

**INTERNATIONAL COMPETITION NETWORK
MERGER WORKING GROUP
2009-2010 WORK PLAN**

MISSION

The mission of the ICN Merger Working Group is to promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multi-jurisdictional merger reviews.

The Working Group continues to make great strides in advancing this mission. A description of work completed in the following areas is attached as an annex:

- merger notification and review procedures; and
- the analytical framework and investigative techniques for merger review, including recommended practices for merger analysis and other guidance on the substantive standards for investigating mergers, the criteria for applying those standards, and the tools and techniques used for developing reliable evidence.

The U.S. Department of Justice, Antitrust Division and the Irish Competition Authority co-chair the Merger Working Group. The Working Group includes representatives from antitrust authorities from many geographic regions and stages of development. The Working Group also includes representatives from the legal, economic, academic and business communities. ICN members and non-governmental advisors interested in participating in the projects described below are encouraged to contact the Working Group co-chairs.

PROJECTS FOR 2009-2010

- **Convergence on Substantive Merger Analysis.** The Working Group will continue work on developing recommended practices on substantive merger analysis issues, drawing upon the analytical points in the Merger Guidelines Workbook and those common to ICN members' own guidelines. In 2009-2010, the Working Group plans to develop additional recommended practices on market definition and the analysis of failing firm/exiting asset issues.
- **Workshop on Substantive Merger Analysis and Investigative Techniques.** The Working Group will give serious consideration to holding a workshop on substantive issues in merger analysis and investigation to continue its series of workshops that began in Washington (2002) and continued in Brussels (2004), Dublin (2007), Pretoria (2007), and Taipei (2009). The merger analysis workshops seek to promote use of the concepts in the Recommended Practices for Merger Analysis, Merger Guidelines Workbook, Investigative Techniques

Handbook, and Merger Remedies Review Report by staff lawyers and economists, and to familiarize participants with the tools and techniques used in merger investigation and analysis. The workshop may also cover issues relating to the Guiding Principles and Recommended Practices for Merger Notification and Review Procedures.

- **Possible Teleconferences on Merger Issues.** The Working Group will consider conducting one or two teleconferences on current merger topics that are agreed upon by the group.
- **Implementation of Guiding Principles and Recommended Practices for Merger Notification and Review Procedures.** The Working Group will continue to promote conformity with the Guiding Principles and Recommended Practices, including assisting antitrust agencies with implementation efforts or new merger review laws/regulations and possible additional work addressing specific issues raised by the recommended practices.
- **Web Links and Templates.** Encourage and work with members to keep up-to-date links to national merger review laws and related materials, and to responses to the template of questions about the merger review system.

ANNEX
Merger Working Group
REVIEW OF WORK FROM INCEPTION THROUGH 2009 ANNUAL CONFERENCE

- **Guiding Principles and Recommended Practices.** The subgroup has developed eight Guiding Principles and thirteen Recommended Practices for merger notification and review, which the ICN has adopted at its annual conferences. The Principles and Practices are available at:
<http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.
- **Recommended Practices for Merger Analysis.** The Working Group, with input from non-governmental advisors, began work on developing Recommended Practices on substantive merger analysis issues in 2007-08. At the 2008 ICN conference in Kyoto, the ICN adopted three Recommended Practices for Merger Analysis developed by the Working Group on: 1) the legal framework for competition merger analysis; 2) the use of market shares, thresholds and presumptions; and 3) entry and expansion. The Recommended Practices are available at:
http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf.

In 2008-09, the Working Group completed three additional draft recommended practices for consideration at the 2009 ICN conference in Zurich. These proposed Recommended Practices cover: 4) competitive effects analysis in horizontal merger review; 5) unilateral effects; and 6) coordinated effects.

- **Merger Guidelines Workbook.** The subgroup prepared a checklist of topics that the authors of new or revised merger guidelines may wish to cover, with an explanation as to why those topics have value in merger assessment and suggestions as to how those topics might be assessed in practice. The workbook is available at:
http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf.
- **Handbook on Investigative Techniques for Merger Review.** The Handbook is designed to inform ICN members of the various tools and techniques used in merger investigation, to help members organize and use their tools more efficiently, and to provide for an effective process for the evaluation of evidence. The first chapter summarizes the findings of a survey of members carried out in 2003, and reflects agency practice. The remaining chapters discuss how to plan a merger investigation, developing reliable evidence in merger cases, economic and econometric analyses, the benefits of including economists in merger review, and a private sector perspective on merger review. The Handbook is available at:
http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Investigative_Techniques_Handbook.pdf.

