

ICN's Merger Working Group: A Driver of International Cooperation

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One of the four tenets in the International Competition Network’s mission statement is “to facilitate effective international cooperation to the benefit of member agencies.” ICN working groups have addressed the topic of enforcement cooperation in various projects over the course of ICN’s existence.¹ In 2012, the ICN Steering Group initiated an ICN-wide international cooperation project to address the topic across enforcement areas and deepen the discussion of enforcement cooperation within the network.²

The network’s increased emphasis on the practice of enforcement cooperation reflects the proliferation of multijurisdictional matters and the needs of ICN member agencies. ICN discussions and written work have focused on the goals and methods of cooperation within existing legal frameworks, with a view to identifying effective practices and producing practical guidance.

In 2011, the first ICN program to address international enforcement cooperation in a variety of competition enforcement areas occurred at a roundtable program on enforcement cooperation in Washington, D.C. The roundtable provided an interactive forum for sharing experiences among agencies and non-governmental advisers (NGAs). The discussion at this forum helped shape an ICN-wide effort to evaluate enforcement cooperation. Several of the suggestions offered at the roundtable inspired new work, including the creation of a contact list of merger cooperation liaisons, substantive discussion calls on case cooperation examples and techniques, and discussion of additional ICN cooperation enforcement guidance.

In 2012, ICN’s International Enforcement Cooperation Project began, and the ICN and the OECD’s Competition Committee worked closely to create a comprehensive survey of competition agency’s cooperation practices. The results of this worldwide survey were reported by the OECD and ICN in 2013.³ Survey respondents identified the ICN’s important role as a “platform for interaction” and indicated a desire to see additional work related to cooperation on cartels and mergers in particular, with a majority supporting “new recommended practices or other guidance on cooperation.”

The Merger Working Group (MWG) has been one of the primary outlets for the discussion and production of cooperation-related work within the ICN. While this article focuses on the ICN’s merger-related cooperation work, the ICN’s Cartel Working Group has also

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¹ The ICN’s website has a page that compiles its existing cooperation-related work. See <http://internationalcompetitionnetwork.org/about/cooperationwork.aspx>.

² The mandate for the International Enforcement Cooperation project is available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>

³ OECD Competition Committee, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation at www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf; ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation at <http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf>

produced significant work on international cooperation in cartel investigations, notably its 2007 report on Cooperation between Competition Agencies in Cartel Investigations.⁴

In 2004, the MWG produced the first cooperation-related ICN work product with its recommended practice on Interagency Coordination, RP X of the Recommended Practices for Merger Notification and Review Procedures.⁵ The recommendation starts with the premise that “agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern,” and sets out broad encouragement for such coordination. The Merger Working Group followed up this recommendation with a 2007 report, Waivers of Confidentiality in Merger Investigations, which contains an ICN model waiver form for merger investigations.⁶ The report and model support the idea that competition agencies generally should encourage and facilitate cooperation from parties during parallel merger reviews. In 2012, the MWG established the Framework for Merger Review Cooperation “to facilitate effective and efficient cooperation between and among member agencies...reviewing the same merger.”⁷ All ICN members can choose to participate in the framework, and those who do are provided with contact information for staff at all participating competition agencies.

In 2013 and 2014, the Merger Working Group devoted itself to a systematic exploration of international cooperation among agencies conducting parallel merger investigations. Over the past six months, the working group held a series of teleseminars on various aspects of cooperation. During these calls, agency staff discussed practical examples of cooperation among agencies reviewing same merger transaction. Non-governmental advisors participated in the calls and shared their experiences advising on multi-jurisdictional mergers.

The first call focused on alignment of proceedings,⁸ identifying how an agency can learn whether another agency is reviewing the same transaction, how and when to make contact with another reviewing agency, and understand obstacles and limitations to cooperation. Frequently, agencies learn that another agency is reviewing the same transaction from news sources, online searches, merger notification forms, and through conversations with the parties. More formal tools, such as notifications pursuant to bilateral or multilateral agreements, have occasionally been the basis for learning of another agency’s review. Once an agency is aware of a concurrent investigation, staff may decide to contact other reviewing agencies at an early stage. Early in an investigation, agencies may discuss

⁴ ICN report on Cooperation between Competition Agencies in Cartel Investigations at <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>.

