



# DEPARTMENT OF JUSTICE

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## **THE ICN MERGER WORKING GROUP: SETTING THE STAGE FOR CONVERGENCE**

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## **INTRODUCTION**

Good morning. It is a great honor for me to open the Merger Working Group program today here in Moscow. First, I want to thank President Artemiev and our gracious hosts at the Russian Federal Antimonopoly Service. We are grateful for your generous hospitality. I applaud the FAS's willingness to help further the global antitrust dialogue, its hard work both in organizing this excellent conference and in the substantive work of ICN over the past year, and the FAS's commitment to ideals we all share: improving our enforcement methods based on sound antitrust principles that benefit our consumers, and ultimately our economies as a whole.

## **MERGER WORK IN AN ICN CONTEXT**

Last year at this time, the Merger Working Group, with the Irish Competition Authority and the UK Office of Fair Trading taking lead roles, had completed the Merger Guidelines Workbook for presentation to the ICN membership. It had been a year since the ICN, in Bonn, last approved new recommended practices for merger notification and review procedures. Then, in Cape Town, I asked a question: should ICN explore the prospects for convergence in substantive merger analysis? Today, I am announcing that, in the coming year, the Working Group proposes to begin developing consensus recommendations for substantive merger analysis. We propose to begin with three topics, which I will discuss later, and assuming we produce a useful work product pursuant to our initial plans, this project could usefully extend for one or two additional years.

I should put our proposed work in a broader ICN context. In the area of cartel enforcement, ICN members are united in a commitment to pursue hard core anticompetitive conduct that we know to be the most pernicious: bare agreements among competitors aimed

directly at harming consumers. That is why many ICN jurisdictions punish such conduct with significant fines, and in the case of the U.S. and a growing number of other jurisdictions, with jail time. The benefits of close coordination have driven the success of ICN's cartel enforcer workshops and spurred discussions on a range of topics from leniency to digital evidence gathering to negotiated settlements. The matching of useful work to ICN members' needs will continue to drive the Cartel Working Group's agenda.

Looking to unilateral conduct, as this conference did yesterday, ICN members agree that we need more dialogue and more careful thought in an area where it is often difficult to differentiate between vigorous competition and anticompetitive conduct. The Unilateral Conduct Working Group has made progress, and will make more in the coming year.

With respect to mergers, the third significant area for most agencies' enforcement efforts, one might say that we are somewhere in between. There has been great cooperation and growing consensus in both the substance and procedure of merger review. Still, there have been some notable differences in outcomes or analysis that reflect the need for more dialogue, and more understanding about the law and economics of modern merger analysis.

Our distinguished speakers opened the conference yesterday by highlighting the benefits of economic globalization and importance of competition to rapidly growing international commerce. Multijurisdictional mergers are an important part of global commerce. Virtually all agencies and firms represented here today have been involved in cross-border transactions in some way. Yet, despite the growth in such mergers and the number of agencies that review them, multijurisdictional merger enforcement generally has not generated frequent inconsistencies or conflicts. One might ask, therefore, whether proposing work on substantive

merger convergence amounts to offering a solution to a problem that does not exist – or exists only on the margins. As more and more jurisdictions become more deeply involved in merger review, however, the risk of divergence increases dramatically. Thus, I believe that we should address now the issue of substantive merger review across multiple jurisdictions.

## **THE FOUNDATION FOR FUTURE MERGER WORK**

In reviewing the previous work of the Merger Working Group, two notable features stand out. The first is the high agency demand for practical improvements in the quality of our work, as evidenced by participation in the three merger workshops held to date, the latest held two months ago in Dublin; the 2005 Investigative Techniques Handbook; and the 2006 Merger Guidelines Workbook. This demand is perhaps not surprising given that many agencies devote a substantial portion – often the majority – of their resources to merger review. The second feature is the willingness with which members have embraced the recommended practices for merger notification and review procedures and have worked to bring their own regimes into line with those recommended practices. The Working Group’s proposed agenda for next year builds on the momentum of both features: two workshops are planned for the coming year, and as usual, we will continue to promote and encourage member efforts to implement the recommended practices. In that respect, they are well worth another advertisement – if your agency is thinking about creating new merger review procedures or improving old ones, the global antitrust community has some advice for you: start with a careful examination of the ICN recommended practices.

As I mentioned earlier, in 2006 the Merger Working Group completed the Merger Guidelines Workbook, a comprehensive, practical presentation of the basic framework that many

agencies use to assess mergers. The Workbook had its roots in common principles drawn from merger guidelines from around the world. The rigorous exercise of producing the Workbook confirmed the contours of a common language among antitrust agencies when we speak about merger analysis. An experienced reader from any jurisdiction who has given careful thought to merger analysis would find the concepts of the workbook familiar. It is this work, this common ground of similar principles embodied in our merger guidelines, upon which we seek to build consensus for substantive recommendations.

### **THE CONTENT OF OUR FUTURE WORK**

In the months after Cape Town, we in the Antitrust Division, as working group chair, began to evaluate the prospects for convergence on substantive merger issues. The benefits of enhanced convergence are founded on the basic premise that agencies share a strong common interest in improving the quality of their merger analysis. Common interest feeds incentives for broad consensus. And consensus around common analyses, based on sound principles, helps minimize divergent outcomes.

During this time, we carefully reviewed the ICN Merger Guidelines Workbook in order to identify areas of merger analysis ripe for convergence. We also sought the views of our colleagues at the Federal Trade Commission, of non-governmental advisors who have experience with multijurisdictional merger reviews, and of other working group members. We discussed with them the value of, and prospects for, substantive convergence. Again, we started with the baseline question: Is it useful for ICN to pursue work on substantive merger convergence?

