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# Surveying the surveys: The drive for implementation of the ICN's recommended practices for merger notification and review procedures

**ABSTRACT**

One of the first and most enduring work products of the ICN is the Merger Working Group's Recommended Practices for Merger Notification and Review Procedures. Since their initial release in the early 2000s, the Recommended Practices have undergone a number of changes and a number of surveys have been made to gauge their success. This essay reviews those surveys and the progress that has been made towards implementation of the Recommended Practices by ICN members. A number of suggestions are also made as to further work the ICN can undertake to utilise the valuable data in the surveys to help drive implementation efforts and to ensure that the Recommended Practices continue to reflect the reality of modern merger control.

*L'un des premiers et des plus durables produits de travail du RIC est le document du groupe de travail sur les concentrations intitulé "Pratiques recommandées pour les procédures de notification et d'examen des concentrations". Depuis leur publication initiale au début des années 2000, les "Pratiques recommandées" ont subi un certain nombre de modifications et plusieurs enquêtes ont été réalisées pour évaluer leur succès. Cet essai passe en revue ces enquêtes et les progrès réalisés dans la mise en œuvre des pratiques recommandées par les membres du RIC. Un certain nombre de suggestions sont également faites quant aux travaux que le RIC peut entreprendre pour utiliser les précieuses données des enquêtes afin de contribuer à stimuler les efforts de mise en œuvre et de garantir que les "Pratiques recommandées" continuent à refléter la réalité du contrôle moderne des concentrations.*

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## I. Introduction

**1.** Let's take a quick trip back in time to the late 1990s before there was an International Competition Network ("ICN"). There was a merger boom and a boom in the number of merger control regimes around the world. The proliferation occurred in an uncoordinated fashion and there was no consensus on global "best practice" with regard to the key issue of procedure—which deals should be notified, when, where, why or how. This rapid and uncoordinated expansion of merger control globally inevitably led to a divergence of approaches to the notification requirements and review procedures across jurisdictions. This, in turn, led to significant difficulties and uncertainties for advisors and companies trying to assess the notifiability of a transaction and coordinating multiple filings globally. Agencies also faced difficulties during this time, many receiving too many filings with limited or no nexus to their jurisdiction, thereby unnecessarily draining scarce resources, while others saw procedural divergence affect their ability to cooperate on deals that could have benefitted from international agency collaboration. The situation was viewed as chaotic and needed an international fix. Multiple efforts were launched by both the public and private sectors to address the global procedural divergence, all striving for consensus and harmonisation.

**2.** The international merger control divergence problem was one of the contributing factors that inspired the formation of the ICN in 2001 and led to the adoption of one of the ICN's earliest (and perhaps most enduring) convergence work products—the Merger Working Group's ("MWG") Guiding Principles for Merger Notification and Review Procedure, which were then followed by

the Recommended Practices for Merger Notification and Review Procedures (the "N&P RPs").[1] A three-step procedure (that has since been used in many other working groups) emerged from the ICN's N&P RP creation experience with agencies and their non-governmental advisors[2] ("NGAs")—namely (i) surveying jurisdictions and NGAs to identify agency practices and rationales (ii) where consensus could be found, developing and agreeing on the best or "recommended practices" and finally (iii) seeking implementation of those N&P RPs to drive global convergence where possible.

**3.** This last and key step of implementation has always been part of the ICN's culture and is key to ensuring that the ICN delivers tangible results. This has been true from its earliest days through to today as evidenced by the relatively recent creation of the "Promotion and Implementation" ("P&I") initiative.[3] The ICN's Mission Statement includes a goal "*to advocate the adoption of superior standards and procedures in competition policy around the world.*" To this end, the ICN's Chair, Andreas Mundt, has said that the ICN needs "*to raise awareness for its work products, promote them and ensure that they are implemented into legislation and everyday work, making the ICN the key element of global convergence in competition law.*"[4]

**4.** However, implementation and compliance measurement will always be challenging for an organisation like the ICN that produces non-binding recommendations leading to hoped-for voluntary adherence. Ensuring hard-won work products are utilised, influential and implemented is key for the ICN—it's where the "rubber hits the road" in terms of its effectiveness and significance. Throughout its history, the MWG has sought to promote implementation of the N&P RPs, and thereby global convergence in merger procedure rules, in a variety of ways. Examples of the MWG's work on implementation have included conducting annual workshops focussing on procedural issues, producing implementation self-assessment tools, providing direct assistance to agencies on reforms where requested and, importantly, on three occasions, "counting our numbers" by seeking to measure implementation of the N&P RPs through various forms of compliance surveys.