⁵ ICN Recommended Practices for Merger Notification and Review Procedures, RP X Interagency Coordination (29) at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

⁶ See report and model waiver at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

⁷ The International Competition Network’s Framework for Merger Review Cooperation at <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

⁸ Presentation slides from this call, “Practical Aspects of International Cooperation in Merger Cases: Alignment of Proceedings,” are available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc941.pdf>.

timelines for review, potential theories of harm, issues related to understanding the relevant market, and previous experience in analyzing similar markets. Cooperating agencies have found it useful to contact one another at or before key stages of their investigations, including prior to clearance, before moving to a second phase investigation, before meetings with parties, and before remedy discussions. Many agencies choose informal, ad hoc contacts, such as phone calls or emails between staffs reviewing the transaction. In transactions where staffs are cooperating more intensely, or when remedies are being negotiated, staffs may hold regular (biweekly or weekly) meetings.

The first call also addressed how parties can facilitate cooperation. For example, parties can time their filings so agencies are at similar stages of review at the same time, and they can grant waivers of confidentiality, which permit agencies to discuss and exchange confidential information with one another. Some agencies routinely use the ICN's Model Waiver Form,⁹ and others, like the Federal Trade Commission and Department of Justice, have their own model waiver.¹⁰

This discussion of waivers was explored in more depth during the MWG's second call,¹¹ when agencies and NGAs focused on how waivers can benefit both parties and agencies. Participants also identified some concerns about privilege, and how timing and scope of the investigation can be impacted by the close cooperation that waivers allow.

One of the challenges discussed during the calls was how agencies with less experience in international cooperation can begin to build cooperative enforcement relationships with other competition agencies. Promoting use of the ICN Framework for Merger Review Cooperation¹² could resolve some of the difficulties encountered. The Framework includes a contact list, maintained by the Japan Fair Trade Commission, which can help newer agencies develop relationships and make contact when they learn another agency is reviewing the same transaction.

Another challenge identified during the calls is understanding confidentiality. Parties and agencies alike must understand the confidentiality protections that apply in their own and in cooperating jurisdictions. This is an essential step to successful cooperation. It helps build trust among parties and agencies, and it helps agencies identify the types of non-confidential information that can be shared with a cooperating agency. Non-confidential information most often includes any publicly available information about a transaction, as well as information about an agency's timeline, methods of analysis, and procedures for review. In some cases, theories of harm can be discussed in general terms without

⁹ ICN Model Waiver Form for use in merger investigations at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

¹⁰ See <http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust> and <http://www.justice.gov/atr/public/international/docs/300917.pdf>

¹¹ Presentation slides from this call, "Practical Aspects of International Cooperation in Merger Cases: Investigations," are available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc943.pdf>.

¹² The ICN Framework for Merger Review Cooperation at <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

disclosing confidential information. Better understanding confidentiality and training staff to understand what types of information can and cannot be exchanged is an essential step toward facilitating cooperation.

The third MWG call focused on case studies and cooperation among agencies considering remedies.¹³ When considering remedies, cooperating agencies often hold regularly scheduled calls and may exchange drafts of potential remedies. Depending on how similar the remedies are among cooperating jurisdiction, agencies may be able to jointly approve trustees, and jointly discuss buyers and other aspects of the divestiture.

The MWG will continue to be a driver of cooperation as the Enforcement Cooperation Project continues. The MWG will host a plenary session at the 2014 ICN Annual Conference¹⁴ on International Enforcement Cooperation in Merger Cases, and will discuss case cooperation during several breakout sessions. The focus on cooperation will continue in the working group's 2014-2015 agenda. In the next year, the issues identified during the cooperation call series will inform the MWG's work toward creating guidance on cooperation.

¹³ Presentation slides from this call, "Practical Aspects of International Cooperation in Merger Cases: Assessment and Remedies," are available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc940.pdf>.

¹⁴ For more information about the 2014 Annual Conference, see <http://www.icnmarrakech2014.ma>.