

Antitrust Law Blog

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ICN Adopts Recommended Practices To Improve Merger Analysis

At the eighth annual International Competition Network (ICN) conference in Zurich, Switzerland, the ICN adopted new Recommended Practices for substantive merger analysis. The ICN conference, hosted by the Swiss Competition Commission, was held on June 3-5, 2009. More than 450 delegates participated, representing over 80 antitrust agencies from around the world, and competition experts from international organizations and the legal, business, consumer and academic communities.

Based on the work of the Merger Working Group (MWG), co-chaired by the Department of Justice's (DOJ) Antitrust Division and the Irish Competition Authority, ICN members adopted the following recommended practices:

A. Competitive Effects Analysis in Horizontal Merger Review:

- The goal of competitive effects analysis in the review of horizontal mergers 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 co-ordination with rivals.
- In conducting competitive effects analysis, agencies should consider whether a merger will be likely to result in anti-competitive unilateral or coordinated effects. These two theories of competitive harm provide the analytical frameworks for determining whether a horizontal merger may be expected to harm competition significantly.
- The analysis of competitive effects under either the unilateral or coordinated effects framework should be clearly grounded in both sound economics and the facts of the particular case.

B. Unilateral Effects

- In analyzing the potential for a horizontal merger to result in anti-competitive unilateral effects, agencies should assess whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently.

- In conducting unilateral effects analysis, agencies should apply the economic theory or model that best fits the characteristics of the market(s) at issue and should assess the competitive constraints and other factors relevant to the ability of the merged firm to exercise market power in the relevant market(s).

C. Coordinated Effects

- In analyzing the potential for a horizontal merger to result in coordinated effects, agencies should assess 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.
- In conducting coordinated effects analysis, agencies should assess whether the conditions that are generally necessary for successful coordination are present: the ability to identify terms of coordination, the ability to detect deviations from the terms of coordination, and the ability to punish deviations that would undermine the coordinated interaction.
- In conducting coordinated effects analysis, agencies should assess the extent to which existing competitive constraints and other factors would likely deter or disrupt effective co-ordination. In making this assessment, agencies should consider all available evidence, including the pre-merger market conditions that may constrain or facilitate successful coordination, and the impact of the merger on these conditions.

The MWG also prepared a report on Information Requirements for Merger Notification that examines member notification practices in an effort to promote greater understanding of and conformity with the Recommended Practices on Merger Notification and Review Procedures. The paper summarizes the type of information commonly sought in merger notification, and describes mechanisms for flexibility that agencies use to minimize unnecessary costs and burdens of notification, particularly for transactions that do not present competitive concerns.

The MWG's efforts at this year's ICN are part of its overall goal to promote best practices in the design and operation of merger review regimes in order to enhance the effectiveness of each jurisdiction's merger review mechanisms; facilitate procedural and substantive convergence; and reduce the public and private time and cost of multi jurisdictional merger reviews. In a press release, Christine A. Varney, Assistant Attorney General in charge of the DOJ's Antitrust Division, stated that, "The ICN plays a central role in promoting collaboration among antitrust authorities from around the world. The Antitrust Division is committed to participating fully in ICN efforts to promote international convergence in antitrust enforcement and explore ways in which we can pursue our shared enforcement goals."

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