



DEPARTMENT OF JUSTICE

SETTING THE PACE OF INTERNATIONAL CONVERGENCE: THE ICN MERGER WORKING GROUP

Remarks by

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Presented to the

**International Competition Network
4th Annual Conference
Bonn, Germany**

June 7, 2005

I. Introduction

Good morning. I am greatly honored to participate in this fourth conference of the International Competition Network, and extremely pleased to introduce the work of the ICN Merger Working Group. Before I begin, I would like to add my personal – and the entire U.S. Delegation’s – thanks to the chorus of others for our gracious host, Dr. Ulf Böge, for undertaking the enormous responsibility of hosting an ICN conference, for providing us with the impressive list of speakers from Germany’s government and business communities, and for this unique venue in the former plenary chamber of the German Parliament.

Simply put, the overall mission of the ICN’s Merger Working Group is to facilitate global convergence around sound merger practice and procedure. As you know, the working group consists of three distinct subgroups that deal with important – and practical – enforcement issues commonly encountered by antitrust agencies: merger notification and procedures, chaired by the U.S. FTC; the analytical framework for merger review, co-chaired by the UK Office of Fair Trading and the Irish Antitrust Authority; and investigative techniques for merger review, chaired by the Israel Antitrust Authority. As chair of the Merger Working Group, I want to thank our distinguished and hardworking subgroup chairs, Dror Strum, John Fingleton, Sir John Vickers, and Randy Tritell. Under their excellent leadership, this Working Group has enhanced the effectiveness of merger regimes across the globe, facilitated procedural and substantive convergence, and reduced the costs of multijurisdictional merger reviews. I am confident that we will enjoy the benefits of their work for many years to come.

II. Moving the ICN Forward

Before I highlight the specific accomplishments of the Merger Working Group over the

past year, I would like to take a moment to raise a couple of big-picture issues that I believe we must address in moving the ICN forward.

One of the ICN's distinguishing features, and one of its greatest strengths, is its partnership with the legal and economic communities, business and academia. The ICN has, in many ways, been a model for how antitrust agencies and the private sector can work together to achieve goals of mutual interest. Non-governmental advisers (NGAs) have played valuable roles in the Merger Working Group. They were instrumental in bringing the right issues to the attention of enforcement authorities and in suggesting realistic proposals for improving multijurisdictional merger review. In fact, over the past four years, we have had well over 50 NGAs participate in the Merger Working Group alone.

Still, we need to improve the number and diversity of NGAs who help ensure that ICN work product reflects and addresses the real issues posed by international antitrust enforcement. In particular, we need more NGAs from other world regions to participate meaningfully in the ICN's work. In that regard, I encourage each of you to invite NGAs in your jurisdiction to get involved in the ICN. One of the best ways to do that is to invite NGAs to the annual conference; looking around the room today, it is obvious that the ICN is off to a good start on that. Another way to involve NGAs is to recruit them to work within our various working groups or ask them to help draft papers or comment on work product. Members have used a variety of different approaches – formal and informal – to solicit the views of NGAs, including ad hoc emails, face-to-face meetings, and conference calls with NGAs.

The most important point I want to make today is that beyond geographic diversity, we need to increase the involvement of the business community itself. I am not referring to outside

counsel, who have provided valuable input to the ICN, thus far. While we can discuss general principles, the best comparative judges are those who we subject to our processes – the business community. It is the business executives and in-house counsel that have the direct experience of participating in markets and crafting long range strategic plans. They can bring to the ICN a different and fresh perspective. For whatever reason, presently too few NGAs from the business sector are involved in the work of the ICN; I cannot emphasize enough that there should be more. In the United States, we will make a concerted effort to involve more NGAs from the business community, and I ask that you do the same. Reaching out to the private sector has paid – and will continue to pay – strong dividends by not only improving the overall quality of the ICN’s work, but also in facilitating implementation of ICN recommendations in our respective jurisdictions.

I also would like to spend a minute talking about implementation of ICN work product. When the ICN was created in October 2001, the founding agencies emphasized that ICN recommendations would be aspirational, forward-looking, and non-binding, and that it would be left to governments to implement them voluntarily. In my own agency, the process of developing recommended practices for merger review has required us to look critically at our own procedures. Last October, for example, in keeping with the Recommended Practice on Transparency, the Antitrust Division issued its Policy Guide to Merger Remedies. The guide provides the business community, antitrust bar, economists, and others with an understanding of the Division's analytical framework for crafting and implementing relief in merger cases.

