



DEPARTMENT OF JUSTICE

THE MERGER REVIEW WORKING GROUP: FULFILLING THE PROMISE OF THE INTERNATIONAL COMPETITION NETWORK

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I. Introduction

Good morning.

It is a great honor for me to participate in the International Competition Network's third annual conference. I want to thank our host, Chairman Kang, for providing us this wonderful venue in Seoul, Korea. I know that I speak for myself and for the other representatives from the United States Department of Justice when I say that we sincerely appreciate the gracious hospitality that the Chairman and his colleagues at the KFTC have extended to us during this visit. This is my first trip to Korea and I am deeply impressed by the vitality and energy I've seen here, both inside the hotel and outside on the streets of Seoul. I am especially looking forward to experiencing a taste of Korea's rich cultural heritage this evening.

It is difficult to keep my remarks about the important work of the Merger Working Group brief because this has been such a productive year for the working group, and I am excited and proud to share with you what has been accomplished.

First of all, as chair of the Merger Review Working Group, and on behalf of the whole ICN membership, I wish to thank Dror Strum, Randy Tritell, and John Vickers—the very capable and productive chairs of our three subgroups. Also, I want to give special thanks to my former colleague and past chair of the working group, Debbie Majoras—who I am honored is with us as an adviser—for her past work. Although Debbie recently left the Department of Justice, it is our good fortune that she did not resign her commitment to the success of the ICN. Because of the hard work and leadership of Dror, Randy, John and Debbie, this Working Group continues to make major contributions to the ICN's work of substantive and procedural convergence in international antitrust law. I will briefly describe those contributions, touch on the upcoming future of the subgroups, and then say a few words about implementation.

II. Accomplishments of the Merger Review Working Group

As many of you know, the Merger Review Working Group was created to address issues arising from the fact that nearly 70 jurisdictions around the world have now enacted merger review laws and merger notification regimes in one form or another. In an increasingly global economy in which transactions are often reviewed by multiple antitrust agencies across jurisdictions, the risk of procedural and substantive conflict increases dramatically. This risk is of concern to many antitrust agencies, including my own, that seek to preserve competition and want to avoid inadvertently derailing procompetitive or competitively neutral transactions. In order to be effective and sustainable in today's world, merger enforcement must be grounded in efficient and effective processes and sound substantive principles, guided by economic realities.

To pursue these goals, the Merger Working Group has three subgroups, each of which focuses on a particular enforcement issue of practical consequence to agencies. Those are (1) the notification and procedures subgroup; (2) the analytical framework subgroup; and (3) the investigative techniques subgroup. I will briefly describe the extraordinary accomplishments of each subgroup, and then give you a sense of where they may go from here.

A. The Notification and Procedures Subgroup

In its first year, the notification and procedures subgroup submitted to the Naples conference eight Guiding Principles for merger notification and review. Those eight important principles, which the ICN membership adopted and you are familiar with, are available on the ICN website. They have provided a consensus roadmap for the work of the working group.

At Naples, the subgroup also submitted (and ICN members endorsed) three Recommended Practices concerning (1) the nexus to the reviewing jurisdiction, (2) notification

thresholds, and (3) timing of notifications. In contrast to the broad language of the Guiding Principles, these Recommended Practices articulate a detailed ICN consensus on sound merger processes that each agency should use as a baseline for measuring the quality of its own practices.

During its second year, the notification and procedures subgroup spent a great deal of time and effort refining the Recommended Practice on nexus to the reviewing jurisdiction (as directed by the Naples conference), and drafting four additional Recommended Practices concerning (1) review periods; (2) requirements for initial notification; (3) transparency; and (4) review of merger provisions. Last year, in Merida, the ICN membership adopted these four Recommended Practices—bringing the total number of Recommended Practices to seven.

Since Merida, the subgroup has been drafting four new proposed Recommended Practices. These relate to: (1) conduct of the investigation; (2) procedural fairness; (3) confidentiality; and (4) interagency coordination of merger reviews. We will be asking you to adopt these new recommended practices tomorrow. The adoption and implementation of these practices is an important step towards streamlining multijurisdictional merger review. Randy Tritell's subgroup will describe the details of these Recommended Practices later this morning.

Before I move on, I should also report that the Notification and Procedures Subgroup has been diligently working with ICN members to compile their merger-related laws and materials and to post them, along with templates describing the key features of their merger review systems, on dedicated web pages to be linked to the ICN website. The unique aspect of this project is that it is a compilation of agency requirements and procedures that has been prepared by the agencies themselves. I know firsthand, having once had the daunting assignment about

eight years ago in private practice to research Brazil's, Chile's and Argentina's merger laws in connection with a major transaction, that this project will be a tremendously valuable resource for practitioners, agencies, and scholars alike.

B. Analytical Framework Subgroup

The Analytical Framework Subgroup has approached its work in quite a different way from that chosen by the Notification and Procedures Subgroup—and that difference illustrates the value of the ICN's structural flexibilities and preference for avoiding formulaic approaches to its mission of enhancing consensus in antitrust enforcement.

In its first year, the subgroup produced a series of papers intended to serve as a baseline for comparing and contrasting existing analytical frameworks for merger review. John Vickers then created a thought-provoking discussion paper that examined basic issues involved in choosing a particular substantive framework.

