

## INTERNATIONAL COMPETITION NETWORK MERGER ANALYSIS SELF-ASSESSMENT:

### ASSESSING WHETHER MERGER ANALYSIS PRACTICES CONFORM TO THE ICN'S RECOMMENDED PRACTICES FOR MERGER ANALYSIS

The Merger Working Group<sup>1</sup> has developed this self-assessment tool for members to use to analyze their merger analysis practices, based on the Recommended Practices for Merger Analysis. The Merger Analysis Self-assessment tool complements the [self-assessment tool](#) developed for the Recommended Practices for Merger Notification and Review Procedures.

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.

#### How to use this tool:

To assess how the merger analysis system in your jurisdiction compares to the Recommended Practices, please consider the questions and examples in this tool. A 'yes' response indicates that aspects of your merger law and policy may conform to ICN's Recommended Practices for Merger Analysis. The example for each question describes one way that merger law and policy may conform to the Recommended Practices, but the written examples are not the only way that merger law and policies may conform to the Recommended Practices.

When analyzing your agency's approach to merger analysis, also review the ICN's [Investigative Techniques Handbook for Merger Review](#) and the [Merger Guidelines Workbook](#). The Working Group has revised Chapter 4 of the Handbook, "The Role of Economics and Economic Evidence in Merger Analysis". The update aims to promote a better understanding of the role of economic analysis in merger review. Please visit the Working Group's [website](#) for the updated version of Chapter 4.

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<sup>1</sup> In 2010-2011, the Merger Working Group (the Working Group) conducted a comprehensive assessment of its existing work and the views of members and non-governmental advisors on future work. The [results of that assessment](#) identified (among other priorities) the importance of promoting familiarity, use, and implementation of the Working Group's existing work product. Since 2010-2011, the Working Group has continued efforts to assess the level of use and implementation of Working Group work product, with a particular emphasis on implementation of the Recommended Practices.

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## **Recommended Practice**

### **I. The Legal Framework for Competition Merger Analysis**

**A. The purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly.**

## **Questions**

1. Does your agency focus on identifying mergers that are likely to harm competition significantly?

Yes       No

a. Example: Law or guidelines explicitly state this purpose; in its analysis, the investigative team identifies potential harms to competition including increased prices, lower quality products, reduced innovation, and reduced choice of products available to consumers.

b. Citation: RP I.A, Comments 1 and 2

2. Do you have a process to quickly identify and clear non-problematic mergers?

Yes       No

a. Examples: Your law or guidelines explicitly describe the timeline and procedures for your agency to approve mergers that are not likely to harm competition significantly; your agency takes a “quick look” or has a “fast track” review of the parties’ initial submissions within one month, finds no likelihood of significant competitive harms because there is no or a negligible overlap in the relevant market, and concludes its investigation, permitting the parties to complete the merger.

b. Citation: RP I.A, Comments 2 and 3

3. Do you have the authority to prohibit anticompetitive mergers?

Yes       No

a. Example: Your competition law grants your agency the power to prevent a merger by filing an injunction or the power to pass an order that the merger shall not take place because of its adverse effects on competition.

b. Citation: RP I.A, Comments 4 and 5

**Questions, RP I.A, cont.**

4. Do you have the authority to implement measures to remedy the anticompetitive effects presented by a potential merger?

Yes       No

- a. Examples: Your agency can order, or ask a court to order, a merging party to divest a portion of its business (a structural remedy) and/or amend certain portions of an agreement which are deemed to be anti-competitive (for example, a non-compete agreement) and/or mandate a merging party to grant access to a key input a (behavioral remedy).

- b. Citation: RP I.A, Comments 4 and 5

5. In evaluating mergers, do you distinguish between insignificant or transient (temporary) anticompetitive effects and more significant and longer-lasting effects and not take enforcement action based on the former?

Yes       No

- a. Example: Your agency's policy defines and identifies, and your investigative team uses, economic tools to identify insignificant and transient effects (such as a price increase for a few months) and your agency will not take enforcement action based only on this type of effect.

- b. Citation: RP I.A, Comment 4

6. Does your agency only intervene in a merger to restore or maintain competition that may be affected by the merger itself, not to enhance premerger competition?

