

ICN Framework for Merger Review Cooperation Survey Report (2018)

Introduction

ICN Framework for Merger Review Cooperation (“Merger Cooperation Framework”) was established in 2012 to promote effective and efficient multijurisdictional merger review cooperation among ICN member authorities (see **ANNEXIV**), and as of today, 59 authorities have registered to participate in the Merger Cooperation Framework.

In September-October 2018, as a part of “the Enforcement Cooperation Tools Project” (Project 4 of the MWG 2018-2019 Work Plan), MWG co-chairs took a survey of ICN member experience using the Merger Cooperation Framework and suggestions for improvement of the Framework to promote more efficient and effective information exchanges among ICN member authorities. A copy of the questionnaire is set out in **ANNEXII**. This paper reports on the results of the survey.

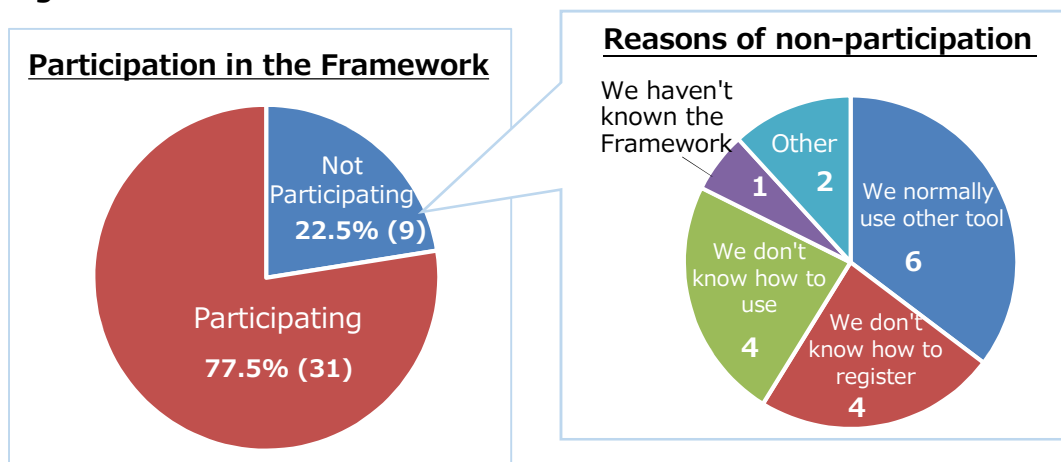
Survey Results

1. This survey was sent to the 78 competition authorities (including the 59 registered participants) and responses were received from 40 authorities (overall response rate: 51.3%). A list of all respondents and a simple tabulation of the survey results can be found in **ANNEX I** and **ANNEXIII**.

[Framework Participation](**Figure 1**)

2. Out of 40 authorities responding to the survey, 31 authorities (77.5%) are registered participants of the Merger Cooperation Framework and 9 are not.
3. The main reasons the 9 authorities have not yet registered to participate in the Merger Cooperation Framework are; (a) They have little need to use it since they normally use other tools (6 authorities), (b) They don’t know how to register (4 authorities), (c) They don’t know how to use it (4 authorities).

Figure 1



[Experience of using the Framework] (**Figure 2**)

4. However, most authorities who have registered to participate in the Merger Cooperation Framework, specifically, 22 out of 31 authorities (71%), have never used the Merger Cooperation Framework¹.

5. The main reasons for non-use by the 22 authorities who have not yet used the Merger Cooperation Framework are: (a) They have used other cooperation mechanisms such as personal channel with other competition authority (15 authorities), regional framework (9 authorities) and bilateral cooperation agreement/MOU (8 authorities), (b) They have nothing to request from other authorities (3 authorities), (c) They don't know how to use the Merger Cooperation Framework (2 authorities).

6. These responses suggest membership and active participation could be increased by promoting how to register and how to use the Merger Cooperation Framework.