**5.** The three N&P RP implementation surveys came in different forms in 2007, 2011 and 2016, each progressively increasing the scope and detail of the review, including in this last decade the most comprehensive survey ever. The important next step is to use the data obtained to continue to drive implementation and convergence, and help agencies towards the goal of even greater global harmonisation. This essay outlines the key aspects of the Recommended Practices, before going on to review the implementation of the N&P RPs to date, by reference to three separate surveys that have been conducted since they were first adopted. The essay concludes by considering what further steps could be taken in order to continue to move towards full implementation of the N&P RPs and convergence across merger control regimes globally, as well as areas where research and potential reform of the N&P RPs could assist these efforts. It is hoped that this "survey of the surveys" on N&P RP implementation will help the ICN members and NGAs remember their good work over the last two decades on this important convergence project while looking ahead to the work yet to be done in the ICN's next decade, in order to continue the convergence mission of the N&P RPs, one of the ICN's earliest and most influential work products.

# II. The N&P RPs

**6.** At the ICN's Second Annual Conference in 2003, three N&P RPs were adopted. A further 10 were adopted over the following years. The N&P RPs have been amended and added to a number of times since then.

**7.** As at January 2020, there are 13 categories of recommendation:

| | |
|---|---|
| **N&P RP I** | Definition of a Merger Transaction |
| **N&P RP II** | Nexus to Reviewing Jurisdiction |
| **N&P RP III** | Timing of Notification |
| **N&P RP IV** | Review Periods |
| **N&P RP V** | Requirements for Initial Notification |
| **N&P RP VI** | Conduct of Merger Investigations |
| **N&P RP VII** | Procedural Fairness |
| **N&P RP VIII** | Transparency |
| **N&P RP IX** | Confidentiality |
| **N&P RP X** | Interagency Enforcement Cooperation |
| **N&P RP XI** | Remedies |
| **N&P RP XII** | Competition Agency Powers |
| **N&P RP XIII** | Review of Merger Control Provisions |

**8.** Each wider N&P RP contains a number of specific recommendations and includes commentary, reflecting best practice and experiences across the ICN membership, as well as the views of NGAs to the ICN, from private practice and the business community.

1 For further detail of the origin and development of the Recommended Practices, *see* M. Coppola & C. Lagdameo, Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures, in P. Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia, 2011).

2 D. Anderson, Reflections on the ICN and its NGAs: Advocacy and Implementation, in P. Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia, 2011).

3 *See* the description of the Promotion and Implementation Group's mandate on the ICN website here: https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/implementation.

4 A. Mundt, Focus, inclusiveness and implementation – The ICN as a key factor for global convergence in competition law, 2013.

**9.** The N&P RPs only cover questions of notifiability and procedure—i.e., the question of which transactions might require notification, and the procedure that applies to that notification. They do not, in particular, cover the substantive review of a transaction, which is covered by a separate set of recommendations.[5]

**10.** While the substance of a merger review will, of course, be crucial in some cases, the requirements for a notification obligation to arise and review procedures are important in all cases. The significant majority of notified transactions do not raise any substantive issues and are relatively routine—for example, in 2019, around 78% of transactions notified to the European Commission were notified and cleared at Phase One under the Commission's "simplified procedure,"[6] meaning they did not raise substantive issues. However, while such transactions do not raise substantive issues and Phase I clearance is more or less guaranteed, they still require notification and (in most jurisdictions) suspension until clearance is received. This has an important bearing on overall deal timelines, and in some cases on the viability of a deal at all.

**11.** In the modern economy merging companies will often have sales in multiple countries around the world, meaning it will often be necessary to assess notification thresholds and potentially notify a transaction in several jurisdictions. In order to give businesses certainty of where filings are required and, consequently, the effect on deal timelines, and also to assist parties and their advisors to coordinate filings across multiple jurisdictions, it is of crucial importance that merger rules across the world are clear and, as much as possible, consistent. This is what the N&P RPs aim to achieve.

**12.** However, while the drive for conformity with the N&P RPs is an important aspect of the ICN's work, it has its limits and it is important to remember that they are just that—recommendations. Not all global competition agencies are members of the ICN, and ICN members are not obliged to adopt them. Indeed, many aspects of the N&P RPs involve matters that are set out in legislation that agencies do not have direct power to control, and to implement them would require political buy-in and changes to that legislation, a key barrier to implementation.

**13.** It must be kept in mind that these factors do not mean the ICN membership should not strive towards implementing the N&P RPs and, indeed, as is set out below there is evidence of a gradual move towards conformity with the N&P RPs across the ICN membership. However, there is also still a way to go.

5 ICN, Recommended Practices for Merger Analysis.

6 *See* European Commission Merger Statistics: https://ec.europa.eu/competition/mergers/statistics.pdf.

# III. Assessing conformity with the N&P RPs

**14.** Because implementation of ICN work products is so key to the ICN's mission, tracking the success of the ICN's work products—in particular, the extent to which they have been implemented across the ICN membership—is crucial. To this end, since the initial iteration of the N&P RPs in 2002, the ICN MWG has carried out two systematic surveys of ICN members' compliance with the N&P RPs.