We explored the impact of substantive differences in merger enforcement policy on

businesses involved in transactions before various antitrust agencies. We asked whether substantive differences in analysis are as prevalent as procedural differences, or as important to the antitrust community. Hearing the practical experiences of NGAs who are immediately faced with the consequences of agency differences was very useful.

We also sought to identify specific substantive issues that may be ripe for discussion on convergence. Are there analytical topics of consensus where we can already identify commonalities in our approaches? On the other hand, are there areas of substantive divergence that may provide insight on the possibility of future convergence? Finally, we tried to gauge the value of convergence efforts on substantive analysis and how the ICN should build on the Merger Guidelines Workbook with additional work that embodies recommendations for practical convergence.

The NGAs answered our baseline question with a resounding yes: they viewed the promotion of substantive convergence – particularly to jurisdictions new to merger review – as a worthwhile effort. In this regard, the NGAs generally had high praise for the current level of international cooperation and dialogue on merger analysis, and particularly for the Merger Guidelines Workbook.

Informed by this practical experience, we then had two conference calls with members of the Merger Working Group. Agency views broadly matched those of the NGAs – agencies were supportive of an effort to explore substantive convergence. The potential areas of focus that we discussed included: efficiencies; the role of sound economic analysis and the use of economists in merger enforcement; the use of presumptions or safe harbors; burdens of proof; vertical and conglomerate mergers; and entry and expansion. For some of these topics, we may need only to

acknowledge a consensus that already exists; for others, the reality may be that consensus would be very difficult to achieve. Accordingly, reflecting the practical focus inherent in ICN's work, our proposed starting points are firmly within the boundaries of readily identifiable convergence, but also hold promise for clarifying and expanding such boundaries.

## **INITIAL TOPICS**

Our Working Group discussions identified three topics for initial consideration during the coming year. The first topic is *the efficacy of an agency's legal framework for addressing anticompetitive mergers*. This topic, which is more focused than it may sound, would encompass a jurisdiction's general merger review powers – essentially, that an effective merger law needs to be comprehensive in scope and to enable the agency to intervene to remedy the competitive concerns arising from a particular transaction, and that remedies should be limited to merger-specific harms. To use one example, the U.S. amended its merger law in 1950 to close jurisdictional gaps that had allowed firms to circumvent merger notification, based upon how transactions were structured. Our legislative change helped focus the review of transactions on substance rather than form. Similarly, in 2004 the European Commission's Merger Regulation was modified to clarify that the Regulation covers all types of anticompetitive mergers.

A second initial topic for initial consideration is *the use and role of presumptions and safe harbors or thresholds*. Many jurisdictions use intervention thresholds or presumptions, often based on market shares, to provide a basic indication of how a merger will be evaluated. Such presumptions can be useful starting points in providing guidance, or even certainty, to firms and streamlining the process for identifying those relatively few mergers that may be harmful. For this topic, we envision a look at how presumptions are used in the merger context,

both in guidelines and in practice.

The third initial topic that the Working Group proposed to pursue is *the analysis of entry and expansion*, a common factor in members' merger guidelines. Past ICN work has indicated that there is broad agreement on the conditions that agencies evaluate to determine whether entry is a competitive constraint. This should be an area where we can identify common ground as well as highlight the nature of merger investigation as a comprehensive evaluation of competitive conditions, not merely the mechanical application of inflexible statutory formulas.

### **WORK PRODUCT**

The possible written form/or forms of our substantive merger work will necessarily be responsive to the input received and the consensus we reach. A preliminary concept might be of some sort of normative recommendations in a format not unlike the Guiding Principles or Recommended Practices for merger notification and review procedures. But it might be something else. Certainly we do not envision replicating the type of detail in the Merger Guideline Workbook, but rather we will more concisely encapsulate convergence from the Workbook discussions.

### **CONCLUSION**

Since we met in Cape Town over a year ago, our agencies have evaluated hundreds of mergers with multijurisdictional impact without making headlines: that is, we either arrived at the same conclusions or did not produce conflicting outcomes. This is the silent success story of international convergence around sound merger analysis. But we must not become complacent; multijurisdictional mergers are now commonplace and will continue to be so, and more agencies are joining the active ranks of merger enforcement.



Seeking enhanced convergence in this area is not just about avoiding the next headline about crisis or conflict in the antitrust enforcement world. It is also about incremental improvements in our analyses in the form of more efficient merger review and better consistency and transparency. And it is about providing additional guidance to new agencies and the business community and ideas that experienced agencies can use to refine their practices.

There will always be differences in markets, local effects, procedures, and laws that may lead to reasonable differences in outcomes in some transactions. We will not completely eliminate all possible sources of potential substantive divergence. But where we can readily identify differences and arrive at recommendations that help drive greater convergence, such efforts are well worth undertaking. Because of the frequency with which we deal with mergers, any incremental improvements to merger analysis that agencies take away from the project can generate significant benefits. The very exercise of identifying common ground and articulating the extent of analytical convergence will bolster transparency, leading to a better understanding of how our respective merger laws are enforced. Recognizing that we may not always be able to develop a consensus on a given issue, we will all learn better the strengths and weaknesses of our positions in the process. As responsible antitrust agencies, we owe it to ourselves, our consumers, and our economies to pool our experiences, exchange expertise, and to work to identify the best practices in merger analysis. I invite all interested members and NGAs to contribute to the success of the coming year's stimulating work in the Merger Working Group.

Thank you.