Yes       No

- a. Example: Your analysis identifies competition in the current market and forecasts the impacts the merger will have on competition. Any steps to authorize remedies or block a merger are only based on the anticompetitive effects caused by the merger.

- b. Citation: RP I.A, Comment 5

**Recommended Practice**

**I. The Legal Framework for Competition Merger Analysis**

**B. A jurisdiction's merger review law and policy should provide a comprehensive framework for effectively addressing mergers that are likely to harm competition significantly.**

**Questions**

1. Does your agency have the authority to review many types of transactions that may raise significant competitive concerns?

Yes       No

a. Example: Your agency can review changes in a company's ownership beyond a complete acquisition, including acquisitions of a minority interest or joint control, new joint ventures, and changes to existing joint ventures.

b. Citation: RP I.B, Comment 2

2. Are any sector-specific exemptions from merger analysis narrowly drawn, clearly delineated, and reviewed periodically?

Yes       No       N/A (no sector-specific exemptions)

a. Example: A regulation or policy exempts specific products and has an expiration date of three years. As the expiration date approaches, your agency examines the market and makes a recommendation regarding whether the exemption should be renewed.

b. Citation: RP I.B, Comment 3

3. Are your legal standards and analytical guidelines clearly based on strong and robust economic principles?

Yes       No

a. Examples: Your agency uses the Herfindahl-Hirschman Index, a widely accepted way to measure market concentration, and uses common price correlation analysis to identify substitute goods. Your agency has researched and understands current economic theories and how to apply them to merger analysis.

b. Citation: RP I.B, Comment 4

**Questions, RP I.B, cont.**

4. Does your merger analysis allow the use of new economic tools and theories?
- Yes       No
- a. Examples: Your merger analysis policy does not limit the economic tools and theories that staff will use to determine the cross-price elasticity of demand and diversion ratios, and economic models are applied based on the specific facts of each case. Specific economic tools or models are only applied where it is appropriate to do so.
- b. Citation: RP I.B, Comment 4
5. Does your law establish a legal framework and legal procedures for merger review?
- Yes       No
- a. Example: Your agency presents its merger analysis to an administrative court and that court's or authority's rules of procedure are clearly stated and publicly available.
- b. Citation: RP I.B, Comment 5; RP1.C, Comment 4
6. Does your merger law identify a standard of proof?
- Yes       No
- a. Example: Your agency must prove or be satisfied that it is *more likely than not* that anticompetitive effects are likely to be caused by a merger. The standard varies across agencies. Other agencies use a standard based on *real chance*.
- b. Citation: RPI.CB, Comment 5, RPI.C, Comment 4
7. Can the agency or parties seek review of an agency's decision by an independent judge or tribunal?
- Yes       No
- a. Example: Law clearly states procedures for a party to petition a court or tribunal to review your agency's decision.
- b. Citation: RP I.A, Comment 1; RP 1.B, Comment 5

## **Recommended Practice**

### **I. The Legal Framework for Competition Merger Analysis**

- C. An agency's merger analysis should be comprehensive in its assessment of factors affecting the determination of whether a merger is likely to harm competition significantly.**

## **Questions**

1. Does your agency analyze mergers on a case-by-case basis with regard to the factual context of the transaction and the related competitive effects?  
 Yes     No
  - a. Example: For each proposed transaction, your agency analyzes the impact the merger will have on market conditions, including the incentives and ability of a merged entity to raise prices and reduce output, quality, service, or innovation, or to reduce prices to suppliers below competitive levels for a significant period of time.
  - b. Citation: RPI.C, Comment 1
  
2. Does your agency avoid rigid presumptions and formulaic concentration levels and use structural information appropriately in its merger review procedures?  
 Yes     No
  - a. Example: Your agency's guidelines state that market shares are used as a factor in the analysis and do not provide conclusive evidence that a merger should be prevented.
  - b. Citation: RPI.C, Comment 1
  
