

Merger Working Group

2022-25 Working Group structure and 3 year plan

MISSION

The mission of the ICN Merger Working Group (MWG) 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 merger review; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of merger reviews.

ORGANISATION

The MWG leadership for 2022-2023 consists of co-chairs from the Administrative Council for Economic Defense - Conselho Administrativo de Defesa Econômica (Brazil CADE), the Konkurransetilsynet (Norwegian Competition Authority) and the EU DG COMP (European Union Directorate-General for Competition).

The MWG includes over 60 competition authorities from a variety of geographic regions and experience levels. The MWG also includes dozens of Non-Governmental Advisors (NGAs) from the legal, economic, academic, and business communities.

LONG TERM GOALS

- 1) Promote greater international cooperation and convergence in merger review standards, practices, and outcomes;
- 2) Enable members to improve the quality of their merger investigation and analysis;
- 3) Assist members to avoid imposing unnecessary burdens on agencies and businesses;
- 4) Encourage transparency in agency practice to increase predictability in merger review;
- 5) Pursue merger-related work that addresses the needs of ICN members, producing work of interest to merger case handlers, economists, lawyers, and policy officials; and
- 6) Promote familiarity, implementation, and use of MWG work product.
- 7) Have a goal that recognises the benefits from ensuring ICN tools and guidance are current, relevant, and fit for purpose (i.e. plans to review past work to meet this goal as appropriate intervals).
- 8) Consider including long term goals that outline how the working group will work towards improving international cooperation, given enhancing international enforcement cooperation is fundamental to the mission and purpose of the ICN.
- 9) Consider including long term goals that outline how the working group will work towards improving sustainability, given sustainability is a key focus of the ICN.

2022 – 2025 STRATEGIC PLANS

The 2022-2025 MWG work plan focuses on the following categories: a series of webinars on digital mergers and control data in merger reviews; creating new ICN work product and updating existing ones.

For the period 2022-2025 the MWG will seek to:

1. completing the comparative survey and report on control of data, market power, and potential competition in merger reviews.
2. hold up-to-date policy discussions and experience-sharing discussions on areas of common interest to members, such as digital mergers and data control in merger reviews by way of global or regional webinars.
3. Organize webinars to continue exploring merger enforcement issues and share best practices in topics such as digital mergers and control data in merger reviews.
4. Promote familiarity, implementation, and use of the MWG work product through tools such as:
 - a. Update of the ICN Recommended Practices for Merger Analysis, with more recent practices, on topics such as entry and expansion or market definition, to help members addressing the procedural aspects of notification and review.
 - b. Update of the ICN Recommended Practices on horizontal mergers to include the enforcement practice regarding the effects of mergers on innovation and dynamic markets.
 - c. Update the ICN Recommended Practices with a chapter on counterfactual, including the latest practices from national competition authorities.
 - d. Update the ICN Recommended Practices with a new chapter on non-horizontal mergers, focusing on non-horizontal theories of harms and including the latest practices in fields such as digital markets and other dynamic markets.
 - e. The MWG section of the ICN website;
 - f. ICN annual conference sessions and merger workshops.
5. Continue outreach and capacity building support for members and NGAs to boost active participation in the MWG and familiarity with its work, including assisting interested members with reform of merger laws, rules, and practices.

Merger Working Group

Annual Plan 2022 – 2023 Projects

Projects summary

Pursuant to ‘Working Group structure and 3 year plan’ the Merger Working Group will work on the following projects during the 2022-2023 ICN year.

- Project 1 Control of personal data, market power, and potential competition in merger reviews.
- Project 2. Digital Mergers
- Project 3. Update the ICN Recommended Practices with a new chapter on non-horizontal mergers
- Project 4. Update of the ICN Recommended Practices Chapter on Entry and expansion

Project 1: Control of data, market power, and potential competition in merger reviews (Lead by CADE)

The MWG will conduct a comparative and informational survey and prepare a report on the correlation between control of data, market power, and potential competition in merger reviews.

The project will focus on analyzing the methods adopted by competition authorities to assess the effects of the control of data on merger reviews, especially regarding the assessment of market power of the merging firms and the potential competition in digital markets.

The project will address how the control of data contributes to grant the companies market power, and how the control of data arising from mergers may strengthen the dominant position of incumbent firms, create barriers to entry for new firms, and/or eliminate potential competitors.

This new multi-year project reflects the ICN members’ interests expressed in the ICN 2020-2023 Working Group structure and 3-year plan, especially the long-term goals (2), (3), and (4).

Title	Control of data, market power, and potential competition in merger reviews
Project Description	Comparative survey and report on the correlation between control of data, market power and potential competition in merger reviews.
Outcomes	Final comparative report on the members’ regulation, theory and analysis on joint venture mergers based on the survey results.

