

The ICN Merger Working Group presents:

How does your merger review regime conform to the ICN's Recommended Practices?

*A discussion of
self-assessment tools*

Thursday, April 10, 2014

Overview

- Using the MWGs two sets of Recommended Practices
 - Notification and Review Procedures
 - Merger Analysis
- Using the self-assessment tools
 - Competition Commission of Mauritius
 - Italian Competition Authority
 - Taiwan's Fair Trade Commission
- AIN and AISUP's work in support of the Merger Working Group
- Questions from the audience

What are the RPs?

- Practical guidance
 - Non-binding aspirational statements
 - Recommendations on specific aspects of merger notification, review, and analysis
- Each RP contains a brief statement of the practice followed by comments that further explain the RP
 - Designed to accommodate different legal traditions and stages of development
- Created through consensus
 - The result of multilateral dialogue
 - Both sets drafted by ICN member agencies and a large group of non-governmental advisors from around the world
 - Received widespread review and comment

Recommended Practices for Merger Notification and Review Procedures

- Adopted at ICN annual conferences in 2002-2005
- Address: 1) Nexus to Reviewing Jurisdiction; 2) Notification Thresholds; 3) Timing of Notification; 4) Review Periods; 5) Requirements for Initial Notification; 6) Conduct of Merger Investigations; 7) Procedural Fairness; 8) Transparency; 9) Confidentiality; 10) Interagency Coordination; 11) Remedies; 12) Competition Agency Powers; and 13) Review of Merger Control Provisions
- MWG developed and uses these RPs to promote sound and principled convergence on procedural standards to help minimize the cost, complexity, and uncertainty involved in the merger review process.

These RPs are available in [English](#), [French](#), and [Spanish](#).

Recommended Practices for Merger Analysis

- Adopted at ICN annual conferences in 2008-2010
- Address: 1) the Legal Framework for Competition Merger Analysis; 2) Market Definition; 3) the Use of Market Shares: Thresholds & Presumptions; 4) Overview of Competitive Effects; 5) Unilateral Effects Analysis; 6) Coordinated Effects Analysis; 7) Entry and Expansion; and 8) Failing Firm/Exiting Assets
- These RPs reflect common practices across member jurisdictions. They are complemented by detailed descriptions of merger analysis in the [ICN Merger Guidelines Workbook](#).

These RPs are available in [English](#) and [Spanish](#) (French coming soon).

How can using the RPs help an agency?

- Better understand common and best practices for merger notification and analysis
- Use an agency's resources more effectively
- Reduce unnecessary or duplicative processes / requirements
- Enhance the effectiveness of review mechanisms
- Bring more consistency and predictability to the merger review process
- Reduce the time and cost of multijurisdictional merger reviews

Using the MWGs

Self-assessment tools

- The RPs can be used to benchmark an agency's practices
 - Use the [ICN Merger Notifications and Procedures Self-Assessment Tool](#) to understand how your agency's merger notification and procedure practices compare to the RPs
 - Use the [ICN Merger Analysis Self-Assessment Tool](#) to understand how your agency's merger analysis practices compare to the RPs
- Each self-assessment contains yes-or-no questions about specific aspects of the RPs
 - Responding to the questions helps identify aspects of your merger law and policy that conform to each of the RPs



**ICN Recommended Practices for Notification and Review Procedures
Self-Assessment by CCM on Procedural Fairness**

Vipin NAUGAH and Sailesh RAMYEAD

Recommended Practice on Procedural Fairness



- Notification and Review Procedures RPVII. Procedural Fairness
 - This RP states that procedural fairness should be afforded to merging parties and third parties with a legitimate interest in the merger
 - Agencies should provide merging parties with sufficient and timely information on the competitive concerns that form the basis for a proposed adverse decision
 - Parties should be given the opportunity to respond to such concerns
 - Third parties should be allowed to express their views
 - There should be an opportunity for timely review of agency decisions
 - This RP seeks to ensure that merging and interested third parties have a meaningful opportunity to express their views.

