



The International Competition Network Merger Working Group: Focus on Implementation

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The International Competition Network (“ICN”) has been rightly heralded as a success story. In twelve short years, this “virtual” organization has promoted a level of international dialog and cooperation that few could have imagined. One of the ICN’s early successes, and maybe to this day the best example of what such an organization can achieve, is its Recommended Practices for Merger Notification and Review Procedures (September 2002, as supplemented and amended). This 37-page document articulates well-recognized principles for sensible administration of merger review.

The ICN, through its Merger Working Group, has supplemented these RPs with such work product as Setting Notification Thresholds (April 2008); Defining Merger Transactions (May 2007); and Merger Notification Information Requirements (June 2009).

Valuable as these pieces have been, over the past few years, it has become increasingly evident that the ICN MWG should devote increased attention to implementation: although recommended practices are just that – recommended – surely more could be done to see whether and how countries not following the practices might be able to more closely align their merger review scheme with the RPs. To that end, in 2011 the ICN adopted a self assessment questionnaire to assist members in “evaluating merger notification provisions for conformity with ICN recommended practices for merger notification and review procedures.”

This was a good step in the right direction but more needs to be done. Although we can readily acknowledge that debating the utility of the UPP, Lerner Index or diversion ratios in merger analysis is more scintillating than the nuts and bolts of merger review, it is also undeniably the case that considerable inefficiencies are generated – for both the public and private sectors – by merger reviews materially misaligned with the ICN RPs. Those societal costs justify increased efforts to improve worldwide merger review.

The MWG has so acknowledged: one of the four long term goals of the MWG is to “assist members in finding ways to avoid imposing unnecessary burdens on agencies and businesses”; and one of the projects for this year includes increasing implementation of the RPs.

How should it be done? There is not a one-size-fits-all solution, because there are a myriad of reasons why a jurisdiction’s merger review processes may not well conform to the RPs. Some change may be effected by further education, leading the enforcement agency to adopt policies that better align with the RPs. Indeed, the

MWG work plan for this year includes educational teleseminars on these RPs. In some cases, change may need to include amendments to the relevant laws. Consistent with that, in his vision statement, the then newly elected Chair of the ICN Steering Group, Eduardo Perez Motta wrote: “It is time for the ICN to take on a more active role in supporting members, whenever they ask for assistance, in the complicated and politically charged debates they often face at home, for example when advocating improvements to their legislation ...”

The good news is that the ICN is well suited to assist a jurisdiction with whatever path needs to be followed to reform its merger review. An agent of change can be defined as one which through communication, education, and other resources helps effect change. The ICN can indeed be a very strong change agent in this area.