7. At the same time, given availability of alternative cooperation mechanisms are pointed out as one of the major reasons for non-use, it seems that the Merger Cooperation Framework is particularly helpful for those agencies that do not have other cooperation mechanisms or for cases when existing cooperation

¹ In the result of the past survey which the JFTC conducted in 2013, the utilization rate of the Merger Cooperation Framework was 13.2% (5 out of 33 authorities). Therefore, it can be said the rate has been slightly increased in five years.

mechanisms do not provide contact points for cooperation.

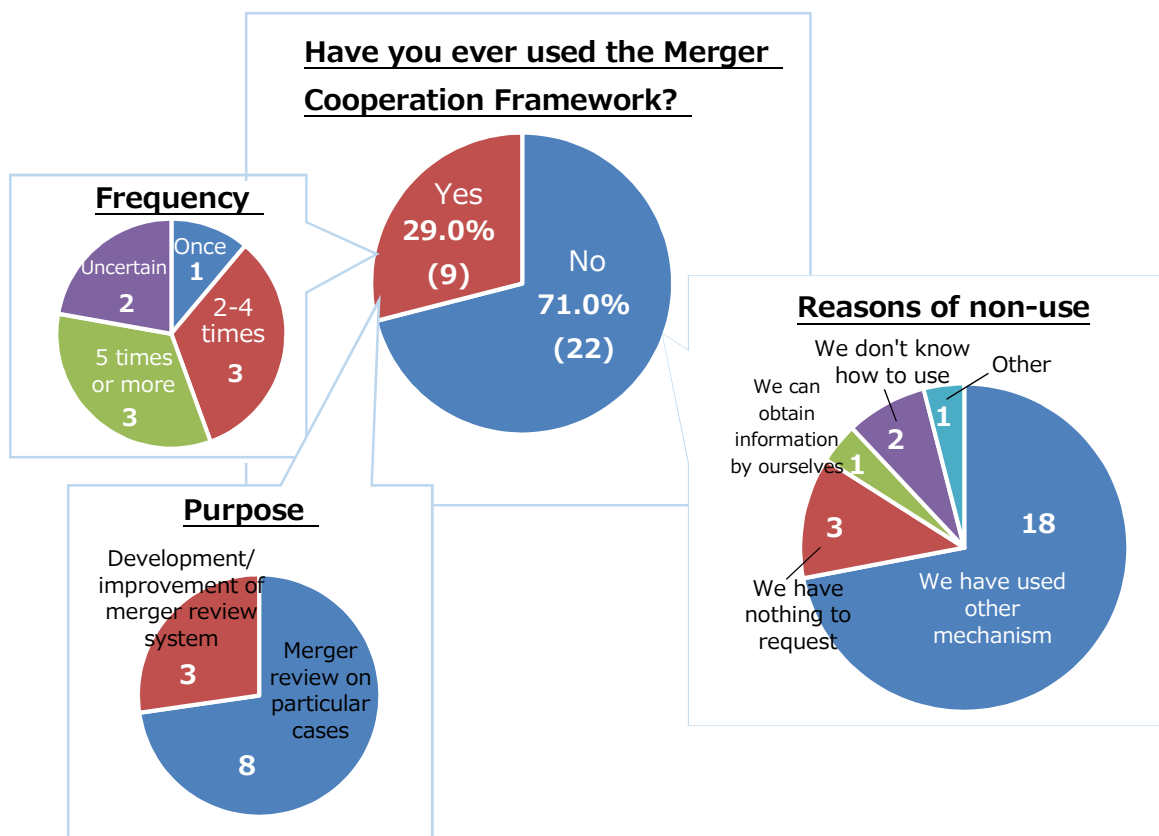
[Purpose of information exchanges using the Framework]

8. As for the 9 authorities, both younger agencies and more experienced agencies from around the world, who have used the Merger Cooperation Framework, the purposes of their information exchange were; (a) to use for merger review on particular cases (8 authorities), (b) to use as a reference for development or improvement of merger review system (3 authorities).

9. With regards to frequency, they have used the Merger Cooperation Framework for (a) 5 times or more (3 authorities), (b) 2-4 times (3 authorities), (c) once (1 authority), (d) uncertain number of times (2 authorities).

