

Multi-jurisdictional merger review procedures – a better way

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Introduction

Corporate mergers are a worldwide phenomenon involving trillions of dollars¹ and have the potential to significantly impact upon national economies. For these reasons they are increasingly being regulated as more and more countries seek to control them through competition law regimes² and the size of the mergers themselves invite multiple regulatory responses because they have an impact in more than one country.³

It is argued that this has led to a level of regulation that goes beyond what is required to protect national economies from undesirable merger activity. The current level of regulation has significant implications for business,⁴ regulators⁵ and, ultimately, the consumer & taxpaying public.⁶ Consequently, it is now more important than ever to ensure that the procedures employed to regulate these mergers are as efficient and consistent as possible.

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¹ The value of worldwide announced deals was estimated at US\$3.46 trillion in 2000, ; US\$1.7 trillion in 2001 and US\$1.2 trillion in 2002 (being the lowest since 1994): Casey Cogut and Sean Rodgers, 'Global Overview' in *Mergers & Acquisitions 2003* (4th ed, 2003) 3.

² 68 Nations regulate mergers; 49 of them *require* pre-merger notification; (White & Case LLP, 'White & Case Global Merger-Control Survey Finds Flood-Tide May Be Ebbing After Years on the Rise' (Press Release 16 January 2003).

³ See, for example, Lise Davey and John K Barker, *Competition Bureau Merger Review Benchmarking Report* (28 June 2001) 7. See also International Competition Policy Advisory Committee, *Final Report* (28 February 2000) 2 ('ICPAC Report').

⁴ See PriceWaterhouseCoopers, *A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews* (June 2003). See also ICPAC Report, above n 3, 3

⁵ See, for example, Davey & Barker, above n 3, 6.

⁶ It is ironic that the public is subjected to unnecessary cost burdens, either through taxes to fund regulators or increased product prices, to facilitate regulation designed, at least in part, for their benefit.

The cost to business is now widely acknowledged and has been the subject of a recent detailed study.⁷ The cost to regulators, in time and resources, is also increasing and shows no signs of abating. However, despite a broad acknowledgment of the inefficiencies and burdens associated with the current regulation of multi-jurisdictional mergers,⁸ and a general acceptance of the benefits likely to flow from a more harmonized system, little substantive action appears to have been taken to harmonize the regulation of mergers.⁹ The most recent attempt to promote harmonisation has come from the newly formed International Competition Network (ICN). The ICN comprises a network of competition agencies, established in 2001¹⁰ with a membership of 14 and with a current membership exceeding 70 states, as well as 3 supra-national bodies,¹¹ whose purpose is to address 'antitrust enforcement and policy issues of common interest' and to formulate 'proposals for procedural and substantive convergence ...'.¹² Importantly, the ICN has placed at the forefront of its agenda the review of 'merger control process in the multi-jurisdictional context',¹³ highlighting the increasing desire amongst the world's competition regulators for increased convergence in this area.

This paper will identify current deficiencies in the regulation of multijurisdictional mergers¹⁴ and examine the proposals put forward by the ICN as well as making recommendations for further reform. The first section will briefly discuss the current state of regulation for multijurisdictional mergers and the justification for pre-merger notification requirements.

⁷ See, for example, J William Rowley and Mark Opashinov, 'The internationalisation of merger review: towards global solutions' in *Merger Control 2003* (7th ed, 2003) 3. See also PriceWaterhouseCoopers, above n 4 and J William Rowley and A. Neil Campbell, 'A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews' (September 2003) *The Antitrust Source* 1-3.

⁸ See, for example, Robert Paul, 'The Increasing Maze of International Pre-Acquisition Notification' (2000) 11 *International Company and Commercial Law Review* 123.

⁹ See, for example, Rowley and Opashinov, above n 7, 5 who note that 'enormous gulf between talk and action'.

¹⁰ The ICN was formed largely as a result of a recommendation by ICPAC (ICPAC Report, above n 3, 281).

¹¹ The Andean Community, EFTA Surveillance Authority and the European Union.

¹² International Competition Network, *Memorandum on the Establishment and Operation of the International Competition Network* at <<http://www.internationalcompetitionnetwork.org/mou.pdf>> at 17 January 2005.

¹³ *Ibid.*

¹⁴ This review will be limited to the regulation of mergers through competition laws and will not address other forms of regulation, such as foreign investment or corporate laws. It will also be restricted to multijurisdictional mergers; that is, mergers having competitive implications in more than one jurisdiction.

Key differences in existing merger law and processes will be identified to demonstrate the current divergent practices employed and the deficiencies inherent in the existing process of multijurisdictional merger review.¹⁵ This will be followed by an examination of the ICN's recommendations for reform in this area. The final section will propose ways for further enhancing the multijurisdictional merger review process.

The current regulation of multijurisdictional mergers

Merger regulation is directed toward ensuring that a competitive economic environment is maintained in the relevant domestic economy.¹⁶ There is no supra-national body or treaty governing the way in which mergers having implications in more than one jurisdiction are to be regulated. The regulation of mergers therefore remains subject to national laws with the result that mergers having implications transcending national borders will often be subjected to regulatory requirements in several jurisdictions.¹⁷ The extraterritorial reach of merger laws in most jurisdictions¹⁸ means that regardless of where the merger takes place, or the location of the merging parties, the requirements of all jurisdictions potentially affected by the merger need to be considered when proposing to merge.¹⁹ These requirements vary, often substantially, between jurisdictions.²⁰

There are two distinct aspects to compliance with merger regimes. The first involves substantive compliance; that is, ensuring the proposed merger will not infringe the substantive law defining which mergers may or may not take place. The second is procedural and often requires parties to notify the relevant competition authority (or

¹⁵ The focus is, therefore, on the cost of procedural (rather than substantive) compliance.

¹⁶ See further, ICN Merger Working Group: Analytical Framework Sub-Group, *The Analytical Framework for Merger Control*, Final paper for the ICN annual conference <<http://www.internationalcompetitionnetwork.org/afsguk.pdf>> at 17 January 2005 and M. A. Utton, *The Economics of Regulating Industry* (1986), viii.

¹⁷ A survey of 51 multinational companies over a period of approximately 18 months, found an average of eight merger reviews conducted per transaction: PriceWaterhouseCoopers, above n 4, 6. The 382 filings examined traversed 49 jurisdictions (PriceWaterhouseCoopers, above n 14).

¹⁸ Extraterritorial application of merger laws is not, at least in principal, particularly controversial, and, for purposes of this paper it will be accepted that some extraterritorial application is appropriate where a sufficient jurisdictional nexus can be established.

¹⁹ See, for example, PriceWaterhouseCoopers, above n 4, 15.

²⁰ See further, Michal S. Gal, *Competition Policy for Small Market Economies* (2003) 199.

authorities) of a proposed merger where certain threshold tests are met, even where it is unlikely to be prohibited by the substantive law. Often whether notification is required will depend entirely on the size of the transaction rather than its potential effects on competition. While there will be, in many cases, a correlation between size and potential effect on competition, this is not invariably the case. As a result, especially where the threshold level is low, many mergers unlikely to have an adverse effect on competition must nevertheless be notified, often in multiple jurisdictions. Significant differences exist between merger regimes in both substantive law and procedural requirements. It is, therefore, important to consider these further before examining the ICN's best practice recommendations.

The substantive regulation of mergers

Mergers that lead to the creation of monopoly conditions are, subject to limited exceptions, universally condemned by jurisdictions that have adopted merger regimes.²¹ Beyond those extreme cases, however, debate rages over the extent to which mergers should be the subject of regulation and the degree to which factors other than reduction in competition or increased dominance, such as efficiencies, increased employment opportunities or the facilitation of international competitiveness, should be considered when determining whether to allow a merger to proceed.²² Indeed, it is far from clear that there is any single jurisprudentially superior test applicable to all jurisdictions.²³ As a result some regimes go further than others in preventing mergers which reduce competition but fall short of creating a monopoly. The choice of substantive law may reflect different goals

²¹ See, for example, Utton, above n 16, 93.

²² See further, Robert H. Bork, *The Antitrust Paradox* (1978) and Utton, above n 16, 129. For more on substantive merger laws see: OECD, *Substantive Criteria Used for the Assessment of Mergers* (2003), DAFE/COMP(2003)5.

²³ See, for example, Gal, above n 20. Compare Richard Whish, 'Substantive Analysis under the EC Merger Regulation: Should the Dominance Test Be Replaced by "Substantial Lessening of Competition"' in J William Rowley (ed), *International Merger Control: Prescriptions for Convergence* (2001) 102.

of merger policy, different economic size, industrial advancement or geographic location²⁴ - including the desire for regional consistency, as is the case amongst most European states.