**15.** Between 2006 and 2007, ahead of the ICN's 2007 Annual Conference in Moscow, 57 ICN members were surveyed on their conformity with N&P RPs II and III ("the 2007 Survey"). In 2016, the ICN MWG implemented a "member self-assessment" survey where ICN members were asked to complete most of the N&P RP "Self-Assessment" tool (initiated in 2011) in a survey form to measure conformity with the N&P RPs ("the 2016 Survey").[7] The 2016 Survey was initiated in late 2015 by a small group of agencies and NGAs working within the MWG. The group started work after the 2015 ICN Merger Workshop in Brussels featured a panel commemorating the 10-year anniversary of the N&P RPs and a suggestion was made by a panellist that it was time to more fully "count our numbers" on implementation and that the existing N&P RPs self-assessment online tool could be used as a vehicle for the survey.[8] The 2016 Survey achieved a very high response rate that resulted in 80 of the 100 jurisdictions surveyed responding, and, to date, the 2016 Survey stands as the most comprehensive dataset and account of compliance with the N&P RPs.

**16.** In addition, in 2011, around half way between the 2007 and 2016 Surveys, Maria Coppola and Cynthia Lagdameo published an essay in the ICN's edited volume celebrating its tenth anniversary.[9] This essay reported the results of a review of ICN members' conformity with N&P RPs I to IV that had been carried out by a small project group.

**17.** Given the evolution of the N&P RPs over time, and the more subjective nature of some N&P RPs, it is difficult to try to assess substantive conformity of ICN members across all N&P RPs. With that in mind, we have focussed the discussion in the following paragraphs on compliance with N&P RPs II, III and IV, which deal

7 ICN Merger Working Group, ICN Recommended Practices for Merger Notification and Review Procedures Member Self-Assessment: Report on 2016 Survey Results, April 2017.

8 This suggestion was made by one of the authors (Dave Anderson) and taken up energetically by the MWG co-chairs at the time, the United States Federal Trade Commission and the French Autorité de la concurrence. The suggestion to do a comprehensive N&P RP implementation study was also raised by the author at the time of the ICN's tenth anniversary (*see* Anderson, *supra* n. 2, p. 284).

9 *See* Coppola & Lagdameo, *supra* n. 1.

with the nexus to the reviewing jurisdiction, notification timing and review periods. These N&P RPs deal with some of the most important issues in practice for business and advisors, as they are crucial to determining whether a transaction will require notification and also the timing impact of that notification obligation.

# IV. The good news: A steady move towards implementation and conformity

## 1. N&P RP II

**18.** N&P RP II is aimed at ensuring ICN members' merger control laws only capture transactions that have a material "nexus" to that jurisdiction before a notification is triggered. That is, merger parties should only be put to the task of preparing a notification, and suspending their transaction until clearance is received, in jurisdictions where the merging parties have material business operations. To this end, N&P RP II makes a number of different recommendations, including:

- Recommending that thresholds incorporate appropriate standards ensuring that there is a material nexus to the reviewing jurisdiction;[10]
- Recommending that the nexus to the reviewing jurisdiction should be based on the business activities of at least two parties and/or the acquired business in that jurisdiction;[11] and
- Recommending that notification thresholds should be based on clear and understandable,[12] and objectively quantifiable,[13] criteria.

**19.** This is one of the most important N&P RPs for business and advisors as it will, in most cases, be the determinative factor in ascertaining whether a notification, and associated obligations, are required. N&P RP I covers the definition of a merger transaction. However, in reality, in most transactions (particularly straight mergers or acquisitions of majority shareholdings), there will not be any doubt that the transaction is of the type that is, subject to the relevant thresholds being satisfied, covered by merger control. Further, N&P RPs III through to XIII all cover questions of procedure (such as timing, information requirements and due process), all of which are only relevant if there is a filing obligation in the first place. So, it is the issues covered by N&P RP II that will in most cases be the "gateway" to whether merger control applies. This makes it even more important that the ICN and its members work towards convergence and conformity with N&P RP II.

**20.** There have been some positive moves toward greater conformity between 2007 and 2016. For example, in 2016, 91% of respondents commented that their thresholds for reviewing a merger required a substantial nexus to their jurisdiction.[14] This compares to only 69% in the 2007 Survey. Similarly, in the 2007 Survey, just 41% of respondents said that their thresholds only took into account the activities of the target business, rather than the selling entity. In the 2016 Survey this had risen to 71%.

**21.** N&P RP II(E) states that mandatory notification thresholds should be based on objectively quantifiable criteria, such as sales values (i.e., revenue) or asset values. The 2016 Survey found that 70% of respondents' jurisdictions used objectively quantifiable criteria within their merger notification thresholds. This represented a modest increase from the 66% who responded accordingly in the 2007 Survey.