In the following year, the subgroup built on its previous work by exploring the analytical frameworks of a dozen different members as revealed in their existing or proposed merger guidelines. The result was a series of very interesting and stimulating working drafts on five key subjects: (1) coordinated effects, (2) unilateral effects, (3) market definition, (4) efficiencies, and (5) market entry, as well as an overview paper.

I am pleased to report that the authors have now completed their chapters and the final product represents probably the most comprehensive review of merger guidelines to date. We will be hearing from John later this morning on this.

C. Investigative Techniques Subgroup

Finally, the Investigative Techniques Subgroup, led by Dror Strum, has focused on identifying ways to maximize the effectiveness of limited enforcement resources. This subgroup has taken yet another approach and has achieved effective results.

In its first year, the subgroup sought to establish a baseline for future work by circulating a comprehensive questionnaire and by conducting a very successful two-day workshop on investigative techniques in November 2002. The subjects covered at the workshop included the role of economists and economic data, developing reliable evidence, and private sector perspectives. Due to the success of the first workshop, the subgroup is now planning a second workshop in Brussels in October 2004. This workshop will focus on improving investigative techniques and tools when dealing with parties and developing requests for data.

The subgroup is also preparing a manual covering the basic investigative techniques and concepts in order to make information about effective investigative techniques accessible to a broader audience. Some of you will recall that the subgroup presented the initial portions of this manual for review and comment in Merida.

This morning, the subgroup will present two additional chapters – one covering investigation planning and a second one drafted by a team of NGAs providing their perspective on the tools and techniques used in merger investigations. The investigation planning chapter covers basic concepts in planning a merger investigation, from creating an effective investigation plan, to focusing the investigation on what's important, managing evidence, and timing. The NGA chapter reviews some of the challenges that merging parties face with respect to timing, uncertainty and the costs of review. The subgroup's goal of making investigations more

effective and efficient can be of great benefit to the private sector and agencies alike and provides real potential for meaningful convergence.

III. The Future Work of the Subgroups

So, where do we go from here?

Following this conference, the Notification & Procedures subgroup will continue to focus on implementation of the Guiding Principles and Recommended Practices. Among other things, the subgroup is considering whether to conduct a workshop (perhaps in 2005) to promote more comprehensive understanding and broader implementation of the Principles and Practices. The subgroup is also canvassing its members and advisors to determine if there are areas for additional Recommended Practices or related work, such as a recommended practice on procedures related to remedies, or a project involving the drafting of model waivers.

The Analytical Framework subgroup is considering its next steps and will solicit your views during the breakout sessions on possible options, including whether to undertake similar substantive comparative studies on related subjects such as merger remedies and prospective merger data analysis. I urge you to provide us with your input during the break-out sessions.

The future of the Investigative Techniques subgroup is clear: the upcoming October workshop and completion of the investigation handbook. Both projects are focused on improving agency techniques—and we hope to include and respond to NGA voices in each of them.

IV. Implementation of the Recommended Practices

Finally, I would like to offer a few observations about implementation.

At this stage, as Fernando and others have observed, there can be no doubt that the ICN is a success. The speed with which the ICN has produced quality consensus guiding principles and recommended practices on merger review, to take just one example, has pleasantly surprised people who are accustomed to the slower pace of consensus-building in other contexts. But we need to think creatively about how to encourage implementation of the products of ICN consensus-building.

Experience has now taught us that agencies bring to ICN work a real openness to the ideas and experiences of others and—equally important— a willingness to question their own traditional ways of doing things, something that is not often observed in other international organizations.

Introspection is one of the keys to implementation. In my own agency, for example, the process of developing recommended practices for merger review has led us to question whether our own procedures are as effective, fair, and efficient as we can make them. During the past three years in particular, the U.S. agencies have taken steps to make them more so and we are constantly thinking of ways to do better, such as our recently-held merger workshop in Washington and our retrospective review of merger data.

Most recently, in keeping with the Recommended Practice on Transparency, the Antitrust Division under Hew Pate's leadership announced its new policy on the issuance of public statements upon closing of investigations. In a departure from past practice, the Division now issues, in appropriate circumstances, a public statement describing the reasons for closing an

antitrust investigation.

We made this change because we believe that public dissemination of enforcement and non-enforcement rationales benefit businesses attempting to comply with complex antitrust standards and benefit consumers through a better understanding of the antitrust laws. This transparency of antitrust analysis also helps international enforcers understand U.S. standards for antitrust enforcement and encourages international convergence on enforcement standards.

I should add that we are not alone in advocating the ICN's work in deed as well as in word. Later this morning, you will hear from Randy about a number of agencies that are engaged in very significant reforms of their respective merger review processes, some of which they have attributed to lessons learned in the ICN.

V. Conclusion

In closing, I would like to commend the terrific hard work of all the members and NGAs of the Merger Review Working Group. As you can see, our efforts have combined process with substance, broad concepts with practical details, and persistence with experience and deep perception.

It has been an honor to report our progress to you and share some ideas about where the future may lead. I will now introduce Dror Strum, chair of the Investigative Techniques subgroup, so that the important work of this morning can get under way. Thank you.