



Happy birthday, ICN

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Ten years ago this week, members of the International Competition Network adopted the first Recommended Practices, on merger notification and review procedures, at the ICN's first annual conference in Naples, Italy.

The Recommended Practices are non-binding aspirational statements designed to make merger review more efficient and effective and minimize unnecessary burden on reviewing agencies and merging parties alike. After the ICN reaches consensus on them, it is left to the individual competition authorities to decide whether, how, and when to implement the recommendations. Agencies implement the practices through efforts such as legislative change, rulemaking, internal practice, and speeches, as appropriate. Because so many ICN members had merger regimes that did not conform to the practices, and because the practices are non-binding, few if any observers could have anticipated that in ten years these Practices would become, in effect, the industry standard.

Indeed, the summary report from that conference highlights the discussion around these first Recommended Practices, noting “While complimenting the subgroup on its enterprise, a European practitioner queried its limits: the principles fix a baseline that all jurisdictions accept; jurisdictions can go above the baseline; but since voluntariness is emphasized, they can also go below it.”[i] However, in tracking ICN member use and conformity with the Recommended Practices over the past decade, the network is unaware of a single member that introduced reforms transformed a previously ICN-compliant merger regime into a non-compliant one. Moreover, the majority of members who have had major reforms have introduced ICN-conforming changes.[ii]

The ICN's new chair, Eduardo Perez Motta [iii] , gave a speech at the International Bar Association's 16th Annual Competition Conference, highlighting both the considerable success of the Recommended Practices, and suggesting new ways forward for implementation of existing Practices, and development of new Practices. The key elements of his speech are reproduced here.[iv]

### **Developing Best Practice**

In addition to 13 recommendations on merger notification and review procedures, the ICN has developed Recommended Practices for Merger Analysis, as well as on the assessment of dominance and the application of unilateral conduct rules to state-created monopolies. Noting that the most recent set of ICN's Recommended

Practices was adopted more than two years ago, Perez Motta encouraged all of the ICN working groups – on cartels, mergers, unilateral conduct, agency effectiveness and advocacy – promote convergence by creating, where possible, Recommended Practices in new areas.

In developing “Recommended Practices”, ICN member agencies work hand-in-hand with nongovernmental advisors (NGAs) – non-governmental experts including private practitioners, economists, academics, representatives of international organizations, and industry and consumer groups. The proposed practices are vetted first with participants in the working group covering the relevant substantive area (e.g., mergers, unilateral conduct). Once the working group and the ICN’s Steering Group have approved the proposed Recommended Practices, the Practices are vetted with ICN’s 123 member agencies, and submitted for approval at the ICN’s annual conference. According to Perez Motta this collaborative and open process, unique in the competition world, provides the Practices with a legitimacy that facilitates their implementation.

Interestingly, Perez Motta also noted that the drafting process has turned out to be a key part of the norm diffusion process as a working group debates a particular idea or technique, each participant understands better the pros and cons of the argument.

### **Implementation of Best Practice**

A significant observation Perez Motta made about the implementation of ICN practices is that reforms, whenever they occur, are nearly always in the direction of ICN’s standards. In the past decade, no ICN member who had conforming laws and regulations introduced reforms that moved the jurisdiction out of conformity with the ICN Recommended Practices. Perez Motta estimated that fewer than 25 percent of ICN members have had a major legislative overhaul to their competition regime and maintained or added a non-conforming provision.

His second observation is that for the merger procedures recommended practices, which are monitored most closely because their implementation is objectively quantifiable and thus more readily tracked, more than a third of the ICN’s members with merger control regimes fully conform, and more than three quarters have made changes in the past decade that bring their merger procedures into at least partial conformity. The merger working is in the process of developing a

methodology to measure conformity with the analytical recommended practices, and hopes to track implementation of these practices as well, as one way of measuring the ICN's effectiveness.

In terms of real world effects, while the number of countries with mandatory merger control has increased by about thirty percent in the past decade, Perez Motta claims that the costs and burdens of merger notification and review in many ICN member jurisdictions have decreased. The general landscape for multijurisdictional merger review, impossibly difficult to navigate a decade ago now appears challenging, but manageable. Elements such as filing, initial and phase 2 review periods – these are more frequently on similar timetables across jurisdictions than they were ten years ago.

### **Challenges Ahead**

Of course, considerable challenges to implementation remain. Perez Motta intends to focus the majority of his efforts during his tenure as chair to assisting members who want to introduce reforms but face significant obstacles. He explains:

“Some members, particularly younger agencies, may need help targeting areas for reform. We are developing self-assessment tools to help agencies identify divergences from ICN Recommended Practices. The more common issue, however, is that members that have identified the reforms face difficulties in realizing them. Since consumers are scattered and interest groups resisting reforms are often concentrated and powerful – as I know from my own experience at the CFC – it can be difficult to build support for reforms. But we should not underestimate the potential influence of 123 agencies speaking with one voice to support one of our own, on the basis of well-founded and time-tested best practices.