Contact Details	Brazilian CADE (international@cade.gov.br)
Description of work/resources	Drafting team, MWG members, moderator and webinar speakers
Multi-year project?	Multi-year project
Facilitating effective enforcement cooperation	Sharing experiences and practices among MWG members and foster cooperation.
Promoting sustainability	By seeking to gather information about merger review in digital markets and to establish parameters to enhance competition while dealing with mergers, the project contributes to better understand the market and look for a more efficient merger control process, necessary for the promotion of competitive and sustainable markets.
Use of existing ICN materials	New project
Method for evaluating and measuring success	Member feedback on experiences in survey

Milestones	Activity
1. March 2022	Developing the outline of the report and draft the survey questionnaire (including MWG co-chairs' views).
2. May 2022	Circulating the survey to MWG members.
3. June 2022	Collecting the survey responses and summarising the responses.
4. July-August 2022	Preparation of the draft report.
5. September 2022	Webinar on control of data in merger reviews.
6. October 2022	Circulate the draft report to MWG members for comments.
7. January 2023	Present the final report to the Steering Group.

Project 2. Digital Mergers (Lead by KT and DG Comp)

The MWG will host a series of webinars on the topic "Digital Mergers" throughout the year, followed by webinar notes, and an overall report.

Topics include: (a) market definition (use of SSNIP, zero price, etc.); (b) competition analysis and theories of harm (network effects, tipping of the market, etc.); (c) use of empirical analysis/evidence (survey, GUPPI, etc.); and (d) remedies in digital markets.

The aim of the project is to share best practices among the ICN members on the covered topics, and to foster cooperation.

Title	Digital Mergers
Project Description	Share best practices on Digital Mergers.
Outcomes	Series of webinars on the topic "Digital Mergers" throughout the year, followed by webinar notes, and an overall report.
Contact Details	Norwegian KT (icn.mergers@kt.no) and DG Comp (COMP-ICN-MERGERS@ec.europa.eu)
Description of work/resources	MWG members, moderator and webinar speakers
Multi-year project?	Multi-year project

Facilitating effective enforcement cooperation	Sharing best practices among ICN members and foster cooperation.
Promoting sustainability	Digital innovations can foster sustainability across various sectors of the economy. The project promotes sustainability by facilitating effective enforcement of digital mergers by sharing best practices and thereby, ensuring that digital markets are competitive and innovations in the digital field are not reduced.
Use of existing ICN materials	New project
Method for evaluating and measuring success	Participation rate in webinars

Milestones	Activity
Sept/Oct 2022	Webinar on digital mergers and market definition
Nov/Dec 2022	Webinar on digital mergers and the competition analysis
Jan 2023	Webinar on digital mergers and the use of empirical analysis
Feb 2023	Webinar on remedies in digital markets
Feb/March 2023	Brief report on the webinars
2023	Presenting report to the Annual Conference or ICN Merger Workshop
2023	Presenting report to SG before or after Annual Conference depending on timing of the 2023 Annual Conference

Project 3. Update the ICN Recommended Practices with a new chapter on non-horizontal mergers (Lead by DG Comp)

The ICN Recommended Practices for Merger Analysis do not have a specific chapter addressing non-horizontal theories of harms. There is a notable gap in the ICN Recommended Practices for Merger Analysis as this topic is not specifically addressed. In recent years, there has been a considerable number of very prominent cases in which non-horizontal theories of harm have been assessed, notably in digital and other dynamic markets.

As follows, the MWG co-chairs intend to add a chapter on non-horizontal mergers with the latest practices from national competition authorities.

Title	Updating the ICN Recommended Practices with a chapter on Non-horizontal mergers
Project Description	Add a chapter on non-horizontal mergers with the latest practices from national competition authorities.
Outcomes	New chapter on the ICN Recommended Practices on non-horizontal mergers.
Contact Details	DG Comp (COMP-ICN-MERGERS@ec.europa.eu)
Description of work/resources	Drafting team, MWG members, moderators and webinar speakers
Multi-year project?	Multi-year project

Facilitating effective enforcement cooperation	Sharing best practices among ICN members and foster cooperation.
Promoting sustainability	Adding a chapter on non-horizontal mergers will allow authorities to share best practices in non-horizontal theories of harm, which, often include assessments of digital or other dynamic and innovative markets, including on sustainability aspects.
Use of existing ICN materials	ICN Recommended Practices for Merger Analysis
Method for evaluating and measuring success	Participation rate in webinars, member feedback on the survey

Milestones	Activity
October 2022	Forming a working group
October 2022 – May 2023	Survey to ICN members Drafting a chapter on non-horizontal mergers based on experience of working group members and input from survey and webinars
March 2023	Webinar on non-horizontal theories of harm and competition analysis
April 2023	Webinar on empirical analysis/evidence on non-horizontal mergers
May 2023	Webinar on remedies on non-horizontal mergers
May 2023	Invitation for comments/views preparing consultation on draft chapter ('preliminary consultation')
June 2023	Circulation of draft chapter for comments from the MWG members ('first consultation')
	MWG Co-Chairs review the responses to the first consultation and prepare a summary of the comments/views received to be presented at the 2023 ICN Annual Conference, Merger Workshop or a webinar.
November 2023	Update draft chapter
December 2023	Circulation of the updated draft chapter for comments from the MWG members ('second consultation')
January 2024	Finalization of the chapter
2024	Presentation of the new chapter at a webinar or at the 2024 ICN Annual Conference or Merger Workshop.