10. These answers may suggest that (a) the Merger Cooperation Framework is used for not only particular cases but also development or improvement of merger review systems, and (b) some agencies having experienced using the Merger Cooperation Framework tend to use it multiple times.

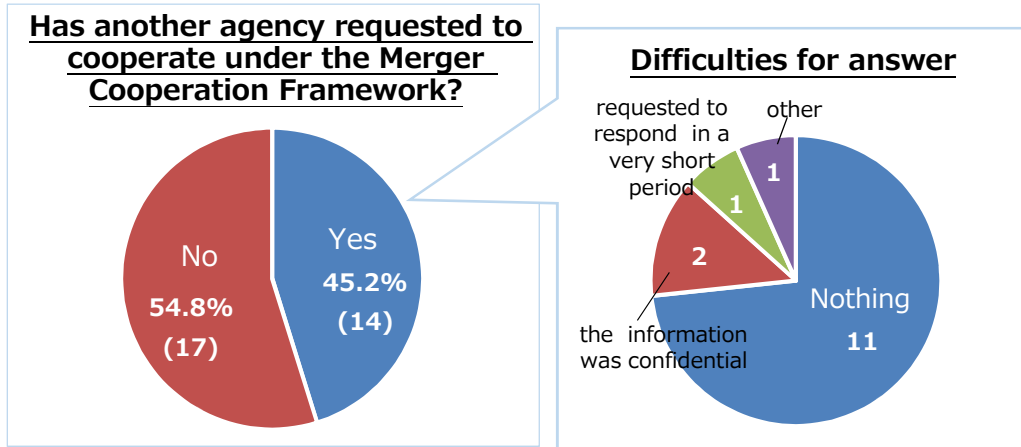
Figure 2



[Experience of receiving requests for information exchanges] (**Figure 3**)

11. On the other hand, about half of the responding authorities who participate in the Merger Cooperation Framework, that is, 14 out of 31 (45.2%), have received requests from other authorities to cooperate under the Merger Cooperation Framework. Most of these authorities, that is, 11 out of 14 (78.6%), answered that they had no particular difficulties responding to the requests.
12. The answers of the 3 authorities who reported having difficulties responding to requests were; (a) the information requested was confidential and they (or the request authority) did not have a waiver, and (b) they were asked to respond to the request in a very short period of time.
13. On the other hand, 25 out of 31 authorities reported having received information requests under other cooperation mechanisms than the Merger Cooperation Framework. The answers of 5 of these authorities who reported having difficulties responding to requests were as follows.
 - Sometimes information tends to be confidential, and parties may not have yet signed waivers, which makes in depth discussions difficult
 - Language can prove to be a challenge
 - In some occasions, it proves difficult to schedule the discussions at a time that is suitable for everyone.
14. One common practical difficulty that was pointed out both by agencies that used the Merger Cooperation Framework and by agencies that used other cooperation mechanism was that the requested information was confidential and could not be exchanged without waivers of confidentiality. Other practical difficulties include timing of information requests, language/time differences, etc.

Figure 3



[Examples of exchanging information using the Framework]

15. For gathering more detailed experience, an additional questionnaire was sent to 8 authorities who have requested other authorities to provide information several times under the Merger Cooperation Framework, and 5 out of 8 authorities responded to it.

16. According to the respondents of the additional questionnaire, the Merger Cooperation Framework has been used for;

- (a) enforcement cooperation for merger review on particular cases
- (b) gathering past case experience on novel issues
- (c) reference for development/improvement of merger review systems.

In enforcement cooperation, the authorities have exchanged information such as market definition, theories of harms and remedies. In addition, it was useful for gathering information of other jurisdiction's system for law amendment, etc.

17. Concrete examples of experiences in using the Merger Cooperation Framework are described below.

(a) Enforcement cooperation for merger review on particular cases

Case1:

During the review of the VIVO Engen merger, the Competition Authority of Kenya coordinated with another competition authority in the definition of relevant market(s) and also coming up with the remedies.

Case2:

Taiwan Fair Trade Commission contacted some other authorities under the Framework to request information about market definition, effect of foreclosure, merger type and the impact on original equipment manufacturer's service on a particular case for assessing innovation effect as well as sharing opinions on investigation of merging parties' competitors.