- **Merger Remedies Review Report.** The subgroup prepared a report that provides practical guidance and outlines key principles and the range of tools in the use of merger remedies. The report is based on and illustrated by remedy practice in a variety of jurisdictions. It is available at: http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Remedies_Study.pdf.
- **Workshops on Merger Notification and Procedures.** In March 2006, the subgroup held a two-day workshop in Washington, DC, to promote implementation of the Guiding Principles and Recommended Practices. In March 2008, the subgroup held a second such workshop in Brno, Czech Republic, hosted by the Czech and Slovak competition agencies. Workshop topics included setting notification thresholds, initial information requirements, review periods, remedies, and transparency, confidentiality, and procedural fairness.
- **Substantive Issues in Merger Analysis Workshops.** In April 2007, the subgroup held an interactive workshop for staff lawyers and economists in Dublin designed to promote greater understanding of the ICN's *Merger Guidelines Workbook* and *Remedies Report*. Using a hypothetical merger case, role playing, plenary and breakout sessions, the workshop encouraged the exchange of practical experience among members. Regional workshops covering substantive issues in merger analysis also were held in Pretoria in 2007, and in Taipei in March 2009.
- **Investigative Techniques Workshops.** The subgroup held two International Merger Workshops for staff lawyers and economists, in Washington, DC, in November 2002 and in Brussels in October 2004. At the workshops, members learned about the different practices, tools and techniques used to investigate mergers, and gained a better understanding of their advantages and disadvantages. The materials from the workshop have been compiled to enable agencies to conduct in-house investigative techniques training sessions. These materials are available at: <http://www.internationalcompetitionnetwork.org/index.php/en/workinggroups/merger/investigation-and-analysis>.
- **"Take-Home" Version of the Workshop on Substantive Issues in Merger Review.** The Working Group adapted the materials used in the April 2007 Substantive Issues in Merger Review workshop to enable antitrust authorities to use the materials to conduct their own internal training. The workshop training materials aim to deepen participants' acquaintance with specific analytical issues in merger review and promote the Merger Guidelines Workbook and the Merger Remedies Study.
- **Web Link and Template Projects.** To facilitate ready access to merger laws and key features of merger review systems, the subgroup established links to national merger review laws and related materials, and to responses to a template of questions the subgroup developed about the merger review system. These materials are available at: <http://www.internationalcompetitionnetwork.org/index.php/en/publication/293>.

- **Implementation Report.** To facilitate implementation of the Guiding Principles and Recommended Practices, the subgroup gathered data on members' experiences with implementation and prepared a report identifying challenges agencies face in implementing the Practices and how they addressed these challenges. These materials are available at:
http://www.internationalcompetitionnetwork.org/media/archive0611/050505MergerNP_ImplementationRpt.pdf.
- **Implementation Handbook.** To facilitate further implementation of the Guiding Principles and Recommended Practices, the subgroup created a handbook containing examples of legislative provisions, guides, statements and notices, and press releases that conform to selected Principles and Practices. The handbook is available at:
http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf.
- **The Analytical Framework for Merger Review.** The subgroup produced a series of papers intended to serve as a baseline for comparing and contrasting substantive merger tests (substantial lessening of competition, dominance, public interest) for merger review. The subgroup then created a discussion paper examining basic issues involved in choosing a particular framework. These papers are available at:
http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/afguk.pdf.
- **Analysis of Merger Guidelines.** The subgroup worked with multinational teams of non-governmental advisors to prepare a set of analytical papers that describe the methodologies of a dozen members through analyzing their existing or proposed merger guidelines. The papers describe how these jurisdictions deal with five topics – coordinated effects, unilateral effects, market definition, efficiencies, and market entry. These papers are available at:
http://www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/amg_chap1_overview.pdf.
- **Information Requirements for Merger Notification.** This paper aims to assist agencies in comparing the approaches to pre-merger notification among some ICN members, and to help agencies planning to introduce or revise their notification forms or requirements in conformity with the ICN N&P Recommended Practice on Initial Information Requirements. The paper summarizes the various categories of information ICN members seek in the initial notification of a merger and describes approaches and mechanisms for flexibility that members use to obtain the information needed for merger review while minimizing unnecessary costs and burdens of notification, particularly for transactions that do not present material competitive concerns.

- **Defining Merger Transactions for Purposes of Merger Review.** Building on the Transparency Recommended Practice, this paper explores the various approaches jurisdictions have adopted to define the types of transactions that are potentially subject to notification and/or review. This paper is available at: http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/23ReportonDefiningMergerTransactionsforPurposesofMergerReview.pdf.
- **Setting Notification Thresholds.** Building on the Recommended Practice on Notification Thresholds, this paper explores the various approaches used to set notification thresholds and members' recent experiences with threshold revisions. The objective of the project is to provide guidance to agencies that plan to adopt or revise thresholds, in order to promote thresholds that are clear, understandable and easily administrable. The paper is available at: http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_2.pdf.
- **Model Confidentiality Waiver.** The subgroup developed a model form that merging parties and competition agencies can use to facilitate waivers of confidentiality protection for information that parties submit in the merger review process. The subgroup prepared an accompanying paper discussing the rationale for, content of, and use of waivers, along with illustrative agency waiver forms. These materials are available at: <http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>.
- **Comparative Study of Merger Notification Filing Fee Systems.** The subgroup studied merger notification filing fee systems worldwide and prepared a report discussing the various types of filing fee regimes. This report is available at: http://www.internationalcompetitionnetwork.org/media/archive0611/filing_fees_rpt.pdf.
- **Costs and Burdens Report.** The subgroup prepared a report on the costs and burdens of multijurisdictional merger review based on available studies and anecdotal information. The report is available at: <http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf>.