**22.** In the 2007 Survey, respondents whose jurisdictions did not use objectively quantifiable criteria were asked to indicate the method that they used to measure whether a merger met the threshold for notification. This question was not repeated in 2016. Sixteen respondents determined whether a threshold was triggered by assessing the market share, five used market power and four assessed both the market share and market power. While, as noted, this same question was not asked in the 2016 Survey, our experience assessing merger control thresholds globally suggests that those jurisdictions that do not use objectively quantifiable criteria continue to use similar concepts of market share and market power.

## 2. N&P RP III

**23.** The time at which merger parties can, or are obliged to, make a notification can be crucial to ensuring tight deal timelines can be met, and to ensuring that multiple merger filings across the world can be coordinated. Two elements of rules relating to timing can be important in this regard:

- The earlier parties can make a filing, the earlier they can usually obtain clearances. Having to wait until a binding agreement is signed before filing, for example, can mean that such merger control procedures will lead to an unnecessarily long time between signing and closing a transaction.

10 N&P RP II(B).

11 N&P RP II(C).

12 N&P RP II(D).

13 N&P RP II(E).

14 Although, as set out in Section V below, it is likely this figure is somewhat overstated as the "local nexus" requirement identified by many jurisdictions is unlikely to be consistent with the ICN's view on what constitutes a relevant local nexus.

– If the parties are obliged to make a filing within a specified deadline (for example, a specified number of days after signing), this can impact their ability to prepare a complete filing (particularly in cases where there are substantive issues to address), as well as their ability (and the ability of the agencies) to coordinate timing across jurisdictions.

**24.** To this end, N&P RP III sets out a number of best practices for the timing of notifications. The two principal recommendations are that:

– The parties should be able to notify a merger on the basis of a good faith intention to consummate a transaction (i.e., it should not be necessary for the parties to have entered into a binding agreement before they are able to notify);[15] and

– In jurisdictions where closing a transaction is prohibited prior to clearance, there should not be a deadline for notification (i.e., the regime should not require notification within a specified time period following signing).[16]

**25.** This is an area that has seen significant improvement in terms of conformity between the 2007 and 2016 Surveys. With regard to N&P RP III(A), relating to notification on the basis of a good faith intention to consummate a transaction (meaning that the parties do not have to wait until they have a signed agreement before notifying), conformity increased from 57% to 81% between the 2007 and 2016 Surveys.

**26.** A greater number of jurisdictions also comply with N&P RP III(B), which suggests that suspensive merger control regimes should not include a deadline to file. In the 2007 Survey, 59% of jurisdictions with these suspensive rules did not impose a pre-merger notification deadline. By 2016, this had also risen to 81%.

**27.** Of course, not all jurisdictions have suspensive merger control regimes. To this end, N&P RP III(C) applies specifically to non-suspensive jurisdictions, where parties are permitted to close notified transactions before the relevant competition authorities have completed their review. This N&P RP acknowledges that filing deadlines are legitimate in such jurisdictions, but recommends that parties be allowed a reasonable time in which to notify the transaction following a clearly defined triggering event. The reasonableness of a deadline is subjective, making it difficult to measure jurisdictions' conformity with this N&P RP. However, in the 2016 Survey only half of the respondents whose jurisdictions were non-suspensive stated that they imposed a filing deadline at all. Furthermore, just over half of these respondents had a clear definition of "triggering event" and just under half allowed extended filing deadlines where parties faced objective difficulties in satisfying notification requirements. In the 2007 Survey, only a third of the respondents with non-suspensive jurisdictions imposed a filing deadline.

**28.** One other important timing issue that is covered by N&P RP III is in relation to pre-notification discussions. Such discussions can be valuable to both agencies and merger parties to, first of all, ensure that a filing obligation actually arises, and if so, on the information the agency requires. This ensures that, once formal filing occurs, the filing can be quickly accepted as "complete," and the clock can start. N&P RP III(D) suggests that agencies should provide for this possibility. In the 2007 Survey, 70% of agencies allowed for such pre-notification discussions. At the time of the 2016 Survey, this had risen to 86%.

# 3. N&P RP IV

**29.** N&P RP IV relates to the review period for transactions. Again, this is of crucial importance to the business community, as the time periods during which their transactions may be subject to suspension obligations can have a crucial bearing on overall deal timing and, in many cases, they can make or break a deal. Further, in the few jurisdictions around the world where the merger control rules are not suspensive, businesses require certainty as to how long a review may run post completion so as to be able to begin truly integrating their businesses. Certainty of review periods also allows merging parties and their advisors to coordinate reviews across multiple jurisdictions simultaneously. Having convergence and consistency can also benefit agencies—by having consistency in review timings, agencies are better able to coordinate and cooperate on merger reviews with their peers.

**30.** To this end, N&P RP IV makes a number of recommendations relating to review periods. Most importantly, it is recommended that reviews are completed in a reasonable time,[17] that expedited reviews are available for cases that do not raise significant issues[18] and that waiting periods should expire within a specified period.