Historically, key debate surrounding the introduction of merger laws has centred on whether to adopt a 'substantial lessening of competition' or a 'market dominance' test. The former prevents mergers that would result in a *substantial* lessening of competition in an identified market and has been adopted by a wide range of countries, including the United States,²⁵ Canada, New Zealand,²⁶ France, Ireland, South Africa and the United Kingdom.²⁷ This test focuses on capturing the effects of both the 'unilateral exercise of market power or implicit or explicit cooperative conduct.'²⁸ The dominance test, on the other hand, generally prohibits mergers when they create or enhance a position of dominance in the identified market and has been used in the European Union (EU)²⁹ and the majority of EU Member States including Switzerland, Hungary, Poland and Norway.³⁰ The dominance test is now often combined with a competition requirement so that a merger that tends to create or enhance a position of dominance will be prohibited only if it also leads to a reduction in competition. To capture the situation where a merger might result in a duopoly or otherwise concentrated market, but does not give rise to single firm dominance, the concept of 'joint dominance' has also emerged in some jurisdictions to capture circumstances in which, post-merger, there is an increased likelihood of collusive conduct.³¹ In some jurisdictions additional tests relating to public benefits or efficiencies

²⁴ See, for example, Gal, above n 20, 200-201.

²⁵ *Clayton Act*, 15 USC §18.

²⁶ *Commerce Act 1986* (NZ) Parts 3 and 5. New Zealand applied a dominance test until 2001 when it was changed to bring it into line with Australia's merger law.

²⁷ *Enterprise Act 2002* (UK) Part 3.

²⁸ Gal, above n 20, 206. Gal claims this is more suitable for small economies because a larger percentage of mergers would tend to lead to or increase dominance.

²⁹ *Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings* [2004] OJ L 24/1, art 10(1). This replaced Council Regulation 3864 of 1989 (EC) and took effect on 1 May 2004.

³⁰ Other EU States adopting the dominance test include Belgium, Denmark, Finland, Germany, Sweden, Italy and the Netherlands.

³¹ See Massimo Motta, *Competition Policy Theory and Practice* (2004) 271.

also apply.³² In many jurisdictions efficiencies are also an important consideration in determining whether or not regulators will pursue a merger, even if this factor is not expressly written in to the substantive law.³³ There are a number of similar examples of modifications to traditional merger tests among the numerous countries that have now adopted merger regulations.

Despite the controversy surrounding which test is or is not the 'best' for reviewing multi-jurisdictional mergers, statistics suggest that there is generally little difference in the outcome of merger reviews conducted in multiple jurisdictions that apply different tests. Nevertheless, the potential remains for divergent outcomes, evidenced by some high profile cases involving the US and EU authorities, which can lead to uncertainty for merging parties and can cause friction between States.³⁴

Procedural regulation of mergers

Procedural regulation of mergers is the area in which the most divergence currently exists. Jurisdictions may be conveniently divided into those that require notification prior to consummation of the merger and those that do not.

Compulsory pre-merger notification

The primary justification advanced for imposing a compulsory pre-merger notification requirement is to ensure that authorities have the opportunity to prevent conduct that could

³² Efficiency is a factor considered when determining if a merger would lead to dominance or a substantial lessening of competition in many jurisdictions. In Canada efficiency provides a defence so that a merger will not be prohibited if it can be demonstrated that there are efficiency benefits that would outweigh the detriments associated with the reduction in competition: s 96 of the *Competition Act*, RSC 1985, c C-34. In Australia and New Zealand a merger may be authorised, despite substantially lessening competition, if the public benefits likely to flow from the merger will outweigh the potential anti-competitive detriment.

³³ See, for example, US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 1992, s 4.

³⁴ See, for example, *Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (July 30, 1997) and *General Electric/Honeywell* EC Case No. COMP/M.2220 (3 July 2001) and 'EU blocks GE/Honeywell deal', *BBC News*, 3 July 2001 <<http://news.bbc.co.uk/1/hi/business/1420398.stm>>. See also ICPAC Report, above n 3, 52-56.

bring about significant and detrimental structural change to a market.³⁵ Remedies of divestiture are available in most jurisdictions if a merger infringes substantive law, but the predominant view is that early detection and prevention of potentially anti-competitive mergers is to be preferred over subsequent efforts to ‘undo’ any harmful effects of the transaction through litigation. This is because, unlike other forms of anti-competitive conduct commonly regulated, such as price fixing, boycotts or exclusive dealing, mergers bring about structural change within the affected market or markets which will be difficult to correct should anti-competitive concerns later arise.³⁶ Perhaps more significantly, mergers, unlike most other forms of anti-competitive conduct, are able to be regulated in this way because they are necessarily very public ventures.

A recent survey concluded that there are now 68 nations that regulate mergers, 49 of which *require* pre-merger notification.³⁷ The procedural requirements in these jurisdictions – in particular, thresholds for notification (including the method of measurement used to determine whether a threshold has been met), timing for notification and review and informational requirements, often vary considerably.³⁸ The variation in filing fees imposed is also significant. These problems are exacerbated by the fact that the threshold timelines and often methods of review are constantly changing within a number of jurisdictions so that there can be great difficulty in obtaining current information.

³⁵ See, for example, Joe Sims and Deborah P Herman, ‘Twenty Years Of Hart-Scott-Rodino Merger Enforcement: The Effect Of Twenty Years Of Hart-Scott-Rodino On Merger Practice: A Case Study In The Law Of Unintended Consequences Applied To Antitrust Legislation’ (1997) 65 *Antitrust LJ* 865.

³⁶ See, for example, Commonwealth, *Mergers, Takeovers and Monopolies: Profiting from Competition*, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, May 1989, p 22 (The Griffiths Report). Compare Sims & Herman, above n 35.

³⁷ White & Case, above n 2. This number is likely to continue to increase.

³⁸ Working Group Comment 1 (September 2002) to Recommendation III(B), International Competition Network, *Recommended Practices for Merger Notification Procedures* <<http://www.internationalcompetitionnetwork.org/mnprepracactices.pdf>> at 20 January 2005 (‘ICN, *Recommended Practices*’).

No compulsory pre-merger notification

Many of the countries that do not require pre-merger notification have in place procedures for the voluntary notification of mergers prior to completion. Australia, New Zealand and the United Kingdom are amongst only a handful of jurisdictions that have adopted a voluntary notification regime.³⁹ Despite the voluntary nature of notification in these jurisdictions, the vast majority of significant mergers are notified by the parties for clearance before the parties proceed.⁴⁰ The authorities also invariably initiate investigation of potentially troublesome mergers regardless of notification by the parties. Thus, while less formal than the jurisdictions imposing compulsory notification requirements, pre-merger notification is effectively the norm in both Australia and New Zealand.

The need for action

The process of examining mergers prior to completion emerged when only a handful of jurisdictions had merger laws and there was limited, if any, cross-border activity. Today there are literally dozens of countries requiring pre-merger notification and more considering the introduction of such systems.⁴¹ In addition there are voluntary systems of notification almost always adopted by the parties and numerous other jurisdictions which regulate mergers without the need for pre-merger notification, but to whose substantive laws parties must still adhere.

Combined with a climate in which trans-national business activity has become the norm, the result is a regulatory jungle for business and a burdensome workload for competition

³⁹ In 1992 the Cooney Committee recommended a mandatory pre-notification scheme be introduced in Australia, but the recommendation never came to fruition (Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls* (1991) recommendations 5&6, pp xiv; 55-76. A more recent inquiry into Australia's competition law regime found no support for the introduction of a mandatory notification system of merger notification and none was recommended: Trade Practices Act Review Committee, *Review of the Competition Law Provisions of the Trade Practices Act* (2003), 60-61 ('Dawson Report').

⁴⁰ See, for example Stephen Corones, 'The Strategic Approach to Merger Enforcement by the ACCC' (1998) 26 *ABLR* 64, 67 and ACCC, *The ACCC's Approach to Mergers: A statistical summary* (1998) 27.

⁴¹ For example, Malaysia, Singapore and Vietnam: John Mollard, *Competition Laws Promote Economic Development* (2005) *International Financial Law Review* <<http://www.legalmediagroup.com/iflr/default.asp?Page=1&SID=5218&F=F>> at 20 January 2005.

authorities. This current process for the multi-jurisdictional review of mergers is in need of substantial reform. The burdens associated with procedural compliance in multiple jurisdictions have triggered numerous calls for increased convergence, cooperation and clearer and more realistic nexus requirements. Still, no international system exists for the review of trans-national mergers, save a hotch-potch of relatively vague bilateral treaties, informal co-operation arrangements and best practices 'recommendations'.

It is, however, legitimate to expect parties to comply with a number of different substantive laws. In this respect, while there have been calls for greater substantive harmony in merger legislation, it is rarely suggested that complying with substantive law in multiple jurisdictions is an unreasonable or unnecessary burden for companies⁴² and it is generally not the issue of greatest concern to the parties. It is, on the other hand, less obvious that jurisdictions should seek to impose, extraterritorially, cumbersome procedural requirements on merging parties – at least to the degree to which this presently occurs. The cost – and, perhaps more importantly, the time burden – expended in complying with multiple procedural regimes is excessive.