Case3:

In the pre-notification stage or the primary review of ASML/Cymer case, the Japan Fair Trade Commission made initial contacts with the US Department of Justice and the Fair Trade Commission of the Republic of Korea by using the contact list of the Merger Cooperation Framework, and exchanged information on time schedule and substantive issues such as scope of the relevant market².

(b) Gathering past case experience on novel issues

Case1:

In the majority of situation, the Competition Bureau of Canada have pre-existing contacts from past cooperation and/or bilateral agreements. The Merger Cooperation Framework would only typically be used on global transactions where the Competition Bureau of Canada is seeking to cooperate with an agency and does not have a contact at that agency. Given that this tool is used infrequently, there are no specific examples of instances where it was used. However, other agencies have contacted the Competition Bureau of Canada using this tool several times for inquiries related to policy decisions, past case experience with novel issues, etc.

² Please refer to page 5-6 of the Practical Guide to International Enforcement Cooperation in Merger (https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf)

Case2:

On a local bank merger review in Japan, the JFTC sent information requests to about 60 competition authorities participating in the Merger Cooperation Framework for gathering experiences of merger reviews of banks of other jurisdictions.

(c) Reference for development/improvement of merger review systems

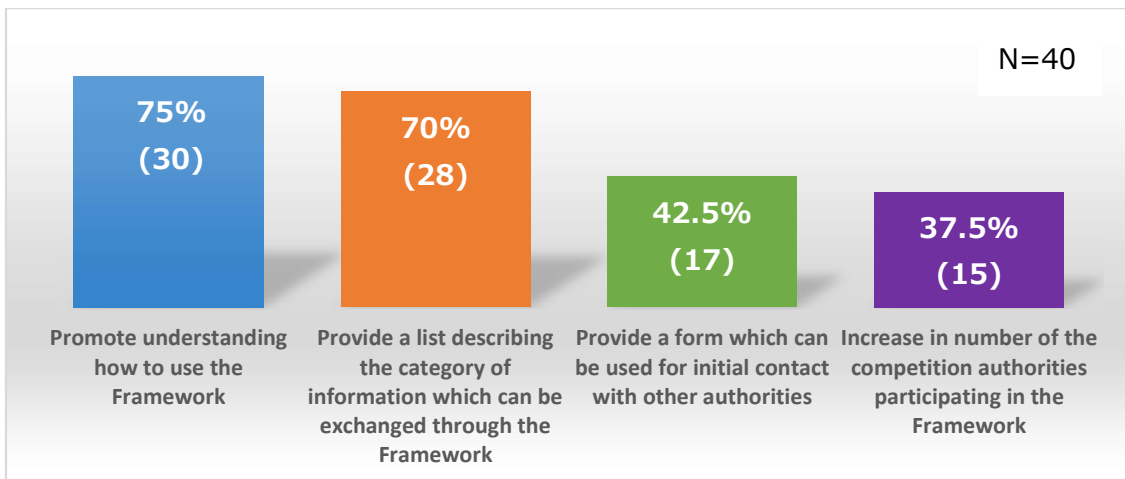
Case1:

In developing the Merger Threshold Rules, the Competition Authority of Kenya gathered information from another competition authority.

[Suggestions for improvements]

18. For improving the Merger Cooperation Framework, most authorities responding to the survey supported possible suggestions for improvements as shown on the **Figure 4**, below.

Figure 4 Support rate for improvement proposals



19. In addition, some individual suggestions are noted as follows.

- Include in the contact list whether the agency has an online public register of the mergers under review and include a link.
- Use direct contact details of case team or relevant division for merger review in the contact list.

- Review framework in light of recent MWG work to consider whether new language or new terms are appropriate for it.

Possible improvements suggested from the survey results

Though many authorities have registered to participate in the Merger Cooperation Framework, it has not been sufficiently utilized. As Figure 4 above suggests, there is room for improving it to allow member authorities to use it more easily and promoting merger enforcement cooperation.

In consideration of the suggestions from the survey results, possible improvements are as follows.