Of course, the United States is not alone. During the past year, I have been very fortunate to be able to visit with many new competition agencies around the world. From Chile

to China, and from Egypt to Peru, I have been struck by the number of officials who truly wish to contribute to good government by learning how to do their jobs more efficiently and effectively. Quite simply, they want to get antitrust enforcement right. Tomorrow you will hear about a number of agencies that are engaged in very significant reforms of their merger review processes, some of which can be attributed to lessons learned in the ICN. In my view, the convergence that has already taken place under the ICN's umbrella has happened precisely because the ICN has taken an aspirational approach and no one is forced into accepting ICN's recommendations.

III. The Merger Working Group

As you all know, the Merger Working Group was created to address issues arising from the fact that more than 70 jurisdictions around the world have now enacted merger review laws and merger notification regimes in one form or another. In a world where a transaction may be reviewed by many antitrust agencies, the risk of procedural and substantive conflicts (especially with respect to large transactions) has increased dramatically – raising costs in terms of time, uncertainty, and money. These risks are of obvious concern to the international business community and agencies alike. As protectors of the competitive process, antitrust agencies should be just as concerned about the risks because our actions can derail or deter procompetitive or competitively neutral transactions to the detriment of consumers worldwide.

In order to be effective and sustainable in today's world, merger enforcement must be grounded in sound processes and sound substantive principles. To this end, ICN members have adopted 8 broad Guiding Principles around which a merger regime should be built and 11 Recommended Practices for Merger Notification and Review Procedures. You will hear from

Randy Tritell later this morning about two more recommendations that we will ask you to adopt tomorrow.

The Recommended Practices represent a consensus on sound merger processes. Antitrust agencies use them as a benchmark for measuring the quality of their own practices, and dozens of ICN member jurisdictions have made or proposed changes that bring their merger regimes into closer conformity with the Recommended Practices. Numerous others are considering changes.

Our work on the Guiding Principles and Recommended Practices prompted one of this year's more detailed merger projects: a report and development of a model form that merging parties and competition agencies can use to facilitate waivers of confidentiality protection for information that parties submit during the merger review process. I encourage you to consider adapting the new model ICN waiver to the laws of your own jurisdiction and to post it on your website – ideally on a page linked to the ICN website. (To date, the ICN site has links to the merger laws and materials of nearly every member with a merger law.) As our waiver report found, “waiver-facilitated coordination in individual cases builds confidence and contributes to analytical and procedural convergence not only in the particular case but also in their general merger enforcement policies. Successful coordination breeds further future cooperation and overall convergence.” The Notification & Procedures subgroup also prepared a report on merger notification filing fees around the world.

The Merger Working Group's two other subgroups also have been engaged in important work instrumental to convergence. This past year, the Analytical Framework subgroup prepared a report on remedies. Drawing on the remedy practice in nearly 20 jurisdictions, the

report outlines the key principles behind the various aspects of designing, implementing, and enforcing merger remedies. The subgroup chairs also prepared a preliminary discussion draft of a checklist of topics that agencies may wish to cover in new or revised merger guidelines, including an explanation of why those topics have value in merger assessment and suggestions as to how those topics might be assessed in practice.

The Investigative Techniques subgroup has responded to an urgent need perceived by many ICN members to identify ways to maximize the effectiveness of investigations. Last fall in Brussels, the subgroup hosted a second workshop on investigative techniques. Building on the lessons learned at these two highly successful workshops, the subgroup prepared a series of papers on the tools and techniques used in merger investigations. Those papers, which were presented at the second and third annual conferences, were consolidated this past year into the *Investigative Techniques Handbook for Merger Review*. By encouraging members to identify and adopt better investigative practices, this subgroup has made a very real contribution to more effective and efficient merger review.

IV. Future Work

Following Bonn, much of the focus of the Merger Working Group will be on implementation. When I speak of implementation, I am not just thinking of the Guiding Principles and Recommended Practices. I see great value in encouraging widespread use of the *Investigative Techniques Handbook* and promoting understanding of the principles and tools addressed in the Analytical Framework papers. This can be done through workshops as well as continued dialogue among members.

