. Availability of Merger Review Materials in English (Q28)	55	25	20

As can be seen from these data, there is considerable variability across the various dimensions of transparency. While most jurisdictions make available extensive public information regarding jurisdictional and procedural matters (including through up-to-date websites), it is disconcerting that less than half achieve the *Recommended Practice* on substantive principles and criteria and one-third of those employing non-competition factors have achieved sufficient transparency in this area. Regular publication of key enforcement agency decisions is also an important area for improvement, with equal numbers of agencies making and not making such disclosures.

(a) Timely Availability of Laws, Policies, and Practices

Question 19 sought information on the extent to which each of laws, regulations, policies, case decisions and other materials relevant to merger review were made readily available to the public in a timely manner. To simplify this Preliminary Report, Table 19 presents the responses on an aggregated basis:

TABLE 19
TIMELY AVAILABILITY OF LAWS, POLICIES, AND PRACTICES

Question 19 Responses on Timely Availability	**#**	**%**
All fully available	26	47
Partially available	29	53
All unavailable or not timely	0	0
Total[40]	55	100

While no jurisdiction reported complete unavailability or lack of timeliness, it was disappointing to find that less than half of the responding jurisdictions made all such materials fully available on a timely basis. Given the ease with which transparency can be achieved using internet websites, this surely is a priority area where implementation of the ICN *Recommended Practices* could generate significant benefits quickly and at low cost.

(b) Jurisdictional Scope and Review Procedures

Questions 20 and 21 examined more specifically whether three attributes of jurisdictional scope and 12 aspects of merger review procedures were readily determinable from publicly available materials. Again, this Preliminary Report presents a summary (see Table 20 below) which condenses the components of each question:

[40] One survey respondent provided an answer of "n/a" for Question 19.

TABLE 20 PUBLIC INFORMATION REGARDING JURISDICTION AND PROCEDURES				
Responses Regarding Determinability of Jurisdiction (Question 20) and Procedure (Question 21)	**Jurisdictional Scope**		**Merger Review Procedures**	
	#	**%**	**#**	**%**
All yes	47	86	39	71
Mixed	4	7	15	27
All no	4	7	1	2
Total[41]	55	100	55	100

The results in these areas are much more encouraging. Nearly all jurisdictions achieved full transparency on the jurisdictional scope elements (although the position in Brazil, Indonesia, Kenya and the Philippines is not readily determinable from publicly available information). Similarly, nearly three-quarters of jurisdictions display transparency on all twelve of the listed procedural matters, and only country (Philippines) was not seen as providing readily determinable information about any of these items.

(c) Substantive Principles and Criteria

Question 22 requested a somewhat subjective assessment of the extent to which guidelines or other materials have illuminated the substantive principles and criteria that competition agencies use in applying these merger laws. The results are tabulated in Table 21:

TABLE 21 TRANSPARENCY OF SUBSTANTIVE PRINCIPLES AND CRITERIA		
Question 22 Substantive Transparency Responses	**#**	**%**
Extensively available	24	45
Partially available	19	35
Minimally or none available	11	20

[41] One survey respondent did not provide an answer to Question 20; one survey respondent provided an answer of "n/a" to Question 21.

Total[42]	54	100

The level of substantive transparency varies enormously: nearly half of jurisdictions provide extensive information regarding decision-making principles and criteria, but one-fifth offer minimal or no guidance about agency practices on such important matters.

(d) 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 they interact with competition-oriented criteria. Table 22 outlines the degree of transparency surrounding such elements in the responding jurisdictions which employ non-competition factors in merger reviews:

TABLE 22
TRANSPARENCY OF NON-COMPETITION FACTORS

Question 23 Non-Competition Transparency Responses	**#**	**%**
Yes	13	65
Partially	1	5
No	6	30
Total	20[43]	100

While the majority of merger review regimes focus purely on competition issues, consideration of non-competition factors is not uncommon (36% of jurisdictions). In such systems, it is encouraging that 65% provide transparency that contributes to making the interface between the decision-making factors understandable. However, six jurisdictions (Croatia, Iceland, Indonesia, Kenya, Latvia and Ukraine) have not done so, and New Zealand has only achieved partial transparency in this area.

[42] Two survey respondents did not provide an answer for Question 22.

[43] An additional 36 jurisdictions (64% of those responding to this question) reported that non-competition factors were not used in their merger review processes.

(e) Publication of Key Decisions

The *Recommended Practices* encourage case-specific transparency in the form of reasoned explanations for, at a minimum, those decisions which set a precedent or represent a shift in policy or practice. The frequency of such published decisions is summarized in Table 23:

TABLE 23 **REGULAR PUBLICATION OF REASONS FOR KEY DECISIONS**		
Question 25 Responses on Publication of Decisions	**#**	**%**
Yes	23	41
Case-by-case	10	18
No	23	41
Total	56	100

The practice on publication of key decisions is evenly divided between agencies that regularly do and those that do not, with a small group varying on a case-by-case basis.

(f) Website Reference Materials

The important role of websites in promoting transparency, particularly for international transactions, is examined in Table 24:

TABLE 24 **COMPETITION AGENCY WEBSITE REFERENCE MATERIALS**		
Question 27 Website Responses	**#**	**%**
Website is complete and updated	43	80
Website is incomplete or not updated	9	16
Website is planned / in development	1	2

No website or plans for website	1	2
Total[44]	54	100

The availability of reference materials on websites is very high: over 90% of agencies maintain such a site and 80% of them are complete and up-to-date. Of the two jurisdictions that do not have a current or planned website, both are relatively small and new arrivals on the competition law enforcement scene. While resource constraints are a particular challenge for such agencies, it would be desirable if they could consider this cost-effective form of communication at the earliest feasible date.

