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# ICN Recommended Practices for Merger Analysis and Model ICN Guides

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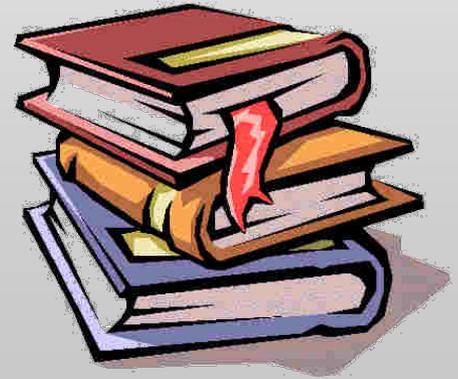
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# Model ICN Guides

# Work Products on Notification & Procedures

- Guiding Principles for Merger Notification & Review Procedure
- Recommended Practices for Merger Notification & Review Procedures
- ICN Merger Notification & Procedures Self-Assessment Tool
- Notification & Procedure Reports:
  - Model Confidentiality Waiver;
  - Setting Notification Thresholds;
  - Defining Merger Transactions;
  - Notification Information Requirements;
  - Merger Notification & Procedures Templates



# ICN Guiding Principles

- Transparency
- Non-discrimination on the basis of nationality
- Sovereignty
- Procedural fairness
- Efficient, timely, and effective review
- Coordination
- Convergence
- Protection of confidential information

# Recommended Practices for Merger Notification & Review Procedures

- **Transactions** 
- Jurisdictional nexus 
- Objective notification thresholds 
- Flexibility in the timing of notification
- Merger review periods
- Requirements for initial notification
- Conduct of merger investigations
- Procedural fairness
- Transparency
- Confidentiality
- Interagency coordination
- Review of merger review provisions
- Remedy procedures 
- Agency powers

Available in English, French, and Spanish.

# RP VI. Conduct of Merger Investigations

Agencies should:

- include opportunities for discussions between the competition agency and the merging parties at key points in the investigation
- provide merging parties with an explanation of competitive concerns
- ensure that investigations are completed without undue delay
- avoid imposing unnecessary costs and burdens on merging parties and third parties
- comply with applicable legal privileges and confidentiality procedures



# RP VII. Procedural Fairness

- Agencies should provide merging parties with sufficient and timely information on competitive concerns.
- Parties should have a meaningful opportunity to respond to such concerns.
- Third parties should be allowed to express their views during the merger review process.
- Agencies should ensure that the process is implemented fairly, efficiently, and consistently.
- Merger review systems should provide an opportunity for timely review by a separate adjudicative body of an agency's final adverse decision on the merits.

# RP. XI Remedies

- A remedy should address the identified competitive harm arising from the proposed transaction.
- The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.
- Procedures and practices should be established to ensure that remedies are effective and easily administrable.
- Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.

# Work Products on Merger Analysis

## Recommendations, Workbooks, and Handbooks For Merger Analysis

- [Recommended Practices for Merger Analysis](#) (2008–2010)
- [ICN Merger Analysis Self Assessment Tool](#) (2013)
- [Handbook on Investigative Techniques](#) (2005)
- [Merger Guidelines Workbook](#) (2006)
- [Practical Guide to International Cooperation](#) (2015)
- [Merger Remedies Guide](#) (2016) 
- All work product is available on MWG section of the ICN website and in the publication *ICN Work Products Catalogue*

# Recommended Practices for Merger Analysis

- ▶ The Recommended Practices for Merger Analysis were adopted at the ICN's annual conferences in 2008–2010 and address:
  - 1) The Legal Framework for Competition Merger Analysis;
  - 2) Market Definition;
  - 3) The Use of Market Shares: Thresholds & Presumptions;
  - 4) Overview of Competitive Effects;
  - 5) Unilateral Effects Analysis;
  - 6) Coordinated Effects Analysis;
  - 7) Entry and Expansion; and
  - 8) Failing Firm/Exiting Assets.