- Further promotion such as creating and distributing a flyer to raise awareness of the Framework and promote understanding of how to use it³ and to increase the number of competition authorities participating in the Framework.
- Create and provide a category list that indicates the types of information typically exchanged (with and without waivers of confidentiality) to help facilitate information exchanges.
- Create and provide an information request form which can be used for initial contact with other authorities, and which the requested authorities can easily grasp requested information.
- Include link to public case information in the contact list of the Framework.
- Update the Framework document to reflect the changes after the establishment of the Framework

³ Especially, it is important to promote advocacy towards not only staff of international section but also case handlers of merger review section.

ANNEX I Competition authorities responding to the survey

Europe	North America	Central and South America	Africa	Asia	Oceania
Austria	Canada	Barbados	Kenya	India	Australia
Bulgaria	USDOJ	Brazil	Mauritius	Japan	New Zealand
Czechoslovakia	USFTC	Caricom	South Africa	Mongolia	
Denmark		Colombia	Zambia	Philippines	
DG Comp		El Salvador	Swaziland	Taiwan	
Estonia					
Finland					
Germany					
Hungary					
Ireland					
Italy					
Netherlands					
Norway					
Poland					
Portugal					
Slovenia					
Spain					
UK					
Cyprus					
Serbia					

ANNEX II The ICN Merger Working Group Survey on the Merger Review Cooperation Survey

Introduction

In 2012, the ICN Merger Working Group (“MWG”) established the Merger Cooperation Framework to promote effective and efficient multijurisdictional merger review among ICN member authorities, and as of today, 60 authorities have registered in the framework membership.

(For more information about the Merger Cooperation Framework, please refer to: <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>)

As a part of “the Enforcement Cooperation Tools Project” (Project 4 of the MWG 2018-2019 Work Plan), MWG co-chairs are taking this survey for gathering experience of using the Merger Cooperation Framework and exploring further improvement of it. Based on the results of this survey, we will make a brief report at the next ICN Merger Workshop in Tokyo.

You are kindly requested to complete the following survey and send it **by 26 September 2018** to: icn-mergers@jftc.go.jp

If you have any questions, please contact us on the above email address.

Note: Unless otherwise described explicitly in each of the following questions, the name of the authorities answering each question will NOT be disclosed in the publicity materials to be prepared based on the results of this survey.

The respondent:

Country / Jurisdiction	
Competition authority	

A. Question for all MWG member authorities

1. Have you already participated in the Merger Cooperation Framework by registering your official(s) as liaison officer(s) in it?
- Yes → Please proceed to the questions of **C**.
 - No → Please proceed to the question of **B**.

B. Question for authorities NOT registered in the Merger Cooperation Framework

2. Why haven't you registered in the Merger Cooperation Framework?:

- we have NOT known the Merger Cooperation Framework;
- we have known the Merger Cooperation Framework, BUT:
→ Please indicate appropriate box (please check all that apply)
 - we do not know how to register in it;
 - we do not know how to use it;
 - we have no need to request member authorities to provide

information;

- we do not want to be requested by member authorities to provide information;

- we have little need to use it since we normally use other cooperation tools (e.g. regional cooperative frameworks, bilateral competition agreements, OECD Recommendation);
- other (please specify).

→ **Please proceed to the questions of D.**

C. Questions for the authorities already registered in the Merger Cooperation Framework

I. Experience of requesting other competition authorities

3. Have you ever requested other member authorities to provide information by using the Merger Cooperation Framework?
- Yes → Please proceed to the questions **4 through 7**.
 - No → Please proceed to the question **8**.

Those who answered **“Yes”** to the **Question 3** above.

4. How many times have you ever requested other member authorities to provide information by using the Merger Cooperation Framework?:

- once;
- 2 to 4 times;
- 5 times or more;
- Uncertain

5. Did you receive replies from the other authorities to your requests?

- Yes, we received replies at all times.
- Yes, but we did not receive replies to all our requests.
- No (Never)

6. For what purpose did you use the Merger Cooperation Framework? (please check all that apply):

- to use for merger review on particular case(s)
- to use as a reference for development or improvement of our merger review system
- other (Please specify) _____

7. Have you ever used OTHER information exchange tool(s) than the Merger Cooperation Framework to gather information from other competition authorities?