**31.** Over time, N&P RP IV has generally seen a high degree of conformity across ICN members. While the 2007 Survey did not assess the compliance of ICN members with N&P RP IV, Maria Coppola and Cynthia Lagdameo's 2011 essay considered some statistics in relation to N&P RP IV. In particular, Coppola and Lagdameo's survey of the 87 ICN members that had merger control rules in 2011 concluded that around 91% of jurisdictions' review periods expired within a determinable timeframe.[19] In 2016, 93% of respondents confirmed that their jurisdictions had merger review periods with definitive and readily ascertainable deadlines, while 96% of respondents added that their competition agencies completed their reviews in a determinable time period.

15 N&P RP III(A).

16 N&P RP III(B).

17 N&P RP IV(A).

18 N&P RP IV(B).

19 Coppola & Lagdameo, *supra* n. 1, p. 303.

**32.** The allowance for expedited review for non-problematic transactions is another core limb of N&P RP IV. Coppola and Lagdameo's 2011 essay concluded that at least 31% of jurisdictions conformed with this N&P RP in 2011, by allowing non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period.[20] By 2016, this figure had increased significantly, with 79% of respondents confirming that their jurisdictions provided for expedited reviews of non-problematic transactions.[21] It should, however, be noted that this apparent increase may be overstated and there is some subjectivity in determining whether an agency's procedures conform with this recommendation. For example, many jurisdictions' (including the European Commission's) procedures allow for a "short form" filing, with lower information requirements, in non-problematic cases. While in practice clearance is usually received much more quickly than in a "full" filing, there is often no formal difference in the statutory review period. As such, these jurisdictions could arguably fall either side of the line. It is, however, now clear that the vast majority of ICN member jurisdictions provide some form of relief to parties facing merger control obligations in non-problematic transactions.

## 4. Conformity with and use of the N&P RPs generally

**33.** While neither the 2007 Survey nor Coppola and Lagdameo's 2011 essay covered all N&P RPs, the 2016 Survey did cover the majority of N&P RPs in one form or another. A full summary of compliance with all N&P RPs is not possible in the context of the current article. However, the 2016 Survey did show some high levels of conformity with various other N&P RPs—including some relating to due process and procedural fairness. A selection of such figures includes:

- 76% of respondents to the 2016 Survey confirmed that the merging parties will be provided with an explanation of the competition concerns that motivate an in-depth review no later than the beginning of a Phase II inquiry.[22]
- 95% of respondents to the 2016 Survey confirmed that parties have the opportunity to respond to material competition concerns before the agency makes a final enforcement decision.[23]
- 96% of respondents to the 2016 Survey confirmed that third parties are permitted to express their views on a merger during the review process.[24]

**34.** The 2016 Survey also demonstrates that, over time, ICN members have made changes to their merger control regimes that reflect the N&P RPs. It also demonstrates that many agencies actively consider the N&P RPs when reviewing their regimes.

**35.** The 2016 survey concluded with questions on how jurisdictions use the N&P RPs, with 65% of respondents confirming that they had used the N&P RPs when reviewing their merger notification and review regimes. Many of the jurisdictions that had used the N&P RPs in this way did so to identify areas for internal reform or legislative change. Others used them to draft specific notification or process rules and, in some cases, entirely new merger control regimes. For others, the N&P RPs were useful for building a consensus of opinion in support of the need for change.

**36.** ICN members were also asked to identify barriers that prevented the implementation of the N&P RPs. The most common obstacles were the cost and difficulty of both implementing legislative change and gaining external consensus for specific areas of reform.

**37.** The final question of the 2016 survey asked ICN members whether any of the N&P RPs should be revised. Only 35% felt that there should be modifications. These respondents were then asked to identify which N&P RPs in particular should be revised. No N&P RPs were identified in greater numbers than the others. So, it appears that most ICN members are content with the N&P RPs in their current form. However, as we set out below, we believe there are a number of aspects of the N&P RPs that warrant revision or additions.

# V. The not-so-good news

**38.** Having read the foregoing discussion, one could be forgiven for thinking that the picture is great—ICN members are using the N&P RPs and conformity is gradually improving, and so the N&P RPs are doing their job. While there is without doubt a lot that the ICN can be proud of, it is important to also consider the picture from the other angle—that is, the proportions of agencies that, in the 2016 Survey, still did not conform with the N&P RPs. When looking at the figures from this perspective, it is clear that there is still a lot of work to do.

