



## **INTERNATIONAL COMPETITION NETWORK MERGER WORKING GROUP 2010-2011 WORK PLAN**

### **MISSION**

The mission of the ICN Merger Working Group 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 each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multi-jurisdictional merger reviews.

The Working Group continues to make great strides in advancing this mission. A description of work completed in the following areas is attached as an annex:

- merger notification and review procedures; and
- the analytical framework and investigative techniques for merger review, including recommended practices for merger analysis and other guidance on the substantive standards for investigating mergers, the criteria for applying those standards, and the tools and techniques used for developing reliable evidence.

To further fulfill its mission, the Working Group has identified the following overall goals for 2010-2014: (i) promote greater international cooperation and facilitate convergence in merger review standards; (ii) enable members to improve the quality of their merger review; (iii) assist members in finding ways to avoid imposing unnecessary burdens on business and agencies; and (iv) increase transparency in agency practice to minimize uncertainty and increase predictability in merger review. The projects identified in this work plan are designed to further these long-term goals.

The U.S. Department of Justice, Antitrust Division, and the Irish Competition Authority co-chair the Merger Working Group. The Working Group includes representatives from antitrust authorities from many geographic regions and stages of development. The Working Group also includes representatives from the legal, economic, academic and business communities. ICN members and non-governmental advisors interested in participating in the projects described below are encouraged to contact the Working Group co-chairs.

## **PROJECTS FOR 2010-2011**

### **First Priorities:**

- **Conduct a Comprehensive Assessment of Existing Work Product and Membership Needs.** The Working Group will conduct a comprehensive assessment of the use and impact of its existing notification, analysis and investigative work product, potential barriers to work product use or implementation, as well as evaluating new areas of work that would assist members in making merger review more effective. The Working Group will consider a variety of tools to conduct this assessment, including ICN member and NGA surveys, interviews or discussion groups, voluntary agency self-assessments, and workshop discussions. At the conclusion of this assessment, the Working Group will report its findings and review its Long Term Plan in light of the findings.

**Projected Timeline:** Surveys will be circulated by August 1, 2010 for completion prior to the workshop. Further discussions will take place during the workshop, and may also occur before and after the workshop. Evaluation of survey responses and additional input will begin in the Fall of 2010 and continue until completed.

Based on the outcome of this assessment, the Working Group will consider improving or updating existing work product, new or improved means of promoting awareness and use of the Group's work product, and additional work that will meet the needs of and engage a broad constituency of ICN members. If appropriate, and subject to consensus of the Working Group, the Working Group may begin work on identified projects prior to the 2011 ICN Annual Conference.

- **Conduct an ICN Merger Workshop on Merger Review Analysis, Procedures, and Investigative Techniques.** The Working Group will conduct a workshop hosted by the Italian Competition Authority in November 2010 on merger review, analysis, and investigation to continue its series of workshops that began in Washington, D.C. (2002) and continued in Brussels (2004), Washington, D.C. (2006), Dublin (2007), Pretoria (2007), Brno (2008), and Taipei (2009). The workshop will seek (i) to promote use of the concepts, tools, and techniques contained in the Recommended Practices for Merger Analysis, Recommended Practices for Merger Notification and Review Procedures, Merger Guidelines Workbook, Investigative Techniques Handbook, and Merger Remedies Review Report by staff lawyers and economists, (ii) to provide a forum for discussion of current substantive and policy issues in merger review, and (iii) to promote interactive discussions on the use and implementation of the Working Group's existing work product, potential barriers to work product use or implementation, and additional work that may benefit ICN members, which will serve as a source of input for the Working Group's comprehensive assessment of existing work product and membership needs.

**Projected Timeline:** Workshop in November 2010; workshop planning to be conducted from May to November 2010.

**Other Priorities:**

- **Teleconferences on Merger Issues.** The Working Group will continue conducting a limited number of teleconferences on current merger topics that are agreed upon by the group.

**ANNEX**  
**Merger Working Group**  
**REVIEW OF WORK FROM INCEPTION THROUGH 2010 ANNUAL CONFERENCE**

- **Guiding Principles and Recommended Practices for Merger Notification and Review Procedures.** The subgroup has developed eight Guiding Principles and thirteen Recommended Practices for merger notification and review, which the ICN has adopted at its annual conferences.

The Guiding Principles are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>.

The Recommended Practices are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

- **Recommended Practices for Merger Analysis.** The Working Group, with input from non-governmental advisors, began work on developing Recommended Practices on substantive merger analysis issues in 2007-08. Since that time, the ICN has adopted six Recommended Practices for Merger Analysis developed by the Working Group on: 1) the legal framework for competition merger analysis; 2) the use of market shares, thresholds and presumptions; 3) entry and expansion; 4) competitive effects analysis in horizontal merger review; 5) unilateral effects; and 6) coordinated effects. The Recommended Practices are available at:  
<http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>.

In 2009-10, the Working Group completed two additional draft recommended practices for consideration at the 2010 ICN conference in Istanbul. The proposed Recommended Practices cover: 7) market definition, and 8) failing firm/exiting assets.

