



# DEPARTMENT OF JUSTICE

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## Merger Work in the ICN: The Challenge of Substantive Convergence

Address by

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## **Introduction**

I am greatly honored to participate in this fifth ICN conference, and extremely pleased to open this meeting of the Merger Working Group.

I want to thank our hosts, David Lewis and Shan Ramburuth, for providing this wonderful venue in the majestic city of Cape Town. In bringing the ICN here, David and Shan have picked an appropriate geographic location. Cape Town lies near the convergence of the Atlantic and Indian oceans. That convergence not only makes for spectacular scenery and diverse and abundant plant, animal and marine life, but it has also made Cape Town a meeting point on global trade routes for centuries. If we were to depict global convergence on a post card, it might very well picture Cape Town.

We are also beginning to see the benefits of antitrust convergence resulting from the work of the ICN. In a few minutes I will review some of the accomplishments of the Merger Working Group over the past five years, and I will also offer a few suggestions as to how to focus the Working Group's efforts in the coming year.

Before doing that, I will take a few moments to highlight why I think the ICN is so critical to improving antitrust enforcement around the world. In a way, the ICN functions as a marketplace of ideas. As John Stuart Mill put it, in a marketplace of ideas, "The 'collision of adverse opinions' may reveal truth on both sides, and may also help both sides achieve a deeper and more vibrant understanding of their own beliefs." As Mill explained, if you engage in a debate with somebody who disagrees with you, one of three things should happen: first, you may persuade the other person that you are right and he or she was wrong; second, the other person may persuade you that you were wrong and he or she was right; and third, and perhaps most frequently, you may persuade each other that you are both right in different ways.

Regardless of the outcome, even if you walk away convinced that you were completely right all along, you have gained a richer and deeper understanding of your own beliefs.

I believe this process is inherently healthy and should be encouraged, and I am glad to say many others share that view. Last year for example, Commissioner Neelie Kroes praised the ICN's work, which is based on what she called the "broad consensus nurtured during multilateral discussion." She cited the challenges of globalization for antitrust enforcers and companies alike, and emphasized that "[t]he more specific approaches converge, the easier it is for globally-active companies to comply" with modern antitrust laws. And I will steal another quotation from my friend Bill Kovacic, who is now a Commissioner at the FTC. As Bill has said, "The only best practice is the constant striving for better practices."

And that's the achievement of the ICN. By promoting a dialogue involving antitrust enforcers and non-governmental advisors from around the world, the ICN provides a forum for enforcement agencies to share their ideas, hear other perspectives, and put these new insights to use as they strive for better practices in their own jurisdictions. After starting five years ago with just 16 agencies from 14 jurisdictions, the ICN has grown to include, at last count, 97 agencies from 85 jurisdictions.

Of course, this explosive growth has benefitted the ICN's Merger Working Group in particular. As the ICN has expanded, many more antitrust enforcers have had the opportunity to contribute to the group's discussions, and many more jurisdictions have worked on and been exposed to our work product. This engagement means that the impact of the group's work is felt far beyond the membership in the Merger Working Group itself. Indeed, many jurisdictions that are relatively new to the ICN, and not members of this Working Group, have nevertheless

adapted their own practices in accordance with the group's work.

### **Merger Working Group Achievements**

The accomplishments of the Merger Working Group over the past five years are impressive by any measure.

*Analytical Framework.* The Analytical Framework subgroup has produced a series of papers intended to serve as a baseline for comparing existing analytical frameworks for merger review. It started in 2002, with a comprehensive issues paper on the general substantive standards for prohibiting mergers. We then built on that work by explaining the analytical frameworks of twelve different member agencies, through analyzing their existing or proposed merger guidelines. Most recently, the Merger Guidelines Workbook, which will be presented today, is designed as a practical, user-friendly manual that should provide detailed insights into the basic framework used in the substantive assessment of mergers.

*Investigative Techniques.* The Investigative Techniques subgroup has promoted basic, effective techniques in planning merger investigations, developing reliable evidence from witnesses and documents, using economists and sound economic evidence, and interacting with merging parties. These types of skills have been highlighted at two workshops and are embodied in a practical handbook that is available on the ICN website. And there is now a revised take-home version of the most recent staff-level workshop, so more people can benefit beyond those who were able to attend in 2004.

*Notification & Procedures.* Merger process has been a primary focus of the ICN since its inception, and the Merger Working Group has in turn devoted a great deal of time and attention to merger notification and procedures. We began our efforts in the hope that any

principles and practices developed here would become well accepted in the international arena. We have had great success. The ICN Recommended Practices for Merger Notification and Review Procedures have become *the* focal point for international convergence efforts on merger process, and their implementation has taken on a momentum of its own. The Recommended Practices Implementation Handbook, developed this year, provides dozens of examples of legislation, procedural rules, practices, statements and notices that represent movement towards greater conformance with the Recommended Practices.

The many ICN members that participate in the Merger Working Group devote considerable resources to promoting successful implementation of the Recommended Practices. In fact, diversity of perspectives is crucial in developing ICN recommendations, because we want any recommendations ICN makes not only to be sound, but to have a broad legitimacy in the global community. Appropriately, the Merger Working Group's achievements to date are due in no small part to the participation of NGAs, whose invaluable knowledge, experience, and perspective are integral to our success.