3. Does your merger law require that a merger's anticompetitive effects be directly attributable to the merger by the standard of proof before your agency can block a merger?  
 Yes     No
  - a. Example: The law states that before you can prevent a merger, your agency must prove or be satisfied by a preponderance of the evidence that an increase in prices, decrease in innovation, or decrease in product choice will likely be caused by the merger and not by other market forces.
  - b. Citation: Citation: RPI.C, Comment 2

**Questions, RP I.C, cont.**

4. Does your merger analysis assess and compare the competitive conditions in the market with and without the proposed merger?
- Yes     No
- a. Example: Your agency identifies the number of participants, prospective entrants, and the prices in the market currently, and it forecasts the same assuming that the proposed merger has occurred.
- b. Citation: Citation: RPI.C, Comment 2
5. Does your agency identify the competitive conditions in the market that would occur in the future, even if the merger did not occur?
- Yes     No
- a. Example: In its analysis, your agency considers a prospective market entrant that would likely enter the market whether or not the merger was completed.
- b. Citation: Citation: RPI.C, Comment 2
6. Does your agency recognize that predictions about future market conditions are inherently uncertain?
- Yes     No
- a. Example: In describing your agency's analysis of post-merger prices and the merger's impact on innovation, your agency acknowledges that its assessment is not conclusive evidence of anticompetitive effects.
- b. Citation: Citation: RPI.C, Comment 3
7. Has your agency created merger review policies that aim to achieve consistent and predictable outcomes and allow merging parties and the public to understand how merger laws are enforced?
- Yes     No
- a. Example: Your agency's guidelines are publicly available and fully describe the analytical methods and procedures that your agency uses to analyze mergers.
- b. Citation: RPI.B, Comment 4 and RP1.C, Comment 4

## **Recommended Practice**

### **II. Market Definition**

**A. Agencies generally should assess the competitive effects of a merger within economically meaningful markets. A relevant market consists of a product or group of products and a geographic area in which it is produced or sold that could be subject to an exercise of market power.**

### **Questions**

1. Does your agency use market definition as part of the analysis of the competitive effects of a merger?  
 Yes     No
  - a. Example: Your agency identifies specific products in specific locations that significantly constrain the behavior of the merging firms to define the market in an economically meaningful way. Your agency considers this as part of its assessment regarding market power and competitive effects.
  - b. Citation: RPII. A, Comments 1, 2, and 3; ICN Merger Guidelines Workbook, Worksheet A
  
2. Does your agency consider whether a merger could result in an exercise of market power within an economically meaningful market, identified by reference to the products (or services) supplied or acquired in a geographic area which would significantly constrain the market power of the merged firm?  
 Yes     No
  - a. Example: Your agency considers whether the merger would result in an increase in prices or a reduction in quality of the products or services in a particular geographic and product market (or a relevant market with a product and geographic dimension).
  - b. Citation: RPII.A, Comments 2 and 3; ICN Merger Guidelines Workbook, Worksheet A
  
3. Does your agency define the market based on the facts of the merger presently under review?  
 Yes     No
  - a. Example: Your merger policy acknowledges that market circumstances change frequently. While markets identified in past investigations in the same industry may be informative, they may not dictate, or even be directly applicable, to your assessment of the merger in question.
  - b. Citation: RPII.A, Comment 4

**Questions, RP II.A, cont.**

4. Does your agency take particular care in defining markets so as not to overstate or understate market shares or concentration levels?

Yes     No

a. Example: Your merger policy acknowledges that market shares and concentration levels are meaningful in merger analysis only when they are based on properly defined markets. When the choice among possible market definitions may have a significant impact on market shares or concentration levels, your agency exercises particular care and may seek to develop more direct evidence regarding likely competitive effects.

b. Citation: RPII.A, Comment 5

## **Recommended Practice**

### **II. Market Definition**

**B. 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.**

### **Questions**

1. Does your agency approach market definition by assessing demand-side substitution?  
 Yes     No
  - a. Example: Your agency assesses demand-side substitution by identifying the products to which consumers would most likely switch in response to a price increase, changes in quality, or availability.
  - b. Citation: RPII.B, Comment 1; ICN Merger Guidelines Workbook, Worksheet A
  