It is not, however, suggested that mandatory pre-merger notification should be abandoned. While there is a case to be made for its elimination or replacement with a set of voluntary systems which would allow parties to focus their attention on substantive compliance, it is accepted at this stage that there is little or no prospect of this occurring. Thus, attention should turn to ways in which the current mandatory regimes can be significantly improved in the short term. In particular, it is suggested that reform is needed

- (1) to ensure that only those mergers having a real possibility of raising competition concerns are subjected to the procedural requirements;

⁴² See, however, Whish, above n 23,101-102.

- (2) to ensure that those that are subject to the procedural requirements of a notification regime, that these are no more burdensome than is necessary to determine whether the proposed merger infringes the substantive law; and
- (3) to promote consistency wherever possible between jurisdictions with pre-merger notification regimes, particularly in terms of initial notification requirements.

In all these areas the current 'system' fails.

A large part of the problem can be attributed to low threshold requirements for notification. However, even where multi-jurisdictional review is appropriate because the size or nature of the merger is such that there is the possibility it *could* contravene the substantive law of multiple states, the differing, and often excessively onerous, procedural requirements impose significant burdens on the parties. A recent study concluded that a typical multi-jurisdictional merger review required filing in 5.6 jurisdictions with an additional 2.2 jurisdictions considered⁴³ at an average combined external cost of Aus\$5.6m.⁴⁴ Costs were made up of 65% legal fees, 19% filing fees and 14% fees for advisors. Not surprisingly, the more complex the deal was, the higher the cost.⁴⁵ However, even for mergers subject to only initial stages of review, the average external costs (comprising mostly legal fees) have been estimated at Aus\$931,000⁴⁶ with an average length of 5 months to complete. In addition to the external costs, average internal costs of compliance have been estimated at 28 person-weeks where only initial reviews are

⁴³ PriceWaterhouseCoopers, above n 4, 15.

⁴⁴ Ibid, 4. The estimate was made in Euro currency (€3.3m). Conversion to Australian dollars is accurate as at 20 January 2005.

⁴⁵ Ibid.

⁴⁶ Ibid. The figure was listed as €545,000. Australian currency conversion was performed on 10 January 2005.

conducted or 120 person weeks where in-depth reviews are involved.⁴⁷ Added to the cost of notification itself is the cost associated with delaying the transaction,⁴⁸ for both the parties and for consumers and business who may be deprived of the benefits associated with increased efficiency, such as cost savings or increased quality products. Where only an initial review is conducted the average duration for the review of a transaction is estimated at five months; this rises to nine months when in-depth review is conducted.⁴⁹

In addition to business costs, there are also significant burdens imposed on regulators in terms of time and resources, funded either by the parties, through high filing fees, or by the taxpaying public generally. It is not surprising, therefore, that various calls for reform have been made and continue in the area of multi-jurisdictional merger review.

The ICN Recommendations

In the past decade various proposals have been put forward for both procedural and substantive harmonisation in multijurisdictional mergers.⁵⁰ The focus, at least at government level, has been on limited 'soft' harmonization through best practice recommendations or increased cooperation between nations. Calls for more substantive action, such as establishing 'common' filing forms for multi-jurisdictional mergers or the negotiation of multi-lateral treaty governing the regulation of such mergers have been ignored or rejected.

⁴⁷ Ibid 4. The study also concluded that 'for initial reviews a doubling of the number of reviews (merger jurisdictions) leads to a doubling of external costs' for which there are *no economies of scale*. See also Eleanor M. Fox and Merit E. Janow, *A Report of the Second Annual Conference of the International Competition Network* (2003) International Competition Network 13 < http://www.internationalcompetitionnetwork.org/merida_report_2003.pdf > at 20 January 2005.

⁴⁸ Simon J Evenett, 'How Much Have Merger Review Laws Reduced Cross-Border Mergers and Acquisitions?' in J William Rowley (ed), *International Merger Control: Prescriptions for Convergence* (2001) 39. See also Davey & Barker, above n 3, 96.

⁴⁹ PriceWaterHouseCoopers, above n 4, 29.

⁵⁰ See, for example, Richard Whish and Diane Wood, *Merger Cases in the Real World: A Study of Merger Control Procedures* (OECD, 1994) 12, OECD, *Report on Notification of Transnational Mergers* (1999) DAF/CLP(99)2/FINAL, 4, BIAC & ICC, *Recommended Framework for Best Practices in International Merger Control Procedures* (2001) and ICPAC Report, above n 3, 5.

The International Competition Network (ICN) is the most recent international body to make recommendations for change in the way international mergers are regulated. The ICN was formed in 2001 and comprises competition law officials from around the globe, currently numbering more than 70 states as well as the Andean Community, European Union and EFTA Surveillance Authority.⁵¹ The creation of the ICN has provided a unique opportunity to promote reform in merger review. Regulators, in many cases, have both the ability and the inclination to affect real change in domestic competition law and policy.⁵² While the ICN plans to address all areas of competition policy and enforcement, the importance regulators attach to reform of the multi-jurisdictional merger review process is highlighted by the placing of this issue at the forefront of the ICN's agenda for discussion.⁵³ This has resulted in the development and adoption of 'Eight Guiding Principles' for merger notification and review,⁵⁴ and a set of Recommended Practices for Merger Review ('Recommended Practices'), which have developed and expanded since the ICN's first annual conference in September 2002. It is expected that development and implementation will continue throughout 2006 and beyond.⁵⁵ The recommendations are, however, non-binding and governments and agencies may or may not implement them as they choose.

⁵¹ See above n 10. Figures current to 17 January 2005.

⁵² See White & Case, above n 2.

⁵³ ICN, *Memorandum on the Establishment and Operation of the International Competition Network* (2001).

⁵⁴ ICN, *Guiding Principles for Merger Notification and Review*

<<http://www.internationalcompetitionnetwork.org/icnpguidingprin.htm>> at 20 January 2005 (Guiding Principles).

⁵⁵ ICN, *Recommended Practices*, above n 38. The first three recommended practices were adopted at the ICN's first conference in September 2002 and have been progressively updated. Following adoption of the latest set of recommendations at the 2005 conference, the recommendations now number 13.

Guiding principles and recommendations

The ICN Mergers Working Group⁵⁶ ('Working Group) formulated the following eight *Guiding Principles for Merger Notification and Review* ('Guiding Principles'), which were adopted at the ICN's first annual conference in 2002: sovereignty, transparency, non-discrimination on the basis of nationality, procedural fairness, efficient, timely and effective review, coordination, convergence and protection of confidential information. These Guiding Principles, despite being relatively benign, provide an appropriate framework for the development of more substantive moves toward the harmonisation of merger laws. In particular, the seventh guiding principle, 'convergence', calls for work toward the 'convergence of merger processes toward agreed best practices'. This is currently being facilitated by the development and adoption of a series of recommended practices. The existing *Recommended Practices for Merger Notification Procedures* are grouped into thirteen key areas:

- I. Nexus to reviewing jurisdiction;⁵⁷
- II. Notification thresholds;⁵⁸
- III. Timing of notification;⁵⁹
- IV. Review periods;⁶⁰
- V. Requirements for initial notification;⁶¹
- VI. Conduct of merger investigations;⁶²
- VII. Procedural Fairness;⁶³

⁵⁶ The Mergers Working Group consists of three sub-groups. The relevant sub-group for purposes of this paper is the Merger Notification and Procedures subgroup. This group will be referred to throughout as the 'Working Group'.

⁵⁷ ICN, *Recommended Practices*, above n 38, recommendation I.

⁵⁸ ICN, *Recommended Practices*, above n 38, recommendation II.

⁵⁹ ICN, *Recommended Practices*, above n 38, recommendation III.

⁶⁰ ICN, *Recommended Practices*, above n 38, recommendation IV.

⁶¹ ICN, *Recommended Practices*, above n 38, recommendation V.

⁶² ICN, *Recommended Practices*, above n 38, recommendation VI (originally recommendation VIII). Note that following the 2004 ICN Conference, the recommended practices have been re-ordered. To avoid confusion references have been included, where applicable, to the pre-2004 number order as well as the current order.

⁶³ ICN, *Recommended Practices*, above n 38, recommendation IX.

- VIII. Transparency;⁶⁴
- IX. Confidentiality;⁶⁵
- X. Interagency Coordination;⁶⁶
- XI. Remedies;⁶⁷
- XII. Competition Agency Powers;⁶⁸ and
- XIII. Review of merger control provisions.⁶⁹

These have developed progressively over the first four annual conferences of the ICN, held in Italy,⁷⁰ Mexico,⁷¹ Korea⁷² and Germany⁷³ respectively. The focus is now likely to shift from creating new recommendations to their implementation.⁷⁴

Jurisdictional nexus

The first of the recommended practices concerns the nexus to the reviewing jurisdiction. After observing that jurisdictions are sovereign in relation to the application of their merger laws, the recommendation calls for jurisdictions to ensure they apply an appropriate 'local nexus' requirement, sufficient to eliminate transactions unlikely to have any significant effect on local competition.⁷⁵

⁶⁴ ICN, *Recommended Practices*, above n 38, recommendation VIII (originally recommendation VI).

⁶⁵ ICN, *Recommended Practices*, above n 38, recommendation IX.