(g) Availability of English Translations

The survey also requested information regarding the availability of english translations of basic merger review materials (*i.e.* laws, regulations and guidelines). The results are presented in Table 25:

TABLE 25
AVAILABILITY OF MERGER REVIEW MATERIALS IN ENGLISH

Question 28 Reponses Regarding English Materials	**#**	**%**
Yes (all)	31	55
Some Selected Materials	14	25
No	11	20
Total	56	100

Notwithstanding the wide availability of website reference materials noted above, english translations are less common. Just over half of jurisdictions have provided english translations of all core materials. A further one-quarter of jurisdictions presently make selected materials available in english, but 20% do not.

[44] Two respondents did not provide an answer to Question 27.

4. Review of Merger Control Provisions (*Recommended Practice #VII*)

The *Recommended Practice* related to Review of Merger Control Provisions has two major elements: (i) plans to periodically review and improve the merger process (Q29); and (ii) intentions to pursue reforms that will promote convergence to ICN *Recommended Practices* (Q30). Appendix G reports the degree of consistency of each jurisdiction with these two components.

In this Preliminary Report, we have focused on the portion of Question 29 which requested an indication of future plans to review each jurisdiction's merger review regime. In addition, Question 30 canvassed intentions to pursue convergence towards ICN *Recommended Practices*. Table 26 contains the responses:

TABLE 26
FUTURE REFORM OF MERGER REGIMES

Question 29 & 30 Plans to Review Regime and Pursue Convergence	**Plans To Review Merger Regime**		**Plans To Pursue Reforms That Converge With Best Practices**	
	#	**%**	**#**	**%**
Yes	44	80	35	64
Uncertain or undecided			6	11
No	11	20	14	25
Total[45]	55	100	55	100

An encouraging 80% of responding jurisdictions have plans to review their merger regime (or have already done so since the ICN's initial meeting in Naples in September 2002[46]). The number of jurisdictions indicating plans to pursue reforms that converge with recognized best practices was a somewhat less impressive 64% (although this figure may reflect a respondent's lack of information — particularly in cases of private law firm respondents — rather than an actual lack of intent to pursue reforms incorporating best practices). While over half of the responding jurisdictions were consistent with both components of this *Recommended Practice*, it is disappointing that 20-24% have no plans to undertake any review or pursue

[45] Two survey respondents did not provide answers to Questions 29 and 30; however, responses to these questions were provided by the Pakistani competition agency, hence the adjusted totals in Table 26.

[46]

convergence with best practices.

5. Government Statements and Actions

The survey concluded by soliciting information about government statements and actions regarding implementation of the *Guiding Principles* and *Recommended Practices*. Data provided in response to these questions are summarized in Tables 27 (public statements) and 28 (changes to legislation) below. Individual country responses are summarized in Appendix G.

TABLE 27
STATEMENTS REGARDING *GUIDING PRINCIPLES* AND *RECOMMENDED PRACTICES*

Responses Regarding Public Statements on *Guiding Principles* (Q31) and *Recommended Practices* (Q32)	***Guiding Principles***		***Recommended Practices***	
	#	**%**	**#**	**%**
Support	13	24	13	24
Neutral	7	13	6	11
None	35	63	36	65
Total[47]	55	100	55	100

These data remain virtually unchanged from responses to similar questions posed in the *2003 Report*,[48] which reported that 13 jurisdictions had made public statements supporting the *Recommended Practices* and 14 regarding the *Guiding Principles*.

TABLE 28
IMPLEMENTATION OF *GUIDING PRINCIPLES* AND *RECOMMENDED PRACTICES*

Responses Regarding Implementation of *Guiding Principles* (Q33) and *Recommended Practices* (Q34)	***Guiding Principles***		***Recommended Practices***	
	#	**%**	**#**	**%**
Yes	11	20	9	16.5

[47] One survey respondent did not provide an answer to Questions 31 or 32.

[48] *Supra* note 10 at 131ff.

In progress	7	13	9	16.5
Considering	8	14	8	14
No	29	53	29	53
Total[49]	55	100	55	100

These data show a more positive trend. Results from the *2003 Report* showed that 10% of responding jurisdictions had or were planning to implement aspects of the *Recommended Practices*, while a further 20% of jurisdictions indicated that such changes were under consideration. These numbers have since increased to 33% and 14%, respectively. A further 33% of jurisdictions have or are planning to implement elements of the *Guiding Principles* (as compared with 14% in 2003), with 14% indicating that such changes are under consideration (16% in 2003).

While it is encouraging to see that some jurisdictions have done so, there is still a clear majority of jurisdictions which do not appear to have made implementation of the *Recommended Practices* a priority. These results suggest that achieving implementation of the *Recommended Practices* will be a significant challenge, notwithstanding the consensus and momentum arising from their development and adoption. How to bridge this gap remains a critical issue for ICN members and other interested stakeholders.

Conclusions

The ICN's *Recommended Practices* are an extremely important means for mitigating the spiralling scope, complexity and costs of international merger review processes. It is hoped that this report on the survey of *Recommended Practices IV-VII* commissioned by the Merger Streamlining Group will provoke discussion and foster implementation of the unanimously-adopted *Recommended Practices* by identifying areas where substantial progress has been made and areas where improvements in merger review practice can be made. As was the case in 2003, the 2004 survey results indicate that such opportunities exist in most jurisdictions.

Additional Information

For further information regarding the survey process and results, please contact J. William Rowley QC (+416.865.7008; MSG.survey@mcmillanbinch.com).

[49] One survey respondent did not provide an answer to Questions 33 or 34.