# Investigative Techniques Handbook for Merger Review

- Chapter 1: Investigation Tools Overview
- Chapter 2: Planning a Merger Investigation
- Chapter 3: Developing Reliable Evidence
- Chapter 4: [The Role of Economists and Economic Evidence](#)  
(updated in April 2013!)
- Chapter 5: A Private Sector Perspective

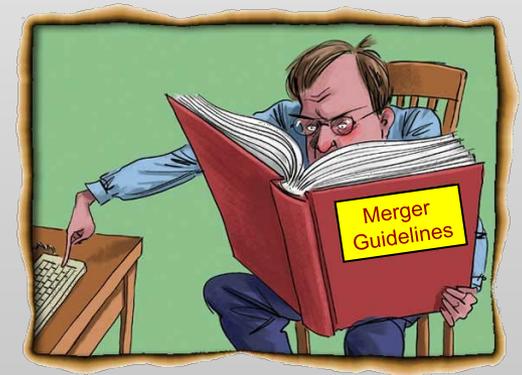
# Chapter 4: The Role of Economists and Economic Evidence

## Highlights:

1. The role of economist/economics in planning merger investigation
2. The economist's toolbox: qualitative evidence and quantitative methods
  - Price correlation and time-series analysis
  - Diversion ratios
  - Upward Price Pressures
  - Natural events / shock analysis
  - Demand estimation
3. Requirements for a solid quantitative analysis
4. Glossary, further resources & case studies

# Merger Guidelines Workbook

- A detailed analytical framework, with key questions an investigating competition authority will wish to address when evaluating a merger's competitive impact.
- It is a practical manual to further build upon the understanding of the key questions which need to be addressed in the merger review process.
- Identifies common approaches to problems and elicits best practices in formulating an analytical framework for the competition assessment of mergers.



# Merger Guidelines Workbook Contents

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# Merger Remedies Guide 2016

- It provides a practical guide to the choice, design, period and implementation of merger remedies
- It achieves this by summarizing key principles and practices employed by a wide cross-section of ICN members and then illustrating significant issues through case studies.

# Merger Remedies Guide

## Table of Contents

Part 1 – Introduction

Part 2 – Guiding Principles and Procedural Considerations

Part 3 – Choice and Design of Remedies

Part 4 – Implementing and Monitoring Remedies

Annex 1: Practical Tips for Competition Authorities Cooperating on Merger Remedies

Annex 2: Examples of Non-structural Remedies

Annex 3: Risks Associated with Price Controls as a Remedy

Annex 4: List of Selected Guidelines on Merger Remedies from Various Jurisdictions

Annex 5: List of Selected Ex Post Reviews and Studies of Merger Remedies

Annex 6: Case Examples

# Self-assessments

- Yes-or-no questions linked to each Recommended Practice
- Taking the self-assessments help you understand how merger notification and analysis in your jurisdiction compares to the Recommended Practices
  - [Notification and Procedures Self-assessment](#)
  - [Merger Analysis Self-assessment](#)
- These self-assessments can help you use the RPs as a benchmark and identify areas for improvement.

# ICN Training on Demand Modules

- A comprehensive curriculum of competition law training materials for competition agency staff and officials
- From Series I Competition Fundamentals:
  - Module I – 3 Market Definition
  - Module I–5: Competitive Effects
- From Series IV Mergers
  - Module IV–1: Handling Merger Investigations
  - Short presentations on: Unilateral Effects and Merger Remedies
  - Module VI–1: Planning and Conducting Investigations
  - Module VI–2: Interviewing Witnesses: Who, What, Where, When, Why & How
- All modules available at:  
<http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>



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# Recommended Practices for Merger Analysis

# Recommended Practices for Merger Analysis

- Legal framework for competition merger analysis
- Market definition in merger review
- Use of market shares: thresholds and presumptions
- Overview of competitive effects analysis in horizontal merger review
- Unilateral effects
- Coordinated effects
- Entry and expansion
- Failing firm/exiting assets
- Efficiencies (forthcoming 2017)

# Legal Framework for Competition Merger Analysis

- The purpose of merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly
  - Agency should only intervene to restore or maintain competition affected by the merger, not to enhance premerger competition
  - Merger review law should not be used to pursue other goals
- Merger review law and policy should provide a comprehensive framework, based on sound economic principles, for effectively addressing mergers that are likely to harm competition significantly