- Yes → What tool(s) you use for information exchange besides the Merger Cooperation Framework? (please check all that apply)
 - personal channel with other competition authority;
 - bilateral cooperation agreement / MOU;
 - FTA / EPA;
 - regional framework;
 - other international organization’s framework such as OECD Recommendation;
 - other (please specify); _____

→ In what kind of situation do you choose to use the Merger Cooperation Framework?

No

→ **Please proceed to the questions of II.**

Those who answered “No” to the Question 3 above (about use of the Framework).

8. Why haven't you use the Merger Cooperation Framework? (please check all that apply):

because we have used other cooperation mechanisms

→ What tool(s) you usually use for information exchange? (please check all that apply)

personal channel with other competition authority;

bilateral cooperation agreement / MOU;

FTA / EPA;

regional framework;

other international organization's framework such as OECD Recommendation;

other (please specify); _____

because we have nothing to request from other competition authorities;

because we have been able to obtain all information necessary to our merger reviews by ourselves;

because we don't know how to use the Merger Cooperation Framework or other cooperation mechanisms;

other (please specify)

→ **Please proceed to the questions of II.**

II. Experience of being requested information from other competition authorities under the Merger Cooperation Framework

9. Has another agency requested to cooperate under the Merger Cooperation Framework?

Yes → Please proceed to the questions **10 through 12.**

No → Please proceed to the question **12.**

Those who answered **"YES"** to the **Question 9** above

10. Have you ever faced difficulties to respond to the request(s)? Please indicate appropriate box below (please check all that apply):

- none in particular;
- we were not able to provide any information because the information requested was confidential and we (or the request authority) did not have a waiver;
- we were forced to respond to the request in a very short period of time;
- we had to spend a lot of time to respond due to the unclear or vague request;
- we had to spend a lot of time to respond due to the broad or burdensome request;
- other (please specify).

11. For what purpose did another member authority(ies) contact you using the Framework? s (please check all that apply):

- to use for merger review on particular case(s)
- to use as a reference for development or improvement of merger review system
- others (Please specify) _____

Question for the **all authorities** who answered to the **Question 9** above

12. Have member authorities contacted you to cooperate under OTHER cooperation mechanisms than the Merger Cooperation Framework?

- Yes → Have you ever faced difficulties/usefulness to respond to the request(s) under other cooperation mechanisms?
 - Yes
(please specify) _____
 - No
- No

→ **Please answer the questions of D.**

D. Other

13. Please provide comments and/or suggestions to improve the Merger

Cooperation Framework. Please indicate appropriate box below (please check all that apply):

- promote understanding how to use the Merger Cooperation Framework;
- provide a list describing the category of information which can be exchanged through the Merger Cooperation Framework (with/without waivers);
- provide a form which can be used for initial contact with other competition authorities;
- increase in number of the competition authorities participating in the Merger Cooperation Framework;
- other (please specify) _____

14. Regarding your answer to this survey, would you mind if MWG co-chairs disclose your authority's name on the report presented at the merger workshop?