⁶⁶ ICN, *Recommended Practices*, above n 38, recommendation X.

⁶⁷ ICN, *Recommended Practices*, above n 38, recommendation XI.

⁶⁸ ICN, *Recommended Practices*, above n 38, recommendation XII.

⁶⁹ ICN, *Recommended Practices*, above n 38, recommendation XIII (previously recommendation XI and originally recommendation VII).

⁷⁰ The first three of these recommendations were presented and officially adopted at the first conference of the ICN in Italy, September 2002: Eleanor M Fox, *A Report on the First Annual Conference of the International Competition Network*, (2002) International Competition Network 10 <<http://www.internationalcompetitionnetwork.org/news/dec102002.doc>> at 21 January 2005.

⁷¹ recommendations IV, V, VII and XIII were adopted at the ICN's second conference in Mexico in 2003: See Fox and Janow, above n 47, 39. Note, these were originally numbered recommendations IV to VII but have since been re-ordered: see above n 85.

⁷² Recommendations VI, VIII, IX and X were adopted at the ICN's third conference in Korea in 2004.

⁷³ Recommendations XI and XII were adopted at the fourth conference of the ICN held in Germany in June 2005.

⁷⁴ *A Statement of Mission and Achievements Up Until May-2005*, (2005) International Competition Network 13 <http://www.internationalcompetitionnetwork.org/bonn/Work_Plans/achievements/ICN_Mission_and_Achievements_Statement.pdf> at 11 July 2005. See also International Competition Network, Merger Working Group, *Notification and Procedures Subgroup 2005-2006 Work Plan* at 3.

⁷⁵ See ICN, *Recommended Practices*, above n 38, recommendation I.

It is arguable that this recommendation adds little or nothing to prevailing theories of international law which require that there be some jurisdictional or national connection before domestic laws and regulations are invoked on foreign parties. Nevertheless, given that corporate mergers often involve companies with assets or dealings in multiple jurisdictions, the technical 'connection' required by international law may frequently be met despite little or no prospect of a merger affecting local competition in any appreciable way. As a consequence, the recommendation seeks to go beyond international law restrictions on the exercise of extraterritorial jurisdiction and also restrict the application of laws to mergers which, while having some 'national' connection, local dealing or economic effect, do not have a sufficiently strong 'nexus' to merit a costly investigation.

The recommendation would be more potent, however, if it dealt with both overall thresholds (applicable to both domestic & foreign mergers) and jurisdictional nexus requirements. Instead it is restricted the latter. The general consensus is that thresholds are currently far too low in most jurisdictions,⁷⁶ evidenced by the fact that the vast majority of mergers currently required to be notified, whether domestic or foreign, pass through the merger clearance processes unscathed.⁷⁷ For example, in the United States, more than 97% of notifiable mergers do not raise serious concerns for review authorities. In addition to the costs incurred by business in preparing and filing multiple notifications, low thresholds have also resulted, in recent years, in booming costs to many regulators which has seen a number of jurisdictions adopting for the first time, or increasing, fees for review of mergers in an endeavour to fund the system.⁷⁸ A best practices agreement designed to

⁷⁶ For example, in the US more only approximately 2.4% of the thousands of mergers notified each year receive requests for stage 2 reviews (based on 1998-2001 statistics): *Mergers Control 2003*, above n 7, 12.

⁷⁷ Often the figure in OECD countries is above 95%. See further, Davey and Barker, above n 3, 8.

⁷⁸ For example, Canada introduced fees for pre-merger notification in November 1997: Davey and Barker, above n 3, 11.

ensure parties work toward ensuring their thresholds are maintained at a reasonable level could, at least over time, facilitate the lowering of thresholds to a more desirable level.⁷⁹

Despite the focus on nexus requirements, this ICN recommendation could, potentially, go some way to achieving more realistic thresholds. In particular, a working group comment to this recommendation states that notification ‘should not be required unless the transaction is likely to have a *significant, direct and immediate economic effect* within the jurisdiction concerned’ (emphasis added). Unfortunately, as a result of the vague terms in which the recommendation is expressed, it is clear that jurisdictional nexus might be easily established in accordance with this recommendation despite little prospect of a merger having serious competitive effects. This is exemplified by the US’ claimed adherence despite being widely regarded as having unrealistically low thresholds for notification.⁸⁰ The final problem with the recommendation is the lack of guidance as to what constitutes an ‘appropriate’ threshold. While it is appropriate that no specific financial or other threshold be set and made applicable to all jurisdictions, more guidance as to what was intended by ‘appropriate’ might have provided more pressure on authorities to review existing jurisdictional thresholds.

Notification thresholds

The second set of recommendations adopted by the ICN relate to the criteria upon which notifiability is determined, rather than the level of the thresholds themselves. In particular, they recommend that notification thresholds be:

⁷⁹ See further, ICPAC Report, above n 3, 4. See also Davey and Barker, above n 3, 123.

⁸⁰ A survey commissioned by the Merger Streamlining Group (Comprised of Alcan Inc, British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Gldman Sachs International, NERA, Rio Tinto plc and Vodephone Group and assisted by Janet McDavid, Phillip Proger, Michael Reynolds, J William Rowley QC and Neil Campbell) concluded that, while none of the 46 respondent jurisdictions were inconsistent with the first recommendation, 28 were only partially consistent and only 18 substantially consistent. see J William Rowley and A Neil Campbell, ‘Implementation of the International Competition Network’s Recommended Practices for Merger Notification Procedures: Final Report’ (2004) 5 *Business Law International* 110.

- clear and understandable⁸¹
- based on objectively quantifiable criteria;⁸² and
- based on information that is readily accessible to the merging parties.⁸³

The first of these recommendations is straight-forward and uncontroversial. In terms of objectively quantifiable criteria, the recommendation is designed to eliminate the use of criteria such as 'market share' or an assessment of the potential effects of the merger, which are inherently subjective. Turnover, on the other hand, is a commonly used determinant which would conform with this recommendation.⁸⁴ While most jurisdictions already apply an objective criteria for purposes of determining notification, several jurisdictions, such as, Russia, Portugal, Thailand, Taiwan and Brazil, continue to require analysis of subjective issues either in order to assess notifiability or as part of the notification requirements.⁸⁵ It is in the interest of both parties and regulators concerned that threshold determinants be both clear and objectively quantifiable so that parties can accurately identify the jurisdiction or jurisdictions in which they are required to comply with procedural notification requirements.

⁸¹ ICN, *Recommended Practices*, above n 38, recommendation II(A). The Working Group comments that an essential feature of notification thresholds should be 'clarity and simplicity': Working Group comment 1 to recommendation II(A).

⁸² ICN, *Recommended Practices*, above n 38, recommendation II(B).

⁸³ ICN, *Recommended Practices*, above n 38, recommendation II(C).

⁸⁴ The working group also suggests that jurisdictions 'seek to adopt uniform definitions or guidelines with respect to commonly used criteria' such as thresholds, to increase consistency: ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation II(B).

⁸⁵ For example, some countries require assessment of subjective criteria such as acquisition of decisive influence, compared with more traditional objective criteria like the value of shares or assets: OECD, *Report on Notification of Transnational Mergers*, above n 50, 3. A recent study shows that at least 27 of 53 jurisdictions examined use subjective criteria for notification thresholds, mainly relating to market share and/or market power: *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures*, April 2005, Annex B, 2 <http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG1_Notification_Procedures/Implementatio n.pdf> at 12 July 2005.

Finally, it is recommended that thresholds be 'based on information that is readily accessible to the merging parties', meaning available in the ordinary course of business,⁸⁶ subject to the proviso that it is reasonable to require parties to 'report their assets by jurisdiction even if they do not maintain data in that form in the ordinary course of business.'⁸⁷ Such information will invariably be sufficient to determine whether further investigation of a proposal is warranted.

These are all sensible and important recommendations which, if adhered to, should reduce the burden of notification, at least in some cases. It is, therefore, not surprising that they have also appeared in previous calls for convergence.

Timing of Notification

Different tests are currently employed for determining *when* parties may, or must, notify authorities of a proposed merger.⁸⁸ While some jurisdictions do not impose any deadlines for notifications, others impose minimum deadlines based on a variety of tests relating to how far progressed merger negotiations are⁸⁹ and/or maximum deadlines as short as seven days from the signing of an agreement.⁹⁰ Until recently even the EU imposed a maximum deadline of only seven days from the conclusion of agreement, announcement of public bid or acquisition of control.⁹¹ In addition to affecting the ability of parties to file notifications in multiple jurisdictions concurrently, the short time frames imposed by some jurisdictions can cause unnecessary strain on parties.

⁸⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation II(C).

⁸⁷ See also ICN, *Recommended Practices*, above n 38, Working Group comment 2 to Recommendation II(C).

⁸⁸ See, for example, ICN, *Recommended Practices*, above n 38, Working Group Comment 1 to recommendation III(A) and ICPAC Report, above n 3, 11.

⁸⁹ For example 'good faith intent' or 'first signed document'.