# Market Definition

- Agencies generally should assess the competitive effects of a merger within economically meaningful markets
  - Market definition is not an end in itself
  - An economically meaningful market is one that could be subject to an exercise of market power that likely would result in significant harm to competition
  - There may be more than one relevant market
  - Markets should be assessed within the context of the particular facts and circumstances
  - Market shares and concentration levels are meaningful in merger analysis only when they are based on properly defined markets

# Market Definition: the SSNIP Test (1/2)

- The “hypothetical monopolist” or “SSNIP” test is an appropriate test to determine the relevant market(s) in which to analyze the competitive effects of a merger
- In applying the SSNIP test, agencies generally should identify a product or group of products (or area for geographic market) for which a hypothetical, profit-maximizing monopolist would impose profitably at least a SSNIP, assuming the terms of sale of all other products were held constant
  - Market definition depends primarily upon demand-side substitution
  - Test generally identifies an area in product and geographic space within which a hypothetical monopolist would profitably exercise market power
  - Common benchmark is a price increase of between 5 and 10 percent lasting for the foreseeable future
  - “Smallest market principle”: identify a relevant product and geographic market that is no bigger than necessary to satisfy the SSNIP test

# Market Definition: the SSNIP Test (2/2)

- Consider not only whether products are functional substitutes, but also whether they are good economic substitutes to make the SSNIP unprofitable
- Boundaries of the relevant market may not be precise
- Sources of evidence for SSNIP test include
  - Market participants (customers, suppliers, the merging firms, competitors, industry or trade associations, intermediate sellers, etc.)
  - “Natural experiments” (evidence derived from prior market events such as entry and exit or a prior merger)
  - Reliable price, cost, and quantity data for empirical analysis

# Evidence for Product Market Definition

- Relevant evidence in assessing **product markets** includes:
  - the **characteristics, prices, functions, and customer usage** of the product(s) in question
  - evidence that customers have shifted or have considered **shifting purchases** between products in response to relative changes in price or other competitive variables
  - evidence that sellers base business decisions on the prospect of **buyer substitution** between products in response to relative changes in price or other competitive variables
  - evidence regarding the strength and nature of **customer preferences** among products (*e.g.*, brand loyalty, preferences for certain product performance or compatibility standards, etc.)
  - relative **price levels and price movements** of the products compared to costs and to potential substitutes
  - **legal or regulatory requirements** (*e.g.*, product certification standards, regulatory compliance standards, etc.) that may impact the substitutability of products from the standpoint of customers; and
  - the **time and costs** required to **switch** products

# Evidence for Geographic Market Definition

- Relevant evidence in assessing **geographic markets** includes:
  - the **cost** and **difficulty** of **transporting** the product in relation to the **value** of the product
  - **product characteristics** (*e.g.*, product perishability ), **geographic features**, or other circumstances impacting the ability of customers to obtain products from sellers outside the geographic area
  - evidence that customers have shifted or have considered **shifting purchases** between geographic areas in response to relative changes in price or other competitive variables
  - relative **price levels** and **price movements** of products in different geographic areas
  - constraints on the ability of outside sellers to **expand their sales** into the geographic area (*e.g.*, production capacity, committed capacity, the need to establish brand recognition and acceptance; distribution and after-sales service capabilities, etc.)
  - **legal or regulatory requirements** (*e.g.*, import duties, tariffs, quotas, licensing requirements, required regulatory authorizations or approvals, etc.)
  - the **timing and costs of switching suppliers** from one region to another

# Market Participants

- **Rapid entrants:** Agencies should consider the potential for **supply-side substitution**, and whether to include as participants in the relevant market not only all firms that currently produce or sell in the relevant market, but also firms that likely would, in response to a SSNIP in the relevant market, produce or sell in the relevant market within a short time frame and without incurring significant sunk costs
  - Relevant question is not whether a firm has the capability to produce or sell the relevant product, but whether it would likely make such sales profitably in response to a SSNIP
  - Relevant factors in assessing **supply-side substitution** include:
    - extent to which obtaining new tangible or intangible assets, or switching or extending existing assets, to enter into production or sale in the relevant market is technically feasible
    - extent to which customers would be willing to switch
    - time it would take to enter into production or sale
    - costs of shifting or entering into production or sale relative to the profitability of sales at the elevated price
    - whether the firm's capacity is elsewhere committed (or elsewhere so profitably employed ) that such capacity likely would not be available