- Yes
- No

ANNEX III Simple Tabulation of the Survey Results

Question		D	N	%		
Response rate		78	40	51.3%		
Q1 Number of participants in the Framework		40	31	77.5%		
※Among the authorities <u>NOT</u> participating the Framework,	Q2 Reason for not participating in the Framework	We have not known it		9	1	11.1%
		We have known it, but	We do not know how to register	9	4	44.4%
			We do not know how to use	9	4	44.4%
			We have no need to request other authorities	9	0	0.0%
			We do not want to be requested by other authorities	9	0	0.0%
			We normally use other cooperation tools	9	6	66.7%
		Other	9	2	22.2%	
※Among the authorities participating the Framework,	Q3 Authorities who have requested by using the Framework		31	9	29.0%	
	Q4 How many times?	Once		9	1	11.1%
		2~4 times		9	3	33.3%
		5 times or more		9	3	33.3%
		uncertain		9	2	22.2%
	Q5 Did you receive replies?	Yes	all	9	6	66.7%
		Yes	not all	9	3	33.3%
		No		9	0	0.0%
	Q6 Purpose of the information request	Merger review on particular case		9	8	88.9%
		Development or improvement of merger review system		9	3	33.3%
		Other		9	0	0.0%
	Q7 Have you ever used <u>OTHER</u> information exchange tool than the Framework	Yes	Personal channel	9	7	77.8%
			Bilateral agreement/MOU	9	7	77.8%
			FTA/EPA	9	1	11.1%
			Regional framework	9	5	55.6%
			Other international organization's framework	9	2	22.2%
			other	9	0	0.0%
No		9	0	0.0%		

Question					D	N	%	
※Among the authorities participating the Framework,	※Among the authorities <u>NOT</u> using the Framework,	Q8 Why haven't you use the Framework?	We have used other mechanism	Personal channel	22	15	68.2%	
				Bilateral agreement/MOU	22	8	36.4%	
				FTA/EPA	22	1	4.5%	
				Regional framework	22	11	50.0%	
				Other international organization's framework	22	7	31.8%	
				other	22	1	4.5%	
			We have nothing to request			22	3	13.6%
			We have been able to obtain all information by ourselves			22	1	4.5%
			We don't know how to use the Framework			22	2	9.1%
			Other			22	1	4.5%
			Q9 Authorities who have received information request(s) by using the Framework					31
※Among the authorities receiving request(s),	Q10 Have you ever faced difficulties to respond?	No			14	11	78.6%	
		Yes	the information was confidential and we did not have a waiver		14	2	66.7%	
			forced to respond in a very short period of time		14	1	33.3%	
			spend a lot of time to respond due to the unclear request		14	0	0.0%	
			spend a lot of time to respond due to the broad request		14	0	0.0%	
			other		14	1	7.1%	
		Q11 Purpose of the information request	Merger review on particular case		14	12	85.7%	
			Development or improvement of merger review system		14	10	71.4%	
			Other		14	1	7.1%	
		Q12 Have other authorities contacted you under <u>OTHER</u> cooperation mechanisms than the Framework?	Yes	faced difficulties to respond		31	5	16.1%
				faced no difficulties to respond		31	20	64.5%
No			31	4	12.9%			

Question		D	N	%
Q13 Suggestions to improve the Framework	Promote understanding how to use the Framework	40	30	73.2%
	Provide a list describing the category of information which can be exchanged through the Framework	40	28	70.0%
	Provide a form which can be used for initial contact with other authorities	40	17	42.5%
	Increase in number of the competition authorities participating in the Framework	40	15	37.5%

ANNEXIV

International Competition Network's Framework for Merger Review Cooperation

1. Background

Recognizing the benefits of cooperation in multijurisdictional merger review,⁴ and the desire to promote effective and efficient multijurisdictional merger review, the Japan Fair Trade Commission (JFTC) proposes the establishment of the “International Competition Network’s Framework for Merger Review Cooperation” (the framework).

2. Purpose of the framework

The non-binding framework is intended to facilitate effective and efficient cooperation between and among member agencies of the International Competition Network (ICN) reviewing the same merger, under their respective laws, through the identification of agency liaisons and possible approaches for information exchange among agency case teams. The JFTC proposes establishing this framework within the ICN given the breadth of the ICN’s membership and its mission, which includes facilitating effective international cooperation.⁵ The framework is to be established specifically within the ICN’s Merger Working Group, where it is to be informed and refined by existing and future Merger Working Group work, including member input on ways to promote merger review cooperation and feedback on the framework’s utility.

3. Participation in the framework

⁴ “Multijurisdictional merger” refers to a merger or an acquisition that is reviewed by multiple jurisdictions regardless of whether notification is mandatory or voluntary. Depending on the definition of merger in the legislation of each jurisdiction, transactions to which the merger regulation does not apply (e.g., joint ventures) may be included as the object of the cooperation in a specific case under this framework.