N&P Self-assessment: Procedural Fairness Question 1



- **Are merging parties given the opportunity to respond to material competition concerns prior to the agency making a final adverse enforcement decision on the merits?**

→ **Yes**

- **Any stage of the investigation**
- **Factual meetings**
- **Statement of Issues**
- **Provisional Findings**
- **Hearing**

N&P Self-assessment: Procedural Fairness Question 2



- **Are merging parties provided with sufficient information on the basis for the agency's material competition concerns?**

→ **Yes**

- **Assessment of merger situation**
- **Market definition with assessment**
- **Assessment of effects on competition**
- **Proposed remedies**

N&P Self-assessment: Procedural Fairness Question 3



○ **Are merging parties provided with such information in a timely manner?**

→ **Yes**

- **SOI stage – early to mid stage of investigation**
- **Provisional Findings – advanced stage of investigation**
- **Final Report/hearing – 21 days to apply**

N&P Self-assessment: Procedural Fairness Question 4



- **Are third parties permitted to express their views on a merger during the merger review process?**

→ **Yes**

- **Media Release**
- **Factual meetings**
- **Communique**
- **Public SOI**
- **Hearing**

N&P Self-assessment: Procedural Fairness Question 5



- **Does the review system provide safeguards ensuring that the review (procedurally and substantively) is fair, efficient, and consistent?**

→ **Yes**

- **Separate investigative and decision making**
- **Guidelines**
- **Procedural Rules**
- **Review by senior team**
- **Internal weekly meetings**
- **Both legal and economics staff**

N&P Self-assessment: Procedural Fairness Question 6



○ **Is there an opportunity for external review of decisions?**

→ **Yes**

- **Separate investigative and decision making**
- **Any party who is dissatisfied with an order or direction of the Commission may appeal to the Supreme Court against that order or direction**



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Key ICN Work Products

- To learn more about procedural fairness
 - Review other Recommended Practices
 - ICN Report on [Competition Agency Transparency Practices](#)
 - ICN Curriculum Project [Module VI-1: Planning and Conducting Investigations](#)

ICN Recommended Practices for Notification and Review Procedures Self-Assessment: Notification Thresholds

Michele Pacillo
Italian Competition Authority (AGCM)

ICN guidance on Jurisdiction/Notification Thresholds

- From the [Recommended Practices](#):
 - ✓ Jurisdiction should be asserted only over transactions that have a **nexus** with the jurisdiction concerned that meets an **appropriate standard of materiality**, based on the merging parties' activity within that jurisdiction, as measured by reference to the **activities of at least two parties to the transaction** in the local territory and/or by reference to the activities of the acquired business in the local territory (RP I.A-B-C).
 - ✓ “Local nexus” thresholds should be **clear and understandable** (RP II.A), based on **objectively quantifiable criteria** (RP II.B), on **information readily accessible** to the merging parties (RP II.C)

- From the Report [“Setting Notification Thresholds for Merger Review”](#)
 - ✓ Start with the Recommended Practices
 - ✓ Set clear goals of threshold reform
 - ✓ Consider different types of thresholds
 - ✓ Benchmark based on past experience
 - ✓ Compare thresholds with similarly situated jurisdictions
 - ✓ Introduce flexibility for future reform

Notification Thresholds in Italy

➤ Notification creates jurisdiction

➤ Thresholds before January 2013

- ✓ Combined aggregate nation-wide turnover in Italy of all undertakings concerned > 482€m OR aggregate nation-wide turnover in Italy of the acquired business > 48€m

➤ Since January 2013 (2012 reform):

- ✓ the two thresholds are cumulative!

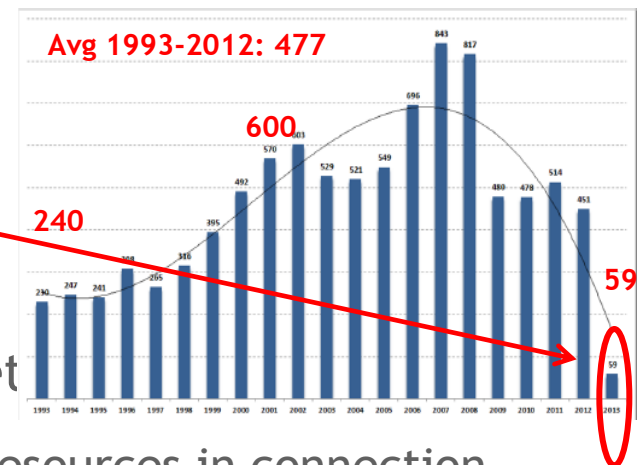
➤ Reform evaluation one year later: one of the two objectives was not being met



limit the expenditure of public and private resources in connection with the notification and review of mergers that are unlikely to raise any competition concerns



minimize the costs to society of mergers that have anti-competitive effects but escape review