# Use of Market Shares: Thresholds & Presumptions

- Market shares and measures of market concentration play an important role in merger analysis but are not determinative of possible competition concerns
  - Useful only when based on properly defined product and geographic markets
  - Should be based on a measure (e.g., sales, production, or capacity) that is the best indication of the firms' future competitive significance
  - Examine over time to gain better insight in the competitive dynamics of the market
- Market shares and measures of market concentration can provide useful initial guidance to help differentiate mergers that are unlikely to have anticompetitive consequences from those that require further analysis

# Overview: Competitive Effects Analysis in Horizontal Merger Review

- The goal of competitive effects analysis is to assess whether a merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power, either unilaterally or in coordination with rivals
  - Analysis conducted within the context of properly defined product and geographic markets
  - Forward-looking inquiry
  - Analysis involves a comprehensive assessment of market conditions
- Competitive effects analysis should be clearly grounded in both sound economics and the facts of the particular case
- Two theories of competitive harm provide the analytical frameworks for determining whether a merger may be expected to harm competition significantly
  - **Unilateral effects:** where the merger creates or enhances the merged firm's ability or incentives to exercise market power independently
  - **Coordinated effects:** where the merger increases the likelihood that firms in the market will successfully coordinate their behavior or strengthen existing coordination in order to exercise market power

# Unilateral Effects

- Issue: Whether the merger creates or enhances the merged firm's ability or incentives to exercise market power independently
  - Market shares and market concentration only a starting point
  - Must examine the specific features of the market that affect the merged firm's ability to exercise market power
- Common unilateral effects theories and models include:
  - Merger to monopoly/dominant firm
  - Merger of competitors in differentiated product markets
  - Merger of competitors in undifferentiated product markets
  - Merger of rivals in bidding or auction markets
- Factors often relevant in assessing the likelihood of a unilateral exercise of market power as a result of a merger include:
  - Availability and responsiveness of alternative suppliers
  - Entry, repositioning or expansion
  - Buyer power
  - Efficiencies

# Coordinated Effects

- Issue: Whether the merger increases the likelihood that firms in the market will successfully coordinate their behavior or strengthen existing coordination in a manner that harms competition significantly
  - Changes in market shares and market concentration are relevant, but not determinative
  - Must examine whether the merger will materially alter firms' ability or incentives to achieve and sustain coordination
- Agencies should assess whether the conditions that are generally necessary for successful coordination are present:
  - Ability to identify terms of coordination
  - Ability to detect deviations from the terms of coordination
  - Ability to punish deviations that would undermine the coordinated interaction.

# Entry and Expansion

- The assessment of firm entry and/or expansion by existing competitors should be an integral part of the analysis of whether a merger is likely to harm competition significantly
- In assessing whether entry and/or expansion would effectively constrain the merged entity, competition agencies should consider whether entry and/or expansion would be:
  - likely;
  - timely; and
  - sufficient in nature, scale and scopeto deter or counteract the competitive effects of concern

# Failing Firm and Exiting Assets

- In cases where the merging parties assert that a merger is unlikely to harm competition because one of the merging firms is failing, agencies should carefully assess the appropriate counterfactual in which to analyze the competitive effects of the merger
  - The failing firm's assets exit the market absent the merger
  - The failing firm's assets are bought by a less competitively significant incumbent or a potential new entrant
- In assessing claims that a merger will not harm competition because one of the merging parties is failing, agencies should determine whether:
  - the firm is unable to meet its financial obligations in the imminent future;
  - there would be no serious prospect of reorganizing the business;
  - there would be no credible less anticompetitive alternative outcome than the proposed merger; and
  - the firm and its assets would exit the market in the imminent future absent the merger.

# ICN MWG Resources

- Recommended Practices for Merger Analysis (*available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>)
- Merger Guidelines Workbook (*available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>)
- Handbook on Investigative Techniques for Merger Review (*available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>)
- MWG website: <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>



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**Thank You**