



DEPARTMENT OF JUSTICE

THE INTERNATIONAL COMPETITION NETWORK GUIDING PRINCIPLES FOR MERGER REVIEW

Address by

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It is a delight to be here attending my first IBA Fiesole Conference. This has long been one of the premier events on the annual competition calendar, and I am pleased finally to have been invited, even if I had to take a huge cut in pay in order finally to wrangle an invitation.

As all of you know, next week we will be holding the first annual conference of the newly formed International Competition Network. It is appropriate, therefore, even if perhaps a bit premature, for the IBA to be having a panel on the ICN. As the chair of the ICN's merger working group, I am pleased to have an opportunity to talk about the important role the ICN is playing in helping to tame the multinational merger thicket that has grown up around us as an increasing number of jurisdictions — roughly 65 at last count — have enacted merger notification regimes.

The International Competition Network

We have made enormous progress in the last twenty years in moving most of the world from command-and-control economies to economies built on free market principles. But free markets need competition in order to function efficiently. For that reason, as the Nobel Prize winning economist Joseph Stiglitz shows in his recent book *Globalization and Its Discontents*, countries invite disaster when they try to create free market economies without having sound competition laws and institutions in place.² Fortunately, most countries have heeded this lesson; more than 100 countries now have competition laws in one form or another. But having a law is only the beginning. Implementing the law sensibly is what really matters.

It was for this reason that the Federal Trade Commission and we joined with competition agencies from 13 other jurisdictions around the world to create the International Competition Network. The concept behind ICN was to form a global network of competition authorities focused exclusively on competition -- “all antitrust all the time” as my boss Charles James put it.

The goal was twofold. First, to provide support for new competition agencies both in enforcing their laws and in building a strong competition culture in their countries. Second, to promote greater convergence among these authorities around sound competition principles by working together, and with stakeholders in the private sector, to develop best practice recommendations for antitrust enforcement and competition advocacy that could then be implemented voluntarily by the member agencies.

Since the ICN was formed last October, its membership has grown to include 63 jurisdictions on six continents, representing more than three-quarters of the world's Gross Domestic Product. Nearly all of these members will be attending our first annual conference in Naples, Italy at the end of this month.

Consistent with its twin goals, ICN initiated two major projects during its first year. The first one, under the leadership of Dr. Fernando Sanchez Ugarte of Mexico, is the development of best practice recommendations in the area of competition advocacy. The second, which I have been leading, is the development of guiding principles and recommended practices for merger review. I have been asked today to discuss the objectives of the merger working group, its overall structure and operation, and the proposed guiding principles it has developed. I understand that Goetz Drauz will be discussing the recommended practices.

The Multinational Merger Thicket

At last count, roughly 65 jurisdictions have adopted merger notification regimes in one form or another. The spread of merger notification is, of course, a positive development as a general matter. Merger regimes with notification requirements give antitrust authorities the ability to identify and potentially remedy problematic transactions before they close, to the

benefit of consumers and competition in their markets.

These benefits, however, do not come without cost. The first significant cost is the cost of determining in which jurisdictions a particular transaction must be notified. The second is the cost and potential delay associated with preparing and filing the required notifications and then responding to requests for additional information as multiple agencies review the transaction. The third is the uncertainty created by the potential for conflicting outcomes, a potential we saw realized last year in GE/Honeywell.

A vigorous, competitive, free-market economy produces thousands of agreements and transactions every day. The vast majority of these are pro-competitive or competitively neutral. It is important that merger review not impose unnecessary transactions costs or bureaucratic roadblocks that might deter efficient, pro-competitive mergers. Our task, therefore, is to preserve the benefits of mandatory merger notification while reducing the costs associated with it.

The ICN Merger Working Group

The ICN Merger Working Group includes representatives from roughly 20 competition authorities from many different geographic regions and differing stages of development. The working group also includes representatives from the OECD and from the legal, economic, academic and business communities in many of these jurisdictions, including the United States, Canada, and Europe.

A great attraction and distinguishing feature of the ICN is that it is a “virtual network,” flexibly organized around geographically diverse working groups. The members of the merger working group have been meeting regularly since ICN was founded last October, sometimes in person, sometimes by video- or tele-conference, and sometimes over the Internet. Working in this manner permits frequent, informal and low-cost interactions that can produce concrete results far more quickly than the periodic formal meetings that have characterized the work of more traditional international organizations in the past.

The ICN Merger Working Group has been concentrating on three distinct areas: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review. Each area has been assigned to its own subgroup. We expect to have important progress to announce in all three areas following the first annual ICN conference next week.

Notification and Procedures subgroup

The Merger Notification and Procedures subgroup, chaired by the FTC’s Randy Tritell, has largely completed three major projects. The first is the development of a set of guiding principles for merger review, to which I will turn in just a moment.

The second is the development of recommended practices for merger notification and review. As Goetz will describe, Randy’s group has completed work on the three topics the business community told us were of the greatest urgency: local jurisdictional nexus, objective filing thresholds, and filing triggers. Beginning in October, we expect Randy’s group to begin work on additional recommended practices, with a goal of completing that work by the next annual ICN conference. In addition, Randy’s group will be working with the ICN members and

with other international organizations, such as OECD and UNCTAD, to encourage implementation of these guiding principles and best practices. We encourage the private bar and business community to assist in this effort in their home countries.