From ICN N&P Self-Assessment (2011):

QUESTION	Examples of Conforming Criteria	N&P Recommended Practices Cite
RECOMMENDED PRACTICE I: NEXUS		
1. Do the merger notification thresholds require a "local nexus" with your jurisdiction, e.g. having a material presence and/or activities in your jurisdiction?	(a) At least two parties have local activities (b) If a single party test is used, the acquired business is required to have local activities	RP I.B. and C. Yes, currently the system is similar to (a), while the pre-2012 reform system an hybrid (a)-(b)
2. Do the merger notification thresholds require an appropriate level of materiality for the "local nexus"?	Material (i.e., significant) sales and asset levels within your jurisdiction	RP I.B. and comment 1. Yes, based on sales in Italy's territory
3. If the activities of the target trigger notification, are these activities limited to the business(es) being acquired from the target?	Sales and assets of the target only (i.e. excluding the seller)	RPI.B. comment 3. Yes, (but notification could be triggered also by the acquirers)
4. If the local activities of the target alone trigger notification in your jurisdiction, are the applicable notification thresholds sufficiently high?		RP I.C. comment 1 and 2. Not applicable currently. In the pre-2012 reform system, the answer would be "yes"

2014 reform process

- Context: preparation of a wider report advocating amendments of the Competition Act
- Interface between Chief Economist Team and International Team
- Consultation process on thresholds (first time):
 - ✓ Stakeholders can help building support for threshold reform
 - ✓ It increases transparency and inclusiveness
 - ✓ Consultation document inspired by ICN report

Evaluation of 2012 reform

- **ICN benchmark 2-5% used:** with 2012 reform Phase 2 transactions (as proxy of problematic notifications) jumped from 0.2-0.7% of the period 2000-2012 to 3.4% in 2013
- However, in the period 2000-2012 13 over 45 (30%) Phase 2 transactions would have escaped the notification with the reform, **unless the threshold for the target had been lower**
- In addition, over 2010-2012, two thirds of notifications under the pre-2012 reform system (alternative thresholds) would have been “lost” under the 2012 reform system (cumulative thresholds) because of the target threshold
 - ✓ 80% of these notifications had a **target turnover of 10€m or less**