On the topic of workshops, next year we currently are contemplating holding (1) a

workshop to facilitate implementation of the Recommended Practices, which we hope to hold in the Spring of 2006, (2) one or more regional workshops modeled on last year's highly successful Investigative Techniques workshop in Brussels, although on a smaller scale, and (3) depending on available resources, a workshop on a specific topic, such as remedies or developing and analyzing economic evidence.

In preparation for an implementation workshop, the Notification & Procedures subgroup will prepare a handbook containing, for example, agency speeches, press releases, and notices prepared in connection with implementing the Principles and Practices, and possibly examples of legislative provisions that conform to selected Principles and Practices.

We will continue our efforts to promote conformity with the Guiding Principles and Recommended Practices through direct contact with competition agencies, through speeches and articles, leading by example, and encouraging private sector advocacy. We invite ICN members to contact us with questions about whether existing or proposed rules and practices conform with the Recommended Practices and will work with members and non-members developing new merger review laws or regulations.

Over the coming year, we will finalize the draft Merger Guidelines Workbook and I encourage you to give us your feedback.

In terms of organization, following Bonn the Merger Working Group will have two subgroups – Notification & Procedures and a new subgroup that combines Analytical Framework and Investigative Techniques. The new subgroup will be called “Merger Investigation and Analysis” and the Irish Competition Authority, the UK Office of Fair Trading, and Israel Antitrust Authority will play leadership roles. Given that the IT subgroup has finished

its core work of developing the *Investigative Techniques Handbook*, and that we plan on holding workshops that focus on both substance and procedure, we thought it made sense to combine the groups.

V. Possible New Projects

Before I conclude, I would like to take just a moment to look even farther down the road and talk about possible new projects for the Merger Working Group following the next annual conference in Cape Town. There still is important work to be done in advancing convergence in substantive merger analysis. For instance, the ICN might begin to identify areas of substantive divergence in merger analysis and promote better understanding of the economic theories that underlie those differences. By paying particularly close attention to those areas where our enforcement approaches diverge, we might constructively assess the strengths and weaknesses of our own respective enforcement policies and continue to learn from those assessments. This process of "constructive divergence" may ultimately help facilitate convergence in the future. As a practical matter, I doubt we could expect to arrive at conclusions that would favor one approach over another in every case. Rather, by understanding our differences, paying close attention to the economic consequences of our respective enforcement decisions over time, and using those observations to test the assumptions that underlie our analyses, we might be able to come together and achieve even greater levels of convergence in the future.

The Merger Working Group might also address enforcement cooperation in a more comprehensive fashion, building on the Recommended Practice on Interagency Coordination. For example, I see some value in a project exploring in detail the various ways in which members currently cooperate in order to identify the types of cases where coordinated review

fosters more efficient and effective merger review and consistent – or at least compatible – outcomes. I see this as a project that could benefit greatly not just from the experience of agencies that cooperate regularly, but also from agencies without experience to better understand any potential barriers to cooperation. Of course, NGA input also would be useful, particularly on ways to reduce duplication and unnecessary burdens on agencies and parties.

In closing, the Merger Working Group's efforts combine process with substance, broad concepts with practical details, and persistence with experience and deep perception. The group has benefitted from the participation of many members and NGAs. It has been a great honor to act as Chair of a group that many observers believe is a model of all that the ICN can and should be.

VI. Conclusion

Let me now briefly introduce the merger program. In an attempt to demonstrate how the work product of the Merger Working Group has real-world relevance, much of the discussion will play off a hypothetical merger between two manufacturers of soymilk – the same one that has been used in the Investigative Techniques workshops.

- We will first hear from the chairs of the Analytical Framework subgroup, who will lead the discussion on the Draft Merger Guidelines Workbook.
- Picking up on this discussion, Avi Weiss will relate the *Investigative Techniques Handbook's* tips on how to obtain and test information to the information needs identified in the Guidelines Workbook.
- Next we will hear from Ted Henneberry who will introduce the panel on designing, implementing and enforcing an effective remedy.

- Staff from the EC and US Federal Trade Commission will then share their perspective on whether they would request a waiver to better coordinate on remedies. Joe Krauss, an NGA involved in the model waiver project, will highlight the factors that go into a decision by merging parties on whether to waive confidentiality and whether to use the model waiver.
- Finally, the chair of the Notification & Procedures subgroup will present the Remedies and Competition Agency Powers Recommended Practices, relating them to issues raised by the other panelists.

I will now turn the podium over to Sir John Vickers. Thank you for your attention.