2. Does your agency employ the *hypothetical monopolist* or small but significant and non-transitory increase in price (*SSNIP*) test to determine the relevant market in which to analyze the competitive effects of a merger?  
 Yes     No
  - a. Example: Your merger policy describes the purpose of the HMT or SSNIP test and how it is used to determine the relevant market.
  - b. Citation: RPII.A, Comment 5
  
3. Does your agency use a benchmark for the SSNIP test, commonly in the range of 5-10%?  
 Yes     No
  - a. Examples:
    - i. Your agency uses prevailing prices of the products of the merging firms as a starting point for application of the SSNIP test.
    - ii. Your agency applies the SSNIP test to the value added by suppliers in the market rather than the final price.
  - b. Citation: RPII.B, Comment 3; ICN Merger Guidelines Workbook, Worksheet A

**Questions, RP II.B, cont.**

4. Does your agency apply the “smallest market principle” to identify a relevant market that is no bigger than necessary to satisfy the SSNIP test?

Yes     No

a. Example: Your agency begins by identifying the relevant market using the smallest set of products and geographic area over which the SSNIP test is satisfied. In some cases, your agency may define broader markets where applying the smallest market principle would fail to detect a horizontal overlap of concern.

b. Citation: RP II.B, Comment 4

5. Does your agency consider evidence of the likely demand responses of customers to a SSNIP?

Yes     No

a. Example: Your agency considers evidence derived from a variety of sources including customers, the merging firms, competitors, and industry or trade associations to assess the likelihood of customers switching to alternative products or services in response to a SSNIP.

b. Citation: RP II.B, Comment 5

## **Recommended Practice**

### **II. Market Definition**

**C. In applying the SSNIP test to identify a relevant product market, agencies generally should identify a product or group of products for which a hypothetical, profit-maximizing monopolist would impose profitability at least a SSNIP, assuming the terms of sale of all other products were held constant.**

### **Questions**

1. Does your agency assess the extent to which products are substitutable from the perspective of customers?  
 Yes     No
  - a. Example: Your agency uses qualitative information and/or own price or cross price elasticities of demand and diversion ratios to assess whether products are close substitutes for one another and to examine substitution possibilities from the customer's perspective.
  - b. Citation: RPII.C, Comment 1
2. Does your agency's analysis of market definition recognize that the boundaries of relevant product markets may not be precise?  
 Yes     No
  - a. Example: Your guidelines state that in differentiated product markets, substitutes may exist along a continuum.
  - b. Citation: RPII.C, Comment 3; ICN Merger Guidelines Workbook, Worksheet A
3. Does your agency consider the available evidence relevant to the likelihood of product substitution in response to a SSNIP?  
 Yes     No
  - a. Example: Your agency considers the time and costs incurred by customers when switching products, brand positioning, product characteristics, and relative sales numbers of competing products to determine whether products are demand-side substitutes.
  - b. Citation: RPII.C, Comment 4

**Questions, RP II.C, cont.**

4. Does your agency consider types of evidence related to product substitution from several sources?

Yes     No

a. Example: Your agency uses evidence of customer preferences, product characteristics, empirical analysis, sales margins, price changes in substitute products, legal or regulatory requirements, and time and costs required to switch products.

b. Citation: RPII.C, Comment 4

## **Recommended Practice**

### **II. Market Definition**

**D. In applying the SSNIP test to identify a relevant geographic market, agencies generally should identify an area in which a hypothetical profit-maximizing monopolist would impose profitably at least a SSNIP, assuming the terms of sale of all products at all other locations were held constant.**

### **Questions**

1. Does your agency consider how customers would respond to a SSNIP in one location by shifting to purchasing products in another location?  
 Yes     No
  - a. Example: Your agency considers whether a sufficient number of customers would shift to suppliers in other locations in response to a SSNIP by a hypothetical monopolist in one area so as to make the SSNIP unprofitable.
  - b. Citation: RPII.D, comment 1
2. Does your agency consider evidence relevant to the likelihood of substitution by customers to other geographic locations?  
 Yes     No
  - a. Examples:
    - i. Your agency considers the cost and difficulty of transporting the product in relation to the value of the product.
    - ii. Your agency considers relative price levels and price movements of