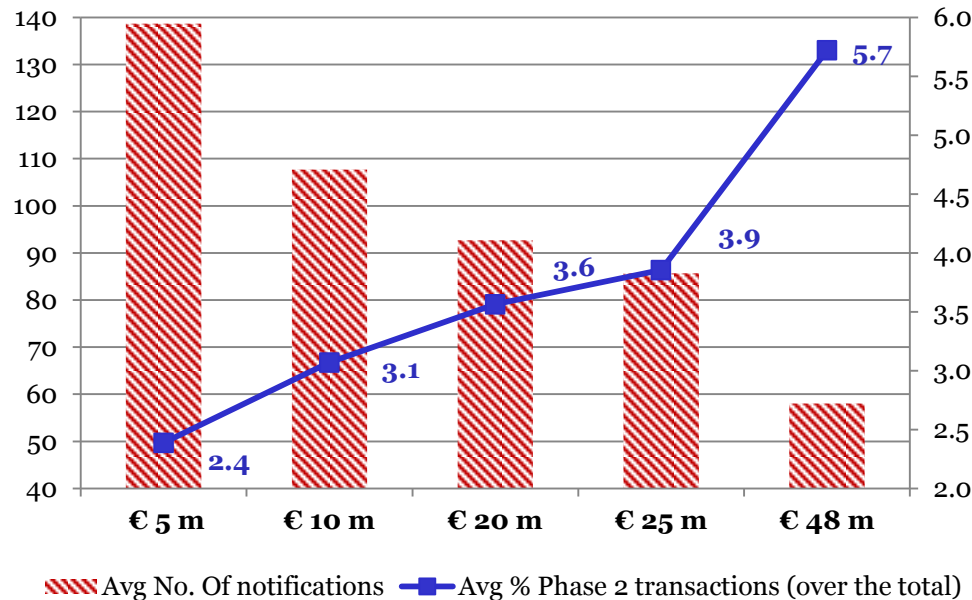
Goal of the 2014 revision

- Improve the mix of notifications: lower number of non-problematic transactions and higher number of problematic ones
- To meet the second objective, **a correction to the threshold for the target may be necessary**, having regard to:
 - ✓ Size of Italian firms. Nearly 95% of Italian firms below 5€m turnover: only 5,000 (over 1,2m) firms meet the current threshold of 48€m
 - ✓ Benchmarking exercise based on historical information (2010-2012): with a target threshold of 5€m, number of additional notifications would have been 80 per year, and 11 over 14 problematic transactions - “lost” under the current threshold - captured.
 - ✓ Thresholds with similarly situated jurisdictions: Germany & Poland have threshold for target company below 10€m
- Improve framework for JVs and “mergers”: second threshold extended to **at least two of the parties** to the merger transaction

Simulations with lower target thresholds

Ability to capture problematic transactions otherwise “lost” (period 2010-2012)

Revenue Threshold Target Company	Problematic (P2) transactions potentially captured among those otherwise “lost” under the current threshold (48€m)		Incremental flow of notifications (annual average 2010-2012)
	No.	% of total 2010-2012 (14)	
above € 5 million	11	79	81
above € 10 million	8	57	50
above € 20 million	4	29	35
above € 25 million	4	29	28



**Simulation:
cumulative system
with different
threshold for target
over the period 2000-
2013**

Key ICN Work Products

- To learn more about thresholds:
 - Read the Recommended Practices
 - [Setting Notification Thresholds for Merger Review](#)
 - [Defining Merger Transactions for Purposes of Merger Review](#)



TFTC's experiences in taking self-assessment exercises

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10 April, 2014

Outline

- ◆ TFTC's Merger System
 - Current merger regime
 - Proposed revision of merger regulations
- ◆ Reasons for TFTC to Undertake Self Assessment
- ◆ Benefits and Challenges of Using Self Assessment Tools

TFTC's current merger regime

Merger Regulations

- Fair Trade Act
- [Enforcement Rules to the Fair Trade Act of 2002](#)
- [Examination Regulations of the Merger Cases of the Financial Holdings Companies](#)
- [Directions for Enterprises Filing for Merger](#)
- Guidelines on Handling Merger Filings
- [Guidelines on Extraterritorial Mergers](#)
- [Thresholds of sales monetary amount which enterprises of a merger shall file with the TFTC](#)

Merger Notification

- Compulsory pre-merger (formal) notification
- Notification thresholds - Market share
 - Sales amount (turnover)

Merger Review Period

- Initial review period - 30 days
 - Extended review period - 30 days
- } Completed notification form with all required documents

Proposed revision of merger regulations

- ◆ The proposals of 2012 amendments
 - Revision of the pre-merger notification thresholds
 - Thresholds only based on turnover and eliminate the market shares criteria
 - Extension of the review period but initial review period remains 30 days

Reasons for TFTC to undertake self assessments

◆ Reasons

- Self assessment provides an opportunity for improvement by comparing the current merger regime with ICN Recommended Practices (RPs)
- Self assessment exercise is taken with intention of increasing awareness of ICN's RPs within the TFTC

◆ TFTC's plan and work assignment

- Merger Analysis — part of staff from four internal units involved (2 investigation departments, 1 Legal Affairs Department and 1 economic analysis office)
- Merger Notification Procedures — Department of Planning drafts the answers, two investigation departments and Legal Affairs Department review and provide suggestions/comments