⁹⁰ This is the case in Poland: *Act on Protection of Competition and Consumers* of December 15, 2000, Article 94.4.

⁹¹ This deadline has now been eliminated: *Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings* [2004] OJ L 24/1.

In response, the third set of ICN recommendations provides that notifications should be permitted any time after the parties certify a ‘good faith intent to consummate the proposed transaction’⁹² and that there should be no ‘maximum’ deadlines imposed on parties required to notify a transaction where closing is prohibited until the notification has been reviewed.⁹³ Even where closing is not prohibited parties should allow a ‘reasonable time’ to file ‘following a clearly defined triggering event’.⁹⁴ This is based on the view that parties wishing to merge have an incentive to file quickly after agreement in any event.⁹⁵ In this respect, parties have evidenced a preference to withhold closure until clearance is granted to avoid the possibility of greater penalties, including divestiture, if the merger is subsequently challenged.

These are all commendable recommendations seeking to correct an area of significant inconsistency⁹⁶ and should help to facilitate the coordination of filing in multiple jurisdictions.⁹⁷ The European Union has already amended its notification timing requirements to conform with these recommendations.

Review Periods

The time taken for review has frequently been cited as the most important concern facing merging parties,⁹⁸ even ahead of the quality of the response, lower fees and less burdensome filing requirements. This is because lengthy review periods necessarily delay time-sensitive mergers and as a result may jeopardise the merger. The delay caused by

⁹² ICN, *Recommended Practices*, above n 38, recommendation III(A).

⁹³ ICN, *Recommended Practices*, above n 38, recommendation III(B).

⁹⁴ ICN, *Recommended Practices*, above n 38, recommendation III(C).

⁹⁵ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation III(B).

⁹⁶ A recent survey found that of 46 ICN members responding, 37% were substantially consistent with recommendation III, 54% were only partially consistent and 9% were inconsistent: Rowley and Campbell, above n 80, 118. See also Fox and Janow, above n 62, 33.

⁹⁷ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation III(A).

⁹⁸ Davey and Barker, above n 3, 34.

review periods is particularly acute where review takes place in multiple jurisdictions and a long drawn-out process in only one jurisdiction can effectively delay a transaction for months.

The working group has recognised these delays may ‘jeopardize the consummation of the transaction’, ‘have an adverse impact on the merging parties’ individual transition planning efforts’ and business operations and, most importantly from the public’s perspective, may defer ‘realization of any efficiencies arising from the transaction’.⁹⁹ They also note the dichotomy that exists between the needs of the authorities to have sufficient time to investigate mergers where ‘complex legal and economic issues’ arise and the needs of the parties to complete time sensitive mergers within a reasonable time. Consequently, this is clearly one of the more difficult areas in which to achieve consensus. In particular, it is unlikely that a formally agreed ‘maximum time frame’, applicable to all mergers, could be negotiated and, for various reasons, this may not be desirable.¹⁰⁰

The ICN has, therefore, made the modest recommendation that all merger reviews ‘should be completed within a reasonable period of time’¹⁰¹ and that review systems should –

‘incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.’¹⁰²

In this respect it is also recommended that there should be a specified initial period of review,¹⁰³ which the working group suggests be no longer than six weeks.¹⁰⁴ Many

⁹⁹ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation IV(A).

¹⁰⁰ Different substantive law and methods of analysis applied in regulating jurisdictions might require at least slightly different time frames; variations in resource capabilities might also necessitate different time frames and there might be special circumstances requiring flexibility.

¹⁰¹ ICN, *Recommended Practices*, above n 38, recommendation IV(A).

¹⁰² ICN, *Recommended Practices*, above n 38, recommendation IV(B).

¹⁰³ ICN, *Recommended Practices*, above n 38, recommendations IV(C) and (D).

jurisdictions already make provision for an initial phase of investigation aimed at eliminating those mergers unlikely to raise competition concerns.¹⁰⁵ If more widely adopted, these recommendations would result in a 'definitive and readily-ascertainable'¹⁰⁶ initial review period which could either result in the expedited clearance of harmless mergers or early notice to parties that their merger will be subjected to more detailed scrutiny.

For those mergers requiring further scrutiny, the ICN recommends a determinable time frame for any extended waiting periods.¹⁰⁷ While not seeking to impose a set review period, the working group suggests that extended stage 2 reviews should 'be completed or *capable of completion* within six months or less following the submission of the initial notification(s)' (emphasis added).¹⁰⁸ The reference to 'capable of completion' refers predominantly to the interruption that occurs when information provided is deemed incomplete or further requests for information come from the reviewing agency, which account for the majority of delays in numerous jurisdictions, perhaps most notably, the United States.¹⁰⁹ While there is no formal recommendation relating to delays caused by requests for further information, the working group has stated agencies should notify parties in a timely fashion of 'any deficiencies in their submission' and provide specific details of any such deficiency so that parties can promptly correct their filing.¹¹⁰

¹⁰⁴ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation IV(C).

¹⁰⁵ See ICN, *Recommended Practices*, above n 38, Working Group comments 1 and 2 to recommendation IV(B). See also *Implementation of the ICN Recommended Practices*, above n 85, Annex B, 3. Currently most jurisdictions with initial review periods adopted a time frame of around 30 days or a month.

¹⁰⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation IV(C).

¹⁰⁷ ICN, *Recommended Practices*, above n 38, recommendations IV(C) and (D).

¹⁰⁸ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation IV(C).

¹⁰⁹ In Australia, for example, the new Australian Competition and Consumer Commission, *Guideline for Informal Merger Review* (September 2004), 5, states that the circumstances which will cause 'the clock to be stopped' on merger review include: 'the provision of incomplete information or the ACCC's need for additional information from the parties.'

¹¹⁰ ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation IV(C).

The working group also observed that in some complex cases additional time may be required by the agencies to reach a determination,¹¹¹ and that, therefore, limited exceptions should be permitted if such extension might ‘avoid a more protracted, formal extension of the waiting period and/or an adverse enforcement decision.’¹¹²

Requirements for initial notification

The fourth set of recommendations focus on the information required to be provided if the threshold levels for notification have been met. Given that an extremely high percentage of mergers reviewed are cleared at the initial stages it is important that the information burdens imposed on parties required to notify at this stage are as small as possible so that no undue burden is imposed upon parties whose merger poses little or no threat to the competitive process.

The key recommendation in this respect is that authorities should limit notification requirements to:

‘information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.’¹¹³

In particular, as the working group commented:

¹¹¹ ICN, *Recommended Practices*, above n 38, Working Group comment 6 to recommendation IV(C).

¹¹² Ibid. See also ICN, *Recommended Practices*, above n 38, recommendation IV(E).

¹¹³ ICN, *Recommended Practices*, above n 38, recommendation V(A).

‘the initial notification should elicit the minimum amount of information necessary to initiate the merger review process.’¹¹⁴

In addition, practices should be implemented to ‘avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.’¹¹⁵ In this respect jurisdictions should permit flexibility in the content of initial notifications and reviews¹¹⁶ to cater for the diverse range of transactions likely to be notified. This might be accomplished by, for example, providing alternative notification formats (such as long and short form options¹¹⁷) and discretionary waivers in relation to information not relevant in a particular case.¹¹⁸ Authorities should also ‘consider’ accepting information that provides substantially the information they require even if not in the precise format requested, where parties have used the alternate format for submission in other jurisdictions.¹¹⁹ In addition, they should be able to waive information requirements during pre-merger consultations where the ‘burden of compiling and submitting the information’ would outweigh its value to the authorities.¹²⁰ Conversely, parties be allowed to submit *additional* information where it may assist in early resolution.¹²¹ Authorities should also provide guidance to parties on notifiability of transactions and content of a notification where requested by the parties.¹²²

Finally, it is recommended that jurisdictions ‘limit translation requirements and formal authentication burdens’ in the initial notification stage.¹²³ While the notification itself could

¹¹⁴ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation V(A).

¹¹⁵ ICN, *Recommended Practices*, above n 38, recommendation V(B).

¹¹⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation V(B).

¹¹⁷ These options have already been adopted in some jurisdictions: see, for example, Canada.

¹¹⁸ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation V(B).

¹¹⁹ ICN, *Recommended Practices*, above n 38, Working Group comment 5 to recommendation V(B).

¹²⁰ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation V(C).

¹²¹ ICN, *Recommended Practices*, above n 38, Working Group comment 6 to recommendation V(B).

¹²² ICN, *Recommended Practices*, above n 38, recommendation V(C).

¹²³ ICN, *Recommended Practices*, above n 38, recommendation V(D). At least 20 jurisdictions of the 53 recently examined in an ICN project require *all* supporting documents to be *fully* translated: *Implementation of the ICN Recommended Practices*, above n 85, Annex B, 5.

appropriately be required to be in the official language of the relevant jurisdiction, supporting documents – at least at initial stages - should not be required to be translated provided summaries and important excerpts are translated. Translation currently imposes a significant time and financial burden for many multi-jurisdictional merger notifications and this recommendation will, therefore, prove valuable if implemented.