As you will hear from Randy Tritell this afternoon, for the first time at an annual conference he will not present new recommended practices on notification and procedures for the conference to discuss and approve. Let me take this opportunity to thank Randy for his dedicated leadership over the years in developing the Recommended Practices, which have come to symbolize the ICN's practical consensus-building work.

### **Future Work**

While there are no *new* recommended practices to present today, the Recommended Practices continue to thrive with ever greater implementation levels. The U.S. agencies have

taken to heart the call to continue striving for better practices. Most recently, in February the FTC announced reforms to its merger review process aimed at reducing the costs and time required to complete in-depth merger investigations. In the Antitrust Division, we recognize that we can always improve what we are doing, and we currently are reviewing our own processes with the goal of taking further steps soon. Every change or improvement to a member agency's procedures inspired by a Recommended Practice helps to strengthen and streamline the multijurisdictional merger system.

As outlined in our work plan for the coming year, the Merger Working Group will continue to push the momentum of convergence. The Working Group's successful workshop in March in Washington showed that agency delegates from around the world are committed to improving their merger procedures and confirmed the potential for even greater convergence. The Merger Working Group will continue its commitment to promoting wider implementation of the Recommended Practices and pursue ideas for practical workshops on analytical and investigative topics.

In addition, I propose that in the coming year the Working Group evaluate the prospects for future convergence on substantive issues. This is a logical step in the progression of the ICN's merger work, and we hope such work on substance can ultimately match the momentum of convergence we now see on the procedural side.

ICN work on procedural convergence was largely built on pre-ICN work, in the OECD and elsewhere, that examined the growing number of international merger notification and review requirements. The sound, practical solutions embodied in the Recommended Practices drew significantly upon this experience, and the ICN has proven to be a useful vehicle for transforming

these aspirations into practical procedural convergence.

The ICN's work to date on merger analysis is still in relatively early stages. Five years ago, there was no comprehensive body of work on substantive convergence comparable to the then-existing work on procedural convergence. Developments since the ICN's founding, however, make it appropriate today to consider potential analytical convergence. A few examples are the new or revised horizontal merger guidelines for the European Commission, Canada, and the United Kingdom; the U.S. agencies' 2004 Merger Workshop and recent Commentary on the Horizontal Merger Guidelines; OECD work, including roundtables on the substantive criteria used for merger assessment and barriers to entry; and, of course, the work of the ICN Merger Working Group's own Analytical Framework subgroup.

In light of these developments, a promising next step for the Working Group would be to consider the prospects for convergence on substantive merger issues, with a goal of identifying areas of merger analysis (and underlying economic theories) that may be ripe for convergence efforts.

There may be analytical topics of consensus where we already may be able to acknowledge commonalities in our approaches. The comprehensive work that went into the Merger Guidelines Workbook provides some examples. The worksheet on entry notes a broad agreement on the conditions agencies evaluate to determine whether entry is a competitive constraint. Many agencies make similar use of intervention thresholds or safe harbors that broadly indicate an agency's likely response to a merger. The workbook also cites common relevant factors used across jurisdictions in the evaluation of unilateral or coordinated effects. On the other hand, such an exercise may identify areas of substantive divergence, and provide

insight on the possibility of future convergence. Again, the workbook may suggest some candidates. For example, the worksheet on efficiencies notes differences in how agencies evaluate such claims.

I do not suggest an immediate exercise to arrive at conclusions or recommendations, but rather a project to explore possibilities. I invite whoever wishes to, including interested NGAs, to identify substantive issues that are ripe for discussion on convergence. NGA perspectives were instrumental in identifying specific areas for procedural improvements; now I hope you will join us in casting a critical eye on analysis. We will invite interested NGAs for such discussions over the coming year, and we will consider using future workshops to continue the dialogue. Perhaps substantive differences in enforcement are not as readily identifiable in terms of unnecessary costs and burdens as are procedural differences. Perhaps they are not as prevalent or as important to the antitrust community. That is why hearing the practical experiences of NGAs who are more immediately faced with the consequences of agency differences is critical to our task.

I suggest that a starting point for such an exercise could be a common foundation based on the principle that an antitrust agency should intervene only when it is confident, based on an analysis that incorporates sound economics, that the transaction in question will harm consumer welfare. The comprehensive dialogue that began with the Working Group's discussions on procedural convergence, analytical comparisons, and investigative tools has proven its value these past five years, and we look forward to continuing that dialogue on the general approach that should be taken with regard to substantive merger assessment.

## **Conclusion**

Five years ago it was hoped that the ICN model would be effective. Now we know that it is. We have seen this success in the work of the Merger Working Group; in the efficiency and focus of this year's Telecom Working Group; in the productive workshops for our cartel experts; in the positive competition policy work in the CPI Working Group, and in beginning a shared discussion on unilateral conduct.

I look forward to additional exciting times ahead for ICN. I share John Stuart Mill's view that our discussions here will have value regardless of whether we achieve specific convergence results. Through these discussions we will each leave Cape Town with a richer and more vibrant understanding of our own beliefs.

I will now ask my Deputy, Jerry Masoudi, to introduce the Merger Working Group presentation so that the real work of this afternoon can get under way. Thank you for your attention.