20 Ibid.

21 N&P RP IV(B).

22 N&P RP VI(C) reads: "*Merging parties should be advised not later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period.*"

23 N&P RP VII(B) reads: "*Prior to a final adverse enforcement decision on the merits, merging parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the proposed adverse decision and should have a meaningful opportunity to respond to such concerns.*"

24 N&P RP VII(C) reads: "*Third parties should be allowed to express their views during the merger review process.*"

**39.** Again, questions of local nexus and thresholds are some of the most important aspects of the N&P RPs. As set out above, there has been a steady increase in conformity with these N&P RPs since the 2007 Survey. However, significant proportions of the ICN membership still do not conform with some of the key recommendations in this area. For example:

- Although 91% of respondents stated that their thresholds require a substantial local nexus, over one third (38%) of respondents to the 2016 Survey confirmed that the local activities of the acquirer alone can trigger a notification requirement. That is, in 38% of ICN member countries, a merger notification obligation can be triggered even if the target has zero presence (in terms of sales or assets) on the local market. This shows that the 91% figure is likely to be somewhat overstated, as, if only the acquirer has a local presence, it is something of a stretch to suggest that the transaction in question truly has a local nexus. Indeed, the survey question itself defined "local nexus" as both parties, or the target business, having local activities.[25]
- Almost one third (30%) of jurisdictions surveyed in 2016 confirmed that their thresholds do not use objectively quantifiable criteria (such as sales or asset values) when determining notifiability. In our experience, most commonly this will mean that thresholds will be based on a subjective concept such as market share as is the case in some significant jurisdictions in Europe (for example Spain, Portugal and the United Kingdom—albeit that notification in the United Kingdom is voluntary), and further afield (such as Israel and Taiwan). Since 2016, conformity with this recommendation has arguably gone backwards, with Germany and Austria recently introducing new "transaction value" thresholds which contain a number of subjective elements—both in terms of actually determining the true "consideration" for a transaction and in determining whether the target is active "*to a significant extent*" in the relevant country. The fact that the joint guidance[26] of the Austrian and German agencies on these new thresholds runs to over 30 pages underlines the difficulties faced by the parties and the agencies in determining whether they are satisfied.

**40.** It is, however, not just in relation to thresholds and nexus where there remains work to do. There are also concerns in relation to the review periods in certain jurisdictions. The 2016 Survey showed, for example, that more than 80% of jurisdictions did not have specific procedures for companies in financial distress[27] (such as allowing for derogations from the suspension obligation, as is the case in jurisdictions such as the EU). The significant lack of such procedures across the ICN membership is concerning—although always the exception, the ability to provide respite from the suspension obligations of merger control can in some circumstances be the difference between a business (along with potentially thousands of jobs) being saved or failing. More than one third (37%) of respondents in the 2016 Survey also noted that their merger review procedures do not allow for early termination of applicable waiting periods (meaning that even in non-problematic transactions, parties are likely to have to see the full clearance timeline run its course before they can proceed with their transaction). This can have an unnecessarily significant impact on transaction timelines in non-problematic transactions.

**41.** The 2016 Survey also provided some worrying results as regards issues of due process and rights of defence. More than a quarter (26%) of jurisdictions responding said that the agency would not provide the merging parties with an explanation of their concerns prior to an in-depth review,[28] and 39% of jurisdictions stated that parties could not withhold disclosure of materials that are subject to legal privilege or similar concepts.[29]

**42.** More generally, it is worth noting that no single respondent to the 2016 Survey demonstrated 100% conformity with the N&P RPs, with conformity across the totality of those N&P RPs ranging from as low as 34% to as high as 95%. While having 100% conformity across the ICN may be an unrealistic goal, it is clear that there are many jurisdictions where significant work can be done in order to bring their regimes into greater conformity with the N&P RPs over the coming years. The next section considers how this can be achieved.

# VI. Conclusion: Continue the drive towards convergence—some suggestions for the next decade

**43.** Andreas Mundt, the chair of the ICN, has said that "[i]*f we want to ensure that the ICN and its work products matter, we need to make our high-quality products available to everyone and continue our efforts to promote*

25 2016 Survey, Question 1.

26 Bundeskartellamt & Bundeswettbewerbsbehörde, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), July 2018.

27 N&P RP IV(E).

28 N&P RP VI(C).

29 N&P RP VI(F).

*their implementation.*"[30] It is clear that further steps are required to promote the implementation of the N&P RPs. These promotion and implementation initiatives are key in assisting this drive towards convergence and conformity—having the N&P RPs freely available is one thing, but promoting them and encouraging their use and implementation is another story.

**44.** The MWG (including its NGAs) must continue to devote time and resources to the promotion and implementation of the N&P RPs (and, indeed, other work products). The MWG's efforts to date have borne fruit, as is evidenced by the significant improvements in conformity with a number of the N&P RPs worldwide. However, the job is not done. The fact that some agencies conform with as little as one third of the N&P RPs that were surveyed in 2016, and the fact that significant proportions of ICN members, in particular younger agencies, do not conform with some of the most important recommendations means that the MWG should be vigilant in ensuring the N&P RPs remain on the ICN's agenda and on the radar of non-compliant jurisdictions. The data generated by the 2016 Survey is a gold mine to help the ICN target its resources towards helping to improve conformity generally, but with a particular emphasis on those agencies that the data shows need significant assistance with implementation.