⁵ See the ICN’s Vision for its Second Decade at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>

(A) Framework participation is open to all ICN member agencies (“ICN members”) responsible for reviewing mergers. ICN members with experience in reviewing or that expect to review multijurisdictional mergers are particularly encouraged to join the framework.

(B) For merger cooperation between ICN members that is facilitated through framework contacts, it is intended that:

- (a) any exchange of information is subject to the laws and regulations governing the confidentiality of information of the agencies cooperating; and
- (b) participating agencies should, to the extent consistent with their respective laws, maintain the confidentiality of any information communicated to them during the course of a multijurisdictional matter.

(C) The framework does not create any legally binding rights or obligations for any of the ICN members participating in the framework. For example, multijurisdictional merger cooperation does not prejudice an agency’s independent decision-making with respect to its cases. An ICN member’s participation in the framework and related cooperation in no way binds their decisions or necessitates a particular outcome.

(D) The framework does not limit agencies from cooperating or otherwise providing assistance to one another pursuant to existing or future cooperation agreements, arrangements, or practices; nor does it require cooperation in any given case.

4. Framework contacts

(A) ICN members are invited to complete an information form to be submitted to the JFTC.

(B) The JFTC should, on behalf of the ICN Merger Working Group, create

and maintain a contact list of liaison officers for the framework based on the information provided by ICN members. The JFTC should make the contact list available to ICN members.

(C) Agencies should inform the JFTC of any changes to their liaison officer(s). The JFTC will update and circulate the contact list when there are new agencies that submit an information form or changes to liaison officer(s).

5. Contacting relevant agencies and exchanges of information

The following outlines steps that agencies may take to promote effective and efficient cooperation in the review of individual multijurisdictional merger matters pursuant to the framework. These steps, which address early contact of agencies reviewing the same merger and exchange of information among such agencies under their respective laws, are based on existing ICN workproduct.⁶ Cooperating agencies are not required to take any or all of these steps and may choose to have differentiated cooperation with individual cooperating agencies depending on, *e.g.*, the nature of each member's review of a particular merger and the competitive impact expected in the jurisdiction.

(A) Contacting agencies interested in the matter

It is generally desirable for an agency that reviews a multijurisdictional merger matter to be aware of other agencies reviewing the same matter as soon as practicable. An agency may use the contact list to contact counterpart agency liaison officers to determine whether they would be interested in cooperating on the matter under the framework.

⁶ See, for example, ICN Recommended Practices for Merger Notification & Review Procedures available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> and paper on Waivers of Confidentiality in Merger Investigations, including Model Waiver of Confidentiality, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>. Creation of further guidance may be developed by the Merger Working Group.

(B) Exchanges of information in individual matters

Once agencies choose to cooperate under the framework on an individual multijurisdictional merger matter, they may seek to exchange relevant information on the matter to the extent compatible with their laws and regulations as well as important interests, and within their reasonably available resources.

(a) Such cooperating agencies may exchange non-confidential information,⁷ which may include, for example, publicly-available information, review timetables, and/or staff views on markets, potential competitive effects, theories of harm and possible remedies (to the extent they do not involve confidential information), at any time that they consider appropriate and consistent with their respective laws and regulations. Individual agencies may choose to exchange different information with different cooperating agencies, depending on the nature of the cooperation the cooperating agencies consider appropriate in the individual matter.

(b) In instances in which an individual agency considers it useful for its investigation of a particular matter, it may seek waivers of confidentiality (“waivers”) from the merging and/or third parties to enable discussion of confidential materials submitted in connection with that matter to one or more cooperating agencies.⁸ Obtaining waivers from the merging and/or third parties may enable cooperating agencies to discuss and/or exchange confidential information that those agencies otherwise may be precluded from doing. Agencies should recognize that it may not be necessary or useful to request waivers in all cases or for use with each and every cooperating agency.

⁷ Confidential information refers to information which is defined as such by the law of the jurisdiction. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.

⁸ For information about waivers of confidentiality, including the ICN model waiver for merger investigations, see ICN, Waivers of Confidentiality in Merger Investigations, at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.