- **Merger Guidelines Workbook.** The subgroup prepared a checklist of topics that the authors of new or revised merger guidelines may wish to cover, with an explanation as to why those topics have value in merger assessment and suggestions as to how those topics might be assessed in practice. The workbook is available at:  
<http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>.
- **Handbook on Investigative Techniques for Merger Review.** The Handbook is designed to inform ICN members of the various tools and techniques used in merger investigation, to help members organize and use their tools more efficiently, and to provide for an effective process for the evaluation of evidence. The first chapter summarizes the findings of a survey of members carried out in 2003, and reflects agency practice. The remaining chapters discuss how to plan a merger investigation, developing reliable evidence in merger cases, economic and econometric analyses, the benefits of including economists in merger review, and a private sector perspective on merger review. The Handbook is available at:  
<http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>.

- **Merger Remedies Review Report.** The subgroup prepared a report that provides practical guidance and outlines key principles and the range of tools in the use of merger remedies. The report is based on and illustrated by remedy practice in a variety of jurisdictions. It is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>.
- **Workshops on Merger Notification and Procedures.** In March 2006, the subgroup held a two-day workshop in Washington, DC, to promote implementation of the Guiding Principles and Recommended Practices. In March 2008, the subgroup held a second such workshop in Brno, Czech Republic, hosted by the Czech and Slovak competition agencies. Workshop topics included setting notification thresholds, initial information requirements, review periods, remedies, and transparency, confidentiality, and procedural fairness.
- **Substantive Issues in Merger Analysis Workshops.** In April 2007, the subgroup held an interactive workshop for staff lawyers and economists in Dublin designed to promote greater understanding of the ICN's *Merger Guidelines Workbook* and *Remedies Report*. Using a hypothetical merger case, role playing, plenary and breakout sessions, the workshop encouraged the exchange of practical experience among members. Regional workshops covering substantive issues in merger analysis also were held in Pretoria in 2007, and in Taipei in March 2009.
- **Investigative Techniques Workshops.** The subgroup held two International Merger Workshops for staff lawyers and economists, in Washington, DC, in November 2002 and in Brussels in October 2004. At the workshops, members learned about the different practices, tools and techniques used to investigate mergers, and gained a better understanding of their advantages and disadvantages. The materials from the workshop have been compiled to enable agencies to conduct in-house investigative techniques training sessions.
- **"Take-Home" Version of the Workshop on Substantive Issues in Merger Review.** The Working Group adapted the materials used in the April 2007 Substantive Issues in Merger Review workshop to enable antitrust authorities to use the materials to conduct their own internal training. The workshop training materials aim to deepen participants' acquaintance with specific analytical issues in merger review and promote the Merger Guidelines Workbook and the Merger Remedies Study.
- **Web Link and Template Projects.** To facilitate ready access to merger laws and key features of merger review systems, the subgroup established links to national merger review laws and related materials, and to responses to a template of questions the subgroup developed about the merger review system. These materials are available at: <http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx>.
- **Implementation Report.** To facilitate implementation of the Guiding Principles and Recommended Practices, the subgroup gathered data on members' experiences with implementation and prepared a report identifying challenges agencies face in

implementing the Practices and how they addressed these challenges. These materials are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf>.

- **Implementation Handbook.** To facilitate further implementation of the Guiding Principles and Recommended Practices, the subgroup created a handbook containing examples of legislative provisions, guides, statements and notices, and press releases that conform to selected Principles and Practices. The handbook is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc325.pdf>.
- **The Analytical Framework for Merger Review.** The subgroup produced a series of papers intended to serve as a baseline for comparing and contrasting substantive merger tests (substantial lessening of competition, dominance, public interest) for merger review. The subgroup then created a discussion paper examining basic issues involved in choosing a particular framework. This paper is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>.
- **Analysis of Merger Guidelines.** The subgroup worked with multinational teams of non-governmental advisors to prepare a set of analytical papers that describe the methodologies of a dozen members through analyzing their existing or proposed merger guidelines. The papers describe how these jurisdictions deal with five topics – coordinated effects, unilateral effects, market definition, efficiencies, and market entry.
- **Information Requirements for Merger Notification.** This paper aims to assist agencies in comparing the approaches to pre-merger notification among some ICN members, and to help agencies planning to introduce or revise their notification forms or requirements in conformity with the ICN N&P Recommended Practice on Initial Information Requirements. The paper summarizes the various categories of information ICN members seek in the initial notification of a merger and describes approaches and mechanisms for flexibility that members use to obtain the information needed for merger review while minimizing unnecessary costs and burdens of notification, particularly for transactions that do not present material competitive concerns. This paper is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>.

- **Defining Merger Transactions for Purposes of Merger Review.** Building on the Transparency Recommended Practice, this paper explores the various approaches jurisdictions have adopted to define the types of transactions that are potentially subject to notification and/or review. This paper is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>.
- **Setting Notification Thresholds.** Building on the Recommended Practice on Notification Thresholds, this paper explores the various approaches used to set notification thresholds and members' recent experiences with threshold revisions. The objective of the project is to provide guidance to agencies that plan to adopt or revise thresholds, in order to promote thresholds that are clear, understandable and easily administrable. The paper is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>.
- **Model Confidentiality Waiver.** The subgroup developed a model form that merging parties and competition agencies can use to facilitate waivers of confidentiality protection for information that parties submit in the merger review process. The subgroup prepared an accompanying paper discussing the rationale for, content of, and use of waivers, along with illustrative agency waiver forms. These materials are available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.
- **Comparative Study of Merger Notification Filing Fee Systems.** The subgroup studied merger notification filing fee systems worldwide and prepared a report discussing the various types of filing fee regimes. This report is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc331.pdf>.
- **Costs and Burdens Report.** The subgroup prepared a report on the costs and burdens of multijurisdictional merger review based on available studies and anecdotal information. The report is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf>.