With this in mind, I am working with the ICN's Steering Group to further develop our process to assist ICN members when they seek external support for domestic reforms. Often, this support will take the form of a letter describing the proposed reforms' conformity with international best practice as reflected in the ICN's Recommended Practices, but it could also involve presentations or in-country support. This growing advocacy role for the ICN with our own members represents a significant step forward from the ICN's historically cautious approach in its early years, but builds on recent steps in this direction both by my predecessor, John

Fingleton, as well as those of Bill Kovacic, as ICN Vice Chair. Earlier this summer we provided public comments on the proposed reforms to the merger review regime in Peru, and my colleagues at the agency tell me this support was important in explaining to legislators that the changes would bring Peru into conformity with international best practice.

Taking on a more active role when members request assistance on specific policy initiatives not only supports competition advocacy, but it also helps crystallize procedural and substantive convergence on those topics on which the ICN has agreed on recommended practices, and thus disseminates the very norms that are the topic of our discussion this morning.”

This significant advocacy role for the ICN – the network advocating for its own best practices – is a major step forward in meeting the challenges to implementation.

A second challenge to implementation, and one Perez Motta suggests may be more difficult to address directly, arises when there is convergence in law, but challenges in application. He cites as an example that most competition agencies now use some form of the substantial lessening of competition standard for merger review. Application of this standard, however, varies considerably. Availability and cost of data, economic expertise within the agency, and other factors influence the application. The ICN is trying to address the application of Recommended Practices through various means. One way is by creating related work product – handbooks, manuals, templates, checklists – that elaborate on the application of the standards. Staff-level workshops are another important way the network addresses gaps between theory and application. The ICN also recently launched a project to create a virtual university. Relying on existing ICN work product as a guide, the ICN’s “Curriculum Project” has produced training modules that incorporate theory and implementation. For example, the market definition module covers principles of market definition as well as the information agencies should try to obtain and techniques to obtain it.

### **A Call to Arms**

While applauding the very good success the ICN has had to date, Mr. Perez Motta used the occasion of the anniversary of the ICN Recommended Practices as a call to arms. He urges:

“Even with all of these good efforts underway, we all need to be thinking very carefully about the ICN’s longer term efforts to promote convergence. While we have had impressive results with the Recommended Practices we created on merger review procedures, it is notable that the most recent set of ICN’s Recommended Practices was adopted more than two years ago. Perhaps because we have not begun drafting others, some observers say the ICN is losing momentum. Other critics say having picked the low hanging fruit, the ICN is not prepared to tackle more difficult topics. While I would argue neither observation is correct, I do we believe we can and should do more to promote convergence by creating, where possible, Recommended Practices in new areas. Even with all of these good efforts underway, Perez Motta contends the ICN needs to be thinking very carefully about longer term efforts to promote convergence and highlighted several projects with great potential on the horizon.”

Mr. Perez Motta cited the new ICN projects on investigative process, international cooperation, and courts and judges, as projects holding great promise for future flagship projects. He also explained in greater detail a project envisaged in his own vision statement for the ICN, which will increase the visibility and importance of competition policy to an audience beyond competition enforcers and practitioners. He envisions the project will include developing messages on the importance of well-functioning markets in formulating economic policy, on the role of government in markets, and perhaps sector-specific positions on competition policy that draw on existing ICN work. In prioritizing this work, Mr. Perez Motta seeks to broaden the audience for the ICN’s work and increase awareness of the importance of competition considerations in formulating economic policy.

Mr. Perez Motta is the first to recognize the many challenges the ICN will face in moving forward on these projects, but believes ICN members and NGAs and the broader competition community is ready to meet this challenge.

**Happy birthday ICN. Here’s to many more.**

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*i* <http://www.antitrustinstitute.org/files/229.pdf>.

*ii* For a detailed assessment of conformity and implementation, see Maria Coppola and Cynthia Lagdameo, *Taking Stock and Taking Root: a closer look at*

*implementation of the ICN Recommended Practices for Merger Notification and Review Procedures, The International Competition Network At Ten, Paul Luard (ed.), Intersentia Ltd. (2011), available here:*

*<http://www.ftc.gov/oia/speeches/coppolaLagdameoicn.pdf>.*

*iii President of the Comision Federal de Competencia, Mexico, and Chair of the Steering Group of the International Competition Network*

*iv The full text of the speech is available at:*

*<http://internationalcompetitionnetwork.org/uploads/library/doc837.pdf>.*