Complete questionnaires

Communication among internal units

Compile and review answers

one month

one month

one month

Benefits and Challenges of Using Self Assessment Tools

◆ Benefits

- Self assessment tools provide an objective approach for assessing TFTC's merger analysis system and merger notification provisions
- Self assessment tools are beneficial to identify areas for future improvement
- Self assessment exercise is helpful for enhancing employees' familiarity with ICN RPs

◆ Challenges

- Management of time and human resource
- Lack of communication between departments

Implementation materials

- To learn more about how to implement change to bring guidelines and policy into closer conformity with the RPs agencies can use the following material:
 - [Implementation Report 2005](#)
 - [Implementation Handbook 2006](#)
- The report aims to provide a better understanding of ICN members' experiences in seeking to implement reforms
- Discusses 3 key “tips”:
 - *Identifying areas for change*: e.g. comparing your regime to the RPs and other jurisdictions
 - *Implementing change*: e.g. start with small changes, complete and update your agency's response to the Template
 - *Building consensus*: e.g. make the private sector your ally

How else can my agency use the Self-assessments and RPs?

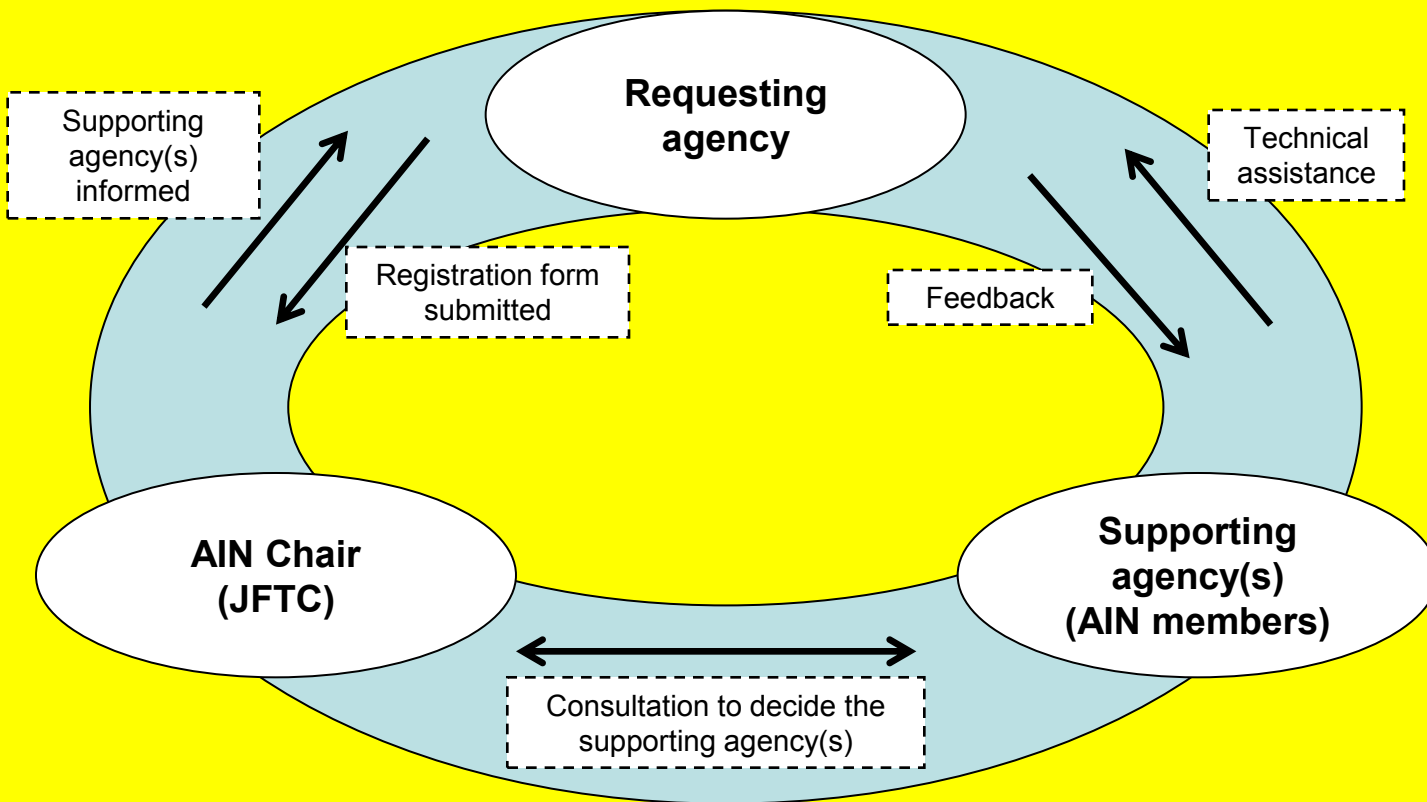
- In staff training programs
- To assist your agency in implementing the practices through legislative change or rule making
- To draft speeches and articles
- In advocacy work
- To encourage implementation of the RPs through persuasion, publicity, monitoring reform efforts, and by leading by example