Transparency

The next key set of recommendations relate to transparency; in particular, it is recommended that merger laws be applied ‘with a high level of transparency’ subject to appropriate confidentiality requirements¹²⁴ and that that merger control regimes be transparent with respect to

‘the jurisdictional scope of the merger control law, the competition agency’s decision-making procedures, and the principles and criteria the competition agency uses to apply the substantive review standard.’¹²⁵

The working group notes that transparency of this nature is ‘important to achieve consistency, predictability and, ultimately, fairness in applying merger control laws ...’¹²⁶

An important element of transparency is ensuring laws, regulations, policy and other key materials¹²⁷ are made available to the public in a timely manner.¹²⁸ The working group envisages not only the publication of substantive law and procedural requirements,¹²⁹ but also the issue of press releases on important decisions, delivering and publishing

¹²⁴ ICN, *Recommended Practices*, above n 38, recommendation VIII(A) (originally recommendation VI).

¹²⁵ ICN, *Recommended Practices*, above n 38, recommendation VIII(B).

¹²⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation VIII(A).

¹²⁷ See ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation VIII(B).

¹²⁸ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation VIII(A). This is expanded on in recommendation VIII(C) which calls for authorities to make available to the public information relating to the ‘current state of merger control law, policy, and practice’.

¹²⁹ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to Recommendation VIII(C).

speeches and issuing statements signifying any change in enforcement policy, as well as general guidelines.¹³⁰

A number of jurisdictions now have guidelines or other notices providing parties with information on the procedural and substantive requirements of their merger regulation. Many also release speeches and other publications. In many cases wider information has been provided in response to the ICN's recommendations.¹³¹ Much of this information is now freely available online, either through dedicated domestic websites or on the ICN's own website which hosts information pages and 'template' documents on a large number of ICN members' merger regimes.¹³² In addition, the Global Competition Network, established by the International Bar Association, also provides free online information about the merger laws in numerous jurisdictions.

In relation to the provision of information on important decisions, the working group recommends that a

'reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice.'¹³³

Currently, few jurisdictions provide detailed explanations for decisions, other than in cases where mergers are challenged.¹³⁴ Reasoned explanations in the circumstances suggested by the working group might prove valuable in establishing a body of precedent

¹³⁰ See further ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation VIII(C).

¹³¹ See, for example, ACCC, 'Revised processes proposed for informal merger reviews', News Release, 23 September 2004.

¹³² The ICN's 'Merger Review Laws, Related Materials, and Templates' web page contains ICN 'Merger Notification and Procedures Template' for more than 60 jurisdictions.

¹³³ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation VIII(C).

¹³⁴ The International Competition Policy Advisory Committee cited Australia as an example of a country in which this did occur. See ACCC, 'Revised processes proposed for informal merger reviews', News Release, 23 September 2004.

to guide parties as to the type of concerns held by the various authorities. Anything more substantial would threaten to slow down the entire process and increase the time-delays so abhorred by merging parties.

In the relatively recent past there was little transparency in the regulation of mergers in many jurisdictions.¹³⁵ While this has now improved significantly, there is still clear scope for improvement.¹³⁶ These recommendations are relatively innocuous for authorities and have perhaps the best chance of wide-ranging adherence in the relatively short term, enabling parties to be better informed, thereby reducing some of the uncertainty frequently cited as a major source of frustration for the parties.

Conduct of Merger Investigations

Merger investigations should be ‘conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process’¹³⁷ and should include opportunities for meetings or discussions between the parties and the authorities.¹³⁸

Where merger investigation proceeds through the initial stages into a more detailed, or ‘second-stage’ inquiry, parties should be advised of why clearance was not given within the initial review period.¹³⁹ These recommendations are designed both to increase transparency and identify, early, problematic issues for the parties which may facilitate faster resolution.¹⁴⁰ While these would seem to be largely common sense recommendations, there are a number of jurisdictions which could not currently claim

¹³⁵ In 2000 the International Competition Policy Advisory Committee noted the lack of transparency in merger review that existed at the time and claimed greater transparency would highlight differences, stimulate discussion and adjustments: ICPAC Report, above n 3, 4.

¹³⁶ This is clear from a recent ICN investigation of compliance which demonstrated that a substantial amount of important information was not yet readily available to the public: *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures*, above n 113, Annex B.

¹³⁷ ICN, *Recommended Practices*, above n 38, recommendation VI(A).

¹³⁸ ICN, *Recommended Practices*, above n 38, recommendation VI(B).

¹³⁹ ICN, *Recommended Practices*, above n 38, recommendation VI(C). Where the relevant jurisdiction has only one phase of investigation, ‘the competition agency should advise the merging parties of perceived competitive concerns as promptly as possible’: Working Group comment 1 to recommendation VI(C).

¹⁴⁰ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation VI(C).

substantial adherence. For those states the recommendations might provide an important catalyst for reform.

It is also recommended that where there are no definitive deadlines relating to merger investigations, 'procedures should be adopted to ensure that the investigation is completed without undue delay'¹⁴¹ and that agencies 'avoid imposing unnecessary or unreasonable costs and burdens on merging parties' in connection with merger investigations.¹⁴² The key difficulty with these recommendations are that the terms 'undue delay' and 'unnecessary or unreasonable costs and burdens' are inherently subjective so that the parties' views on what might be unreasonable are often far removed from those of the authorities. Nevertheless, the recommendations might bring to light the importance of focussing on the task of determining whether the merger should be cleared or challenged rather than, as has been suggested in some jurisdictions, including the US, using the notification process as a means of gathering information for subsequent legal challenges.¹⁴³ The working group suggests that requests for information focus on aspects of the transaction that raise potential competition concerns¹⁴⁴ and parties should be permitted, where possible, to submit information in the manner in which they maintain the information in the ordinary course of their business.¹⁴⁵ In this respect is also suggested that agencies be sensitive to the costs associated with full-text translations, should impose translation requirements only selectively and should consider ways to reduce the burden of translations wherever possible.¹⁴⁶

¹⁴¹ ICN, *Recommended Practices*, above n 38, recommendation VI(D).

¹⁴² ICN, *Recommended Practices*, above n 38, recommendation VI(E)

¹⁴³ Criticism has been levelled at a number of regimes, in particular the United States and European Union, that they unreasonably burden parties in their information requests; in particular, that their requests for information exceed that necessary to perform the task of assessing the legality of the proposed merger.

¹⁴⁴ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation VI(E).

¹⁴⁵ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation VI(E)..

¹⁴⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 4 to recommendation VI(E).

Finally, it is recommended that investigations be conducted with ‘due regard for applicable legal privileges and related confidentiality doctrines’¹⁴⁷ and transparent policies should also be put in place for the exchange of such information with other competition agencies.¹⁴⁸

Procedural fairness

Merging parties and third parties with a legitimate interest in a proposed merger should be afforded procedural fairness¹⁴⁹ in the sense that they should be provided ‘with a meaningful opportunity to express their views.’¹⁵⁰ Third parties should also be allowed to ‘express their views’ during the review process. Procedural fairness should apply equally to domestic and foreign firms.¹⁵¹ In addition, prior to an adverse finding parties should be advised sufficiently of the competitive concerns held by the agency and have a ‘meaningful opportunity’ to respond.¹⁵² This might result in amendments alleviating the competitive concern or the agreed imposition of conditions that would allow the merger to proceed while addressing the agency’s concerns.¹⁵³ The agency responsible for review should ensure processes are ‘implemented fairly, efficiently, and consistently’.¹⁵⁴ Finally, it is recommended that merger review systems ‘provide an opportunity for timely review by a separate adjudicative body’ on the merits¹⁵⁵ within a timeframe which would allow the merger to remain viable.¹⁵⁶

¹⁴⁷ ICN, *Recommended Practices*, above n 38, recommendation VI(F).

¹⁴⁸ ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation VI(F).

¹⁴⁹ ICN, *Recommended Practices*, above n 38, recommendation VII(A).

¹⁵⁰ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation VII(A).

¹⁵¹ ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation VII(A).

¹⁵² ICN, *Recommended Practices*, above n 38, recommendation VII(B).

¹⁵³ ICN, *Recommended Practices*, above n 38, Working Group comment 3 to recommendation VII(B).

¹⁵⁴ ICN, *Recommended Practices*, above n 38, recommendation VII(D).

¹⁵⁵ ICN, *Recommended Practices*, above n 38, recommendation VII(E). This applies only to adverse findings.

¹⁵⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation VII(E).