**45.** There is no "one way" to improve implementation efforts, but we offer a few concrete suggestions here as we enter into the ICN's next decade:

- **Survey using the Self-Assessment tool periodically**: We suggest that the 2016 Survey format using the N&P RPs Self-Assessment tool be used to survey conformity on a periodic basis now that it has been shown to be a successful vehicle for assessing conformity. Its mostly "yes/no" design format is not burdensome for agencies and thus the 2016 Survey obtained a high response rate. The significant amount of useful jurisdiction-specific data on conformity also shows the 2016 Survey model to be a solid one for the MWG to continue to use. Also, surveying periodically and more frequently using the same format means that we will obtain comparable data across surveys thus enabling us to track trends and movements across the network and individual jurisdictions. The ICN should set itself target dates to re-review conformity with the N&P RPs at regular intervals. Running these surveys semi-regularly (for example, every three to five years) will help the MWG and P&I group determine whether the revised efforts are actually working and, if necessary, alter their strategy. It will also help identify any particular agencies that continue to lag behind, and that may therefore merit specific attention and discussion.[31]
- **Use the valuable survey data surgically**: The 2016 Survey provides an N&P RP-by-N&P RP account of agency compliance. Thus, we can see clearly which agencies need the most help and which need less. This should help the MWG target its implementation resources more surgically and efficiently, taking advantage of the detailed Self-Assessment Survey data to focus on assisting with compliance in those jurisdictions that need it the most.
- **Be creative with the "P&I" initiative**: The relatively new P&I group is perfectly placed to take a key role. The P&I group's mandate does not currently extend to engaging in promotion efforts itself. Rather, the group's aim is to work with the various working groups to share best practices for promotion and implementation, with a view to ensuring the ICN's work products are promoted and used to their full potential across the ICN membership (and, indeed, more widely). In this respect, given the fundamental importance that the N&P RPs play in ensuring the efficiency and viability of global merger control (and, in turn, global transactions), there may be room for the P&I group to use experiences across other working groups and more widely to assist the MWG to target agencies where conformity lags behind (and particularly those younger agencies from developing countries where the work product may not be as easily accessible), and also to push for greater conformity on a collection of what may be seen as "core" N&P RPs.
- **Some easy implementation wins**: We think there is merit in starting with some very simple steps to improve the accessibility and promotion of the N&P RPs. This could be as simple as translating the N&P RPs (or even just a summary of them) into languages that will make them more accessible to some agencies. There may also be merit in considering targeted workshops or sessions at ICN conferences or merger workshops to work through key aspects of the N&P RPs with those agencies that are lagging behind. Relaunching the Self-Assessment tool for conformity may also assist agencies to re-engage with this issue, and identify where they have room to improve.

**46.** In addition to working on implementation of the N&P RPs, the MWG has periodically reviewed and amended the N&P RPs to keep up with evolving best practices and as a result improve the N&P RPs based upon the ideas and experiences of the ICN members and

30 Mundt, *supra* n. 4.

31 Currently the Self-Assessment tool for N&P RPs has not been updated and at the time of writing is not operational on the ICN's website—this is an easy thing to fix and we would encourage the MWG to update the tool and put it back online so it can be used for self-assessment and survey purposes again.

NGAs through the years. The authors have been a part of this ongoing reform process and believe that there may be a number of possible review and reform projects to promote best practice and convergence in the ICN's next decade, including:

– **Joint ventures**: There continues to be a multitude of approaches around the world to defining what constitutes a notifiable joint venture. These range from "EU-style" approaches, where both "joint control" and "full functionality" are required, to approaches that require just joint control, and others where the acquisition of a given (even very small) proportion of the shares or voting rights in a target is sufficient. Indeed, many jurisdictions do not even have a special "joint venture" test, meaning joint ventures need to squeeze into definitions of a merger that are best designed to capture straight acquisitions. This divergence globally on the fundamental issue of whether a deal is notifiable leads to different results and treatment of the same transaction around the world. This in turn leads to a significant and unnecessary burden on merging parties and their advisors when assessing notifiability globally. While the MWG has studied the differing approaches in the past[32] and has enhanced the N&P RPs by including for the first time an RP on the "Definition of a Merger Transaction" in the new N&P RP I in 2017, the comments relating to control and joint ventures could be enhanced to the benefit of agencies and parties given the divergence we currently have globally. We suggest that a "joint venture convergence project" should be undertaken in order to survey anew and capture best practices for defining what constitutes a notifiable joint venture. The MWG should then, based on that work, seek to provide more guidance in this area to drive greater legal certainty and convergence in the laws and practices worldwide.