Project 4. Update of the ICN Recommended Practices Chapter on Entry and expansion (Lead by the CMA and KT)

The MWG co-chairs intend to update the chapter on entry and expansion of the ICN recommended practices for merger analysis, last updated in April 2008, with more recent practice from national competition authorities. The project is ongoing and are led by the former co-chair CMA and current co-chair KT.

Title	Updating the ICN Recommended Practice Chapter on Entry and expansion
Project Description	Update the chapter of the ICN recommended practices for merger analysis.
Outcomes	Chapter updated.
Contact Details	Norwegian KT (icn.mergers@kt.no) and UK CMA (ICN.mergers@cma.gov.uk)
Description of work/resources	Drafting team, MWG members, moderator and speakers at the annual ICN conference
Multi-year project?	Multi-year project
Facilitating effective enforcement cooperation	Updating/sharing recent practice from national competition authorities and to foster cooperation
Promoting sustainability	Project contributes to efficient merger control, which in turn promote competitive markets, innovation, and sustainability
Use of existing ICN materials	ICN Recommended Practice for merger analysis
Method for evaluating and measuring success	Member feedback in the consultations

Milestones	Activity
January/February 2022	Formation of a working group/ preparing proposals for updates to be published for consultation
March 2022	Circulation of the draft revised chapter for comments from MWG members ('First consultation').
April 2022	MWG Co-Chairs review the responses to the first consultation and prepare a summary of the comments/views received to be presented at the ICN Annual Conference in Berlin.
4-6 May 2022	Draft revised chapter and summary of responses to the first consultation are presented during a break-out session at the ICN Annual Conference.
May 2022	MWG Co-Chairs incorporate comments to the draft revised chapter and prepare a second draft revised chapter.
June 2022	Circulation of second draft revised chapter for comments ('Second consultation').
Summer 2022	Finalisation of revised chapter.

PAST PROJECTS

The MWG has pursued work in broad categories: merger evaluation, digital mergers, updating existing work products, notification and review, investigative techniques, analytical frameworks, cooperation, and other policy issues. From year to year, the MWG work focuses on different categories, with the intent to cycle through all aspects of merger enforcement on a regular basis.

For example: in 2016 completed work on remedies analysis, 2017-18 revisions to ICN's Recommended Practices on notification and review, and 2018-2019 comparative study on vertical merger analysis as well as 2019 enforcement cooperation tools.

In 2019-2020 the MWG focused on a comparative survey and report on conglomerate mergers, a comparative survey and report on procedural infringements and a series of global webinars on digital mergers and on sound decision making. In 2020-2021 the MGW worked on a comparative survey and report on joint ventures, a regional webinar series on the impact of COVID-19 to the competition authorities' merger review processes, a webinar series on merger remedies, and the update of the merger notification and procedures template.

Following this previous work in 2021-2022 the MGW organised a series of webinars on ex post merger review, hosted the 2022 ICN Merger Workshop in Brazil, began the update of the ICN Recommended Practices Chapter on Entry and expansion, and started a multi-year comparative survey and report on Control of data, market power, and potential competition in merger reviews.

Title	Update of the ICN Recommended Practices Chapter on Entry and expansion
Description and output	Update the ICN Recommended practices chapter on entry and expansion.
Outcomes achieved	Draft updated chapter and circulated for comments.
Assessment of timing	December 2021 – June 2022
Implementation	Draft chapter.
Evaluation	The project is not completed.
Other learning	

Title	Control of personal data, market power, and potential competition in merger reviews
Description and output	The comparative survey questionnaire was outlined in March 2022 and the survey was circulated to MWG members in May 2022.
Outcomes achieved	Draft questionnaire developed and circulated to MWG members.
Assessment of timing	March 2022 – April 2023
Implementation	Project focused in survey and report, not implementation.

Evaluation	Member feedback on experiences.
Other learning	More time to receive comments from MWG members.

Title	Ex-post merger evaluation
Description and output	A series of webinars and an overall report about ex-post merger evaluation.
Outcomes achieved	2 webinars and a report.
Assessment of timing	February 2022 – May 2022
Implementation	The report will be shared with ICN Members.
Evaluation	Participation rate in both webinars.
Other learning	

Title	2022 ICN Merger Workshop
Description and output	Host the hybrid ICN Merger Workshop in Brazil.
Outcomes achieved	3 days of workshop, including 5 plenary sessions and 12 breakout sessions.
Assessment of timing	29 th March - 1 st April 2022
Implementation	CADE hosted the Merger Workshop in 2022 in Brazil, with the support of the MWG Co-chairs, in a hybrid format.
Evaluation	The event succeeded in achieving its purpose and it was evaluated by MWG members and NGAs' feedbacks.
Other learning	The hybrid format was a challenge to be implemented, however it could offer the possibility to participate in the event to many attendees.