Confidentiality

It is recommended that information received by authorities from the merging parties and third parties in relation to the proposed merger 'should be subject to appropriate confidentiality protections'.¹⁵⁷ The need for a certain level of confidentiality in merger reviews to avoid prejudicing 'important commercial interests'¹⁵⁸ has long been recognised and has formed part of most bilateral competition agreements. Confidentiality rules should balance commercial interests of the parties with the need to 'ensure procedural fairness'¹⁵⁹ and the 'public interest' and the need for transparency in the review process.¹⁶⁰ Where an agency determines that certain information will not be granted confidentiality status, parties should have the opportunity to contest that decision prior to disclosure of the information.¹⁶¹ In addition, agencies should 'avoid unnecessary public disclosure of confidential information'.¹⁶²

It is also recommended that agencies 'seek to defer contacts with third parties until the proposed transaction becomes public' where such deferral would not adversely affect the agency's ability to investigate effectively or complete within applicable deadlines.¹⁶³

Interagency coordination

This recommendation provides that agencies should 'seek to coordinate their review of mergers that may raise competitive issues of common concern'.¹⁶⁴ In particular, this is designed to reduce conflict and duplication and to avoid unnecessary delays and burdens

¹⁵⁷ ICN, *Recommended Practices*, above n 38, recommendation IX(A).

¹⁵⁸ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation IX(A).

¹⁵⁹ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation IX(A). See also recommendation IX(D), specifically stating that confidentiality rules should 'strike an appropriate balance between protecting the confidentiality of third-party submissions and procedural fairness considerations.'

¹⁶⁰ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation (A).

¹⁶¹ *Ibid.*

¹⁶² ICN, *Recommended Practices*, above n 38, recommendation IX(E).

¹⁶³ ICN, *Recommended Practices*, above n 38, recommendation IX(C).

¹⁶⁴ ICN, *Recommended Practices*, above n 38, recommendation X(A).

for parties and agencies.¹⁶⁵ Comments to this recommendation make clear that any interagency coordination is voluntary and in no way prejudices the rights of each agency to reach their own independent decisions.¹⁶⁶

Finally, it is recommended that reviewing agencies ‘seek remedies tailored to cure domestic competitive concerns’ and seek to avoid inconsistency with the remedies in other jurisdictions.¹⁶⁷ This is a particularly important recommendation in the context of multi-jurisdictional merger review where there is the potential for remedies to conflict, causing problems for the parties and friction between nations.¹⁶⁸

Remedies

The ICN has recently adopted new and relatively uncontroversial recommendations relating to remedies. They first provide that any remedy should address the identified competitive harm arising from the proposed transaction. While outright prohibition might be necessary to achieve this in some cases, the ICN recommendation provides that agencies should first consider alternative resolution, such as modifications to, or conditions placed on, the proposed transaction.

Procedurally, this set of recommendations also calls for transparency in the ‘proposal, discussion and adoption of remedies’,¹⁶⁹ procedures to ensure effective and easy administration of remedies¹⁷⁰ and the provision of means to ensure ‘implementation,

¹⁶⁵ ICN, *Recommended Practices*, above n 38, Working Group comment 2 to recommendation X(A).

¹⁶⁶ ICN, *Recommended Practices*, above n 38, Working Group comment 4 to recommendation X(A).

¹⁶⁷ ICN, *Recommended Practices*, above n 38, recommendation X(E).

¹⁶⁸ The Working Group suggests that ‘competition agencies should invite the merging parties to consider coordinating and timing the substance of their remedy proposals’: ICN, *Recommended Practices*, above n 38, Working Group comment 1 on recommendation X(E).

¹⁶⁹ ICN, *Recommended Practices*, above n 38, recommendation XI(B).

¹⁷⁰ ICN, *Recommended Practices*, above n 38, recommendation XI(C).

monitoring of compliance, and enforcement of the remedy'.¹⁷¹ While incorporating more substantive (as opposed to purely procedural) components than other recommendations¹⁷² these are all appropriate and relatively free from controversy.

Competition Agency Powers

The most recent set of recommendations adopted by the ICN relates to the powers of competition agencies to enforce merger laws. The first in this set of recommendations simply (and reasonably) states that competition agencies 'should have the authority and tools necessary for effective enforcement'.¹⁷³ In particular, they must have 'appropriate investigative tools and mechanisms'¹⁷⁴ for obtaining relevant information and they 'must have the ability to initiate enforcement actions ... and to seek sanctions for non-compliance'.¹⁷⁵ Supplementary to this is the recommendation that agencies have sufficient staff and expertise to effectively discharge their responsibility¹⁷⁶ and that they should have independence sufficient to ensure objective application and enforcement.¹⁷⁷

There is, of course, a natural self-interest involved in a Network of competition agencies collectively recommending that their powers should, in most cases, be increased. There are also likely to be substantially divergent views as to what constitutes the 'authority and tools necessary' for effective enforcement. Consequently, it may prove difficult for many competition authorities to convince their governments that wider powers are necessary to conform with this recommendation.

¹⁷¹ ICN, *Recommended Practices*, above n 38, recommendation XI(D).

¹⁷² In this respect the ICN Merger Working Group: Analytical Framework Subgroup presented a report on merger remedies at the 2005 ICN conference: *Merger Remedies Review Project*, Report for the fourth ICN annual conference, Bonn, June 2005
<http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG2_Analytical_Framework/Remedies_Study.pdf> at 12 July 2005.

¹⁷³ ICN, *Recommended Practices*, above n 38, recommendation XII(A).

¹⁷⁴ Comment 1 to ICN, *Recommended Practices*, above n 38, recommendation XII(A).

¹⁷⁵ Comment 2 to ICN, *Recommended Practices*, above n 38, recommendation XII(A).

¹⁷⁶ ICN, *Recommended Practices*, above n 38, recommendation XII(B).

¹⁷⁷ ICN, *Recommended Practices*, above n 38, recommendation XII(C).

Review of merger control provisions

The final set of recommendations calls for the periodic review of merger control provisions and consideration of reforms promoting ‘convergence towards recognized best practices.’¹⁷⁸ In addition to assisting convergence, it is important that the threshold levels for merger control be periodically reviewed to account for inflation or substantial changes in the market.¹⁷⁹ This is recognised, albeit briefly, by the working group in their comments to these recommendations which, if adopted, should see increased convergence of procedural requirements for merger review.

The Need for Further Action

The recommendations adopted by the ICN membership are positive in that they address most of the problems currently associated with multi-jurisdictional mergers. However, as noted by Randy Tritell at the second annual conference, recommended practices are meaningful only if they are implemented.¹⁸⁰ In this respect, the Merger Streamlining Group study of recommendations adopted at the first ICN conference concluded that fewer than

‘10 percent of responding jurisdictions have made changes to laws and regulations although some 30 percent have indicated that changes are planned or under consideration.’¹⁸¹

Nevertheless, the trend appears to be changing, albeit slowly.¹⁸² As indicated earlier the EU has recently changed its merger notification timing requirements so that they now

¹⁷⁸ ICN, *Recommended Practices*, above n 38, recommendation XIII(A) and (B) (originally recommendation VII, then recommendation XI).

¹⁷⁹ For example, one of the criticisms of the United States is that its thresholds have not kept pace with inflation.

¹⁸⁰ See Fox and Janow, above n 47, 14.

¹⁸¹ *Ibid* 33-34. See further Rowley and Campbell, above n 80.

adhere to the ICN recommendations and Australia has also made changes to reflect some of the ICN's recommendations.¹⁸³

One of the main barriers to change in response to the ICN recommendations is that many of the recommendations themselves are sufficiently vague that nations might honestly claim adherence by following the letter if not the spirit of the recommendations.¹⁸⁴

Another, perhaps more important, limitation on the ICN's recommendations is with the nature of the 'agreement' itself as simply a set of 'recommendations' with no binding force (so far as it is possible for a document to have 'binding' force in international law). This is highlighted by the use of the word 'should' (as opposed to 'must') in almost all recommendations. Consequently, the recommendations lack any potent force at governmental level. Indeed, despite the adoption of these best practices, little *substantial* action has been taken by governments to give effect to their implementation.¹⁸⁵ Thus, it is mainly in relation to those aspects of merger review within the purview of the relevant authorities that we have seen some real movement toward conforming with these best practices.

In the past, best practice recommendations have proved impotent in their attempts to bring about substantial change to the merger review processes to which multi-jurisdictional mergers are subjected. The ICN recommendations seem more promising given the extensive and expanding membership and the increasing recognition that the current system is unsatisfactory for all concerned. It is still too early to determine whether the ICN's best practice recommendations will result in any meaningful change for parties and regulators or whether they will be relegated to the now extensive pile of "best practice"

¹⁸² See *Implementation of the ICN Recommended Practices*, above n 85, 2.

¹⁸³ See *Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings* [2004] OJ L 24/1 and ACCC, *Guideline for Informal Merger Review*, above n 109.

¹⁸⁴ See further, Fox and Janow, above n 47, 33.

¹⁸⁵ See further see Rowley and Campbell, above n 99. Note that there are exceptions to this trend: *Implementation of the ICN Recommended Practices*, above n 85, 11.

endeavours that have gone before. It is suggested the latter is more likely after, perhaps, an initial period of positive rhetoric and modest change.

Something more solid than a mere 'recommendation' is needed if there is to be meaningful reduction of the burdens associated with multijurisdictional merger review in the short term. It is to this end that the following proposals are put forward.

Proposals for further reform

There is no single solution to the problems associated with multi-jurisdictional merger review. Agreeing upon a common filing form, a set of best practices, a timetable for review, or a procedure for cross-border co-operation will not, in isolation, see an appreciable reduction in the regulatory burden. On the other hand, it must also be accepted that not all problems or inefficiencies associated with international merger regulation can be overcome so long as a system of sovereign states remains. This is not a cause for concern and remains the case for many areas of international private and public law.

Substantive differences in merger review are likely continue for the foreseeable future and the nature of judicial review of mergers also varies between states. For example, in some jurisdictions the regulator is the ultimate arbiter – in others the regulators play only an initial role and mergers are challenged in the courts or decided by government officials (ministers) who may have an overriding national interest reason for approving or declining a merger. These differences reflect different administrative and judicial structures adopted by states and an overarching desire for countries to approve or block mergers which positively or adversely, respectively, impact on their subject views of 'national interest' which can frequently change as a result of changes in government. These problems are

not, however, the cause of the most significant burdens for parties and regulators, and the fact that they cannot all be ‘solved’ should not deter endeavours to remedy those problems that can.

A combination of endeavours is required if meaningful reform is to be achieved. The following recommendations for reforms have the potential to be achieved in the relatively short term¹⁸⁶ and could, together, significantly alleviate the cost of multi-jurisdictional merger review for parties and regulators and other parties to whom the cost is passed on. Some have already been achieved, at least to a degree, through the ICN’s recommendations. However, the first two suggestions, not fully accomplished by the ICN’s recommendations, are by far the most important and, without agreement or convergence on the other aspects, would themselves substantially reduce the regulatory burden currently experienced.

1. Common form for initial (stage 1) notification
2. Binding agreement on thresholds for notification
 - a. Initial thresholds
 - b. Additional nexus requirements for foreign-to-foreign mergers
3. A binding agreement on timeframe for filing mergers
4. Best practices agreement on timeframe for reviewing mergers
5. Best practices agreement on transparency in merger review
6. Best practices agreement on the facilitation of co-operation between Member States where notified multi-jurisdictional mergers raise competition concerns

¹⁸⁶ This is to be contrasted with calls for substantive harmonization which does not appear to be achievable in the short term and is not, in any event, necessarily a desirable outcome.

The first proposal for reform is the establishment of a common form for initial notification. This is made possible by the fact that there is often a ‘common core’ of information required by authorities to make an initial assessment on whether a merger is likely to raise competition concerns. Despite this commonality a multitude of different forms and requirements currently impose significant and unnecessary transaction costs on parties.¹⁸⁷ A common notification form for initial filing is a sensible, meaningful and attainable response to the inefficiencies currently experienced by parties proposing to merge.¹⁸⁸ At least in the initial phase of a merger investigation, the economic issues that arise are substantially similar in all jurisdictions,¹⁸⁹ despite differences in substantive laws. ICN member authorities have already accepted that informational requirements for initial notification be limited to that necessary to determine ‘whether the transaction raises competitive issues meriting further investigation’¹⁹⁰ and that they ‘should elicit the minimum amount of information necessary to initiate the merger review process.’¹⁹¹ Consequently, for parties adhering to the ICN recommendations, a common form for the initial vetting process would be consistent with these objectives and at the same time result in a significant reduction in administrative burdens faced by parties to mergers and would also make cross-border consultation easier.

Where jurisdiction-specific information is required (such as domestic turnover) this could be incorporated by means of an annex for each of the jurisdictions¹⁹² in which notification is required. This would allow for a common core of information to be provided in multiple jurisdictions while also facilitating the provision of domestically focussed information, thus

¹⁸⁷ OECD, *Report on Notification of Transnational Mergers*, above n 50, 2 and Davey and Barker, above n 3, 122.

¹⁸⁸ See, for example, J William Rowley and A Neil Campbell, ‘Multi-Jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?’, < http://www.mcmillanbinch.com/Upload/Publication/Multi-Jurisdictional%20Merger%20Review_with%20attach_April%201999.pdf> at 24 January 2005.

¹⁸⁹ PriceWaterhouseCoopers, above n 4, 26.

¹⁹⁰ ICN, *Recommended Practices*, above n 38, recommendation V(A).

¹⁹¹ ICN, *Recommended Practices*, above n 38, Working Group comment 1 to recommendation V(A).

¹⁹² OECD, *Report on Notification of Transnational Mergers*, above n 50, 2. See also Whish and Wood, above n 65.’

ensuring that countries receive the information necessary to determine potential domestic impact without losing the benefits of a common filing form.

As the ICN has recognised, it is also important that burdens of translation be limited in the initial stages of an investigation, so that while the cost of translating a common core of information into multiple language requirements, where multiple jurisdictions are required to be notified, is a legitimate cost of doing business,¹⁹³ it would be possible, and appropriate, to allow the majority of supporting documents to be annexed in the language of the business involved, provided summaries of each document are translated into the preferred language.¹⁹⁴

A common filing form of the type proposed would provide meaningful relief to business burdened with multi-jurisdictional filings. It would ensure that in most cases mergers unlikely to raise any serious competition concerns would be relieved from the burden of divergent and copious amounts of informational requirements at significant cost.

The second essential component of any reform endeavour is a binding threshold agreement. While states have legitimate interest in pursuing a competitive climate that is best for their unique economy, and this might require *different* threshold levels for notification, an agreement *requiring* thresholds to be set at a level that reflected the potential for mergers to contravene the substantive law could provide an appropriate benchmark against which parties determined their thresholds. Were this to form part of a binding treaty agreement between states then, despite the fact it does not prescribe the level of thresholds, governments could be held more accountable for the threshold tests that they adopt and could be required to regularly review threshold levels and/or put in

¹⁹³ Currently, in OECD jurisdictions alone, there are 19 different languages prescribed.

¹⁹⁴ See further ICPAC Report, above n 3, 16. This would be consistent with ICN recommendations and already occurs in a number of jurisdictions.

place an automatic mechanism for updating the thresholds to ensure they kept pace with inflation and the changing economic climate.

The next element of the proposed reform package is a binding agreement on timeframes for the *filing* of mergers. In this respect the ICN's existing recommendations are commendable. It is suggested, however, that the prospect of these recommendations being applied in the long term would be significantly enhanced by their inclusion in a more formal document which would then permit parties to prepare and file in all necessary jurisdictions at the same time.

In relation to the *review* of mergers by authorities, the ICN's recommendations relating to timeframes, when combined with the associated working group comments, form an appropriate basis for a best practices agreement. While formal agreement could, and should, be reached on a review period for the initial stages of investigation, the setting of specific time limits for review of mergers raising competition concerns is perhaps unattainable in the short term due, in part, to the different administrative and legal frameworks in which authorities operate. Consequently, an agreement incorporating a set of non-binding and variable time frames, depending on size and complexity of the merger,¹⁹⁵ should be established to provide guidance to authorities and parties on appropriate time-frames for review. The agreement should also mandate that authorities review and, where necessary, revise their timelines for review.

Transparency is the next essential ingredient for effective reform. In this respect, the ICN's recommendations on transparency should be incorporated in a more formal document to improve accountability where transparency continues to be a problem.

¹⁹⁵ See ICPAC Report, above n 3, 14-15.

Finally, the increasing number of cross-border mergers necessitates effective co-operation.¹⁹⁶ To a degree this already occurs. Significant discussion between many countries in relation to concerns over potentially anti-competitive multi-jurisdictional mergers is common.¹⁹⁷ Less frequently, work-sharing may occur on a case-by-case basis.¹⁹⁸ A focussed agreement on how to deal with multi-jurisdictional merger review, incorporating confidentiality procedures, would assist in facilitating timely dialogue between reviewing authorities. Developing further, more specific disciplines to guide the review of mergers with significant transnational or spillover effects would also constitute a valuable means of reducing both the parties and the authorities' burdens.¹⁹⁹

Conclusion

There is a need for convergence in the procedural regulation of international mergers. The public funds currently spent scrutinising thousands of merger proposals that have little or no prospect of impacting on competition should be re-allocated. Cost and time savings experienced by business might also be passed on to the community through either higher shareholder dividends or lower priced products.

The ICN's recommendations in relation to merger notifications and procedures represent an important step toward achieving this convergence. They are, however, limited by their very nature as 'recommendations' and not more solid treaty obligations. The ability of a vast number of competition authorities to develop and agree to these recommendations does, however, suggest that the time might be ripe for more formal endeavours to achieve procedural convergence in the regulation of multi-jurisdictional mergers. Formal agreement on procedural convergence is not only desirable, it is a realistic means by which the

¹⁹⁶ Davey and Barker, above n 3, 7.

¹⁹⁷ Ibid 24.

¹⁹⁸ See ICPAC Report, above n 3, 7-8:

¹⁹⁹ Ibid 4

regulatory burden currently experienced might be mitigated. The focus on procedural, rather than substantive, convergence means that countries need not abandon underlying goals of merger regulation.

A more formalised agreement incorporating all or most of the ICN recommendations, combined with the proposals for further reform suggested in this paper would serve to significantly reduce the financial and time burdens and increase the certainty associated with international merger regulation.