Finally, in an effort to make merger laws more transparent and accessible, Randy's group has asked all ICN members to compile their jurisdiction's merger-related laws and materials on dedicated web pages, which are being hyperlinked to the Merger Working Group page of the ICN website. Links to the webpages prepared by 13 agencies in the subgroup are already available on the ICN website. The subgroup has also developed a template to be used by ICN members on their own websites to highlight the key features of each ICN member's merger review systems, such as notification thresholds and review periods. The unique aspect of this project is that this template will be the work of the agencies themselves. These too are being linked to the ICN website, so that the public will have ready access to this information.

Analytical Framework subgroup

The Analytical Framework subgroup, chaired by Dr. John Vickers, Director General of the UK Office of Fair Trading, is developing a discussion paper and panel for the first annual ICN conference on the objectives and analytical framework for merger review. We expect that this subgroup's work will assist countries in designing and implementing their merger control laws.

While it has not yet been decided, this group may move on next year to develop a set of model merger guidelines that would assist those jurisdictions that have not yet developed their own guidelines. As many of you know, both the UK and the EU are currently in the process of developing merger guidelines, and we expect that their work could help to inform the work of

John's group.

Investigative Techniques subgroup

The Investigative Techniques subgroup, chaired by Dr. Menachem Perlman, Deputy Director General and Chief Economist of the Israel Antitrust Authority, is planning an ICN international merger workshop to be held in Washington in November. The workshop -- inspired by the excellent series of cartel conferences held over the past three years in the U.S., the UK, and Canada -- will provide a venue for staff-level lawyers and economists from many antitrust agencies to meet and learn from one another's practical experiences in performing merger reviews, using a hypothetical case. Discussions will include the effective planning of a merger investigation, methods for gathering reliable evidence and its interpretation, the use of economists and the evaluation of economic evidence.

To gather information on the investigative techniques used in different jurisdictions, this subgroup has sent members a questionnaire on their experience using the various tools and techniques to investigate mergers in their jurisdiction. Lessons learned at the November workshop along with responses to the questionnaire will be used to develop a compendium for making merger investigations more efficient and effective. The compendium will present different practices, tools and techniques, their advantages and disadvantages in a manner that would be flexible and allow ICN members to adapt the guide to fit within their own laws, systems, and cultures.

Proposed ICN Guiding Principles for Merger Review

The first project of the Notification and Procedures subgroup was to develop a set of guiding principles for merger notification and review. Randy's subgroup has proposed eight

principles around which a merger review regime should be built:

- sovereignty;
- transparency;
- non-discrimination on the basis of nationality;
- procedural fairness;
- efficient, timely, and effective review;
- coordination;
- convergence; and
- protection of confidential information.

These proposed principles can be found on the ICN website.³

Sovereignty. As a starting point, the members of the subgroup believed it important to recognize that “jurisdictions are sovereign with respect to the application of their own laws to mergers.”

Transparency. In order to foster consistency, predictability, and fairness, this guiding principle provides that the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.

Non-discrimination on the basis of nationality. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.

Procedural fairness. Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an

opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.

Efficient, timely, and effective review. The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.

Coordination. Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

Convergence. Recognizing that it will be left to each ICN member to implement change within their jurisdiction, the subgroup members expressed their view (and commitment) that in so doing, “jurisdictions should seek convergence of merger review processes toward agreed best practices.”

Protection of confidential information. Finally, it is both fair and in the interest of agencies and merging parties alike to maintain the confidentiality of information obtained during the course of an investigation. Accordingly, “the merger review process should provide for the protection of confidential information.”

We believe that adherence to these guiding principles will make the merger review process more efficient and effective, while at the same time reducing delay and the investigative

burden on merging firms. We will propose that the full ICN membership endorse these principles and practices at the annual conference. We recognize that there may be some principles and practices that some jurisdictions may not be able to implement at this time. We will ask members nevertheless to sign on to them as aspirational statements, even if their laws and regulations may not always embody them. We would consider our efforts a success if the ICN guiding principles and practices become well-accepted in the international arena, even if not all jurisdictions are able to accommodate their systems to them.

Conclusion

As cross-border trade and investment grows, and as more and more jurisdictions enact antitrust laws, it becomes all the more critical that antitrust agencies impose no unnecessary bureaucratic roadblocks on the merger process and that antitrust authorities worldwide continue to achieve greater convergence. Of course, we do not expect to achieve convergence in the first year, or even the second or third years. Rather, ICN members expect to maintain a continuous, collegial, and focused dialogue and to achieve meaningful improvements in the practice of international antitrust enforcement, one step at a time, over both the short and long terms. In that way we can hopefully turn the multinational merger thicket into a well-manicured English garden.

1. Deputy Assistant Attorney General for International and Policy, Antitrust Division, U.S. Department of Justice. These remarks reflect my personal views and not necessarily those of the Department. I want to thank Cynthia Lewis Lagdameo and Randy Tritell for their contributions to this paper and, of course, my assistant, Gloria Jenkins.

2. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 74 (2002).

3. The ICN website can be found at www.internationalcompetitionnetwork.org.