ICN's
Advocacy and Implementation Network
and
Advocacy and Implementation Network Support Program

Tatsuro Kuchinomachi
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Advocacy and Implementation Network Support Program

- AIN (**Advocacy and Implementation Network**) is a group of Working Group representatives and other interested members which was established in 2007 to promote and advocate for the use of ICN work products.
- To support ICN member agencies to implement ICN work products, AISUP (**Advocacy and Implementation Network Support Program**) was launched in 2008.
 - Through the AISUP, ICN members can seek advice about specific ICN work products or receive assistance on how ICN recommendations and other guidance documents might be implemented within their jurisdictions.
- Application form is available from the AISUP page on the ICN website
 - To participate in AISUP, see here:
<http://www.internationalcompetitionnetwork.org/about/steering-group/advocacy-implementation/aisup.aspx>



- ✓ **Well-experienced lecturers**
- ✓ **Tailor-made assistance**

The following programs have been implemented and/or are underway regarding the Merger Working Group Work Products:

Supporting Agencies	Recipient Agencies
French Autorité de la concurrence	Competition Commission of India
Japan Fair Trade Commission	Vietnam Competition Authority
Russian Federal Antimonopoly Service	Mongolian Authority for Fair Competition and Consumer Protection

Template discussion

- To support the RPs by increasing transparency, agencies are encouraged to complete the N&P template
- The templates provide background on the jurisdiction's merger laws, rules, and procedures and serve as a tool to help members and the public learn about merger control in member jurisdictions.
- Benefits:
 - *Transparency for agencies/best practice*: a tool for benchmarking themselves against other agencies, allowing agencies to see what fellow agencies in neighbouring regions and across jurisdictions are doing in terms of best practices and whether they are converging or diverging; also includes relevant information for international cooperation,
 - *Transparency for the private sector/merger parties*: help provide an agency-led source on merger rules to the private sector, can help to clear up any misunderstanding of an agency's merger rules
 - *Planning for future workshops and MWG projects*: the template responses can be used to help inform the design of useful and relevant workshops on merger procedure and future ICN work

Templates are on the MWG Website:

<http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx>

Template project - update

- The MWG is working on a project to review and update the template to see whether the current sections are still relevant or not, and if so, how they can be improved or whether new sections are needed
- The team has had helpful input from several agencies and NGAs on revisions that will update and improve the template
- Aim is to have the revised template ready to present at the 2014 Annual Conference in Morocco
- Once updated, the template will also be distributed to all ICN members with the aim of getting all the completed templates on the ICN website over the next years

Implementation project outline and plan for 2014/2015

- MWG working on creating “Implementation Packages” on the RPs
- Aim is to create a “one stop shop” to assist agencies to easily locate and identify all relevant work product that supports the RPs and provide information and tips from the WG’s previous work on implementation
- Plan at the moment is to use these packages as a basis for teleseminar calls for 2015, and put the information on the MWGs website – perhaps not as a standalone document, but as a webpage that lists work product by each RP.
- The packages will draw together and identify specific references in relevant work product that support the RPs including:
 - ICN Handbook on Investigative Techniques for Merger Review
 - Curriculum project modules
 - Merger Guidelines Workbook
 - Role of Economists and Economic Evidence in Merger Analysis



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Questions?