– **Thresholds**:data/digital: At the time of the latest revision to the N&P RPs, the MWG expressly decided that it was too early to make any amendments in relation to the issue of catching transactions in the digital space, where the target may have little or no revenue.[33] This issue has been discussed at various ICN MWG workshops and at annual conferences in recent years while some agencies have moved ahead by introducing new "deal value" thresholds (e.g., in Germany and Austria) and others are considering introducing similar thresholds seeking to capture acquisitions involving "low revenue/high value" targets. In some cases, this involves a clear step away from conformity with N&P RP II regarding nexus, clarity and/or objectively quantifiable criteria in notification thresholds. It is also not necessarily clear that there is a problem to fix given the experience so far of jurisdictions employing such thresholds. There are also other models that are less burdensome to address any jurisdiction "gap" concerns. Given the overall focus within the ICN agency membership on digital issues in mergers, we think the time has now come to tackle this issue within the MWG by carrying out work to document global best practices in this area and, in particular, setting out alternative approaches (such as residual "call in" powers) that can allow such transactions to be captured while avoiding the introduction of deal value thresholds that are overly broad and based on non-objective criteria that increase compliance costs and risks for parties and guidance and consultation costs for agencies.

– **Information requirements**: While N&P RP V provides guidance to agencies on the requirements for initial notification, including recommending that initial requirements should be limited to avoid imposing unnecessary burdens in light of the fact that most transactions do not raise material competitive issues, agency practice worldwide varies considerably with regard to initial notification requirements and is even more varied in connection with further "requests for information" ("RFIs") during in-depth investigations. For example, some agencies "front load" initial requirements while others require less initially and then "back load" requests if issues are found. During in-depth investigations some agencies are willing to discuss and agree the scope of a draft RFI while others will not. The wide variety of procedures and practices in this area can give rise to inefficiencies and unnecessary burdens both for parties and agencies, particularly in multijurisdictional mergers. It would therefore seem that initial notification and ongoing information requirements and practices could be an ideal project for the MWG. Indeed, this was discussed by members of the MWG at the Merger Workshop in Melbourne in February 2020. Such a project could follow the traditional ICN model of first surveying agency procedures and practices with a view to determining the areas of consensus and divergence. The survey results could then give rise to guidance or recommended practices (e.g., enhancing N&P RP V) with a view to reducing burdens on agencies and parties by making information requirements in merger notifications and RFIs more harmonised, effective and targeted, while possibly even facilitating better international cooperation in investigations.

– **Pre-notification** procedures: As noted above, N&P RP III(D) states that jurisdictions should provide for the possibility of pre-notification

32 ICN, Defining "Merger" Transactions for Purposes of Merger Review, 2007.

33 *See* N&P RPs, *supra* n. 1.

discussions. N&P RP V(C) covers this issue to some extent as well. While the increased conformity with this recommendation that we noted above is to be commended, we think that the practice of pre-notification procedure has evolved in an uncoordinated fashion worldwide resulting in a wide variety of practices worldwide leading to timing and other procedural divergences. As such, we believe that this is a clear area for research on "best practices" to help agencies and parties understand the different procedures employed globally and to see if there is scope for convergence through guidance or recommended practices in relation to pre-notification procedures. It is important to recall that N&P RP V(C) was drafted at a time when few agencies used a formal or informal pre-notification process and since then many agencies have developed such procedures while other agencies may be considering such procedures in future. During the review of N&P RP III that led to the 2018 amendments, the MWG drafting team (of which the authors were members) considered including more guidance on pre-notification procedure but that part of the amendment process did not proceed. We believe that this is an area ripe for international best practice development given the expansion of the procedure in merger control globally since N&P RP III and N&P RP V were originally drafted. NGAs can assist in a material way from their experience of the various approaches, procedures and policies and their impact on notification timing and other aspects for parties involved in multijurisdictional filings in particular. It is crucial for agencies to remember that pre-notification engagement is voluntary and should only be intended to first confirm whether a transaction is notifiable and, secondly, confirm that the notification is complete before the formal "clock" begins ticking. In our experience, some agencies utilise pre-notification as an extension of their formal review period, meaning substantial RFIs are sent to the parties, and, in some cases, market testing even begins during this period. This can lead to the amount of time taken to obtain clearance significantly exceeding the formal review period, meaning that conformity with N&P RP IV(A) (which says merger reviews should be completed within a reasonable time) may be overstated in reality. In practice, as the vast majority of mergers are not problematic, pre-notification in most cases should not be an extended procedure but simply a brief one to help both the agency and the parties to agree on jurisdiction and notification requirements.

**47.** As can be seen by the above, there is plenty for the MWG and its NGAs to do in the ICN's third decade in the N&P RP area. We hope that the above "survey of the surveys" shows that the MWG is committed to the ICN's goal of implementation and that while we have come a long way since 2001, there is more to do to enhance implementation and thus deliver a key promise of the ICN to have an impact in practice. As we move into the ICN's third decade, such work within the MWG needs to continue energetically with a view to improving the efficacy and efficiency of the ICN members' merger regimes, helping private parties navigate and comply with the global network of regimes through enhanced convergence and, as a result, contributing positively to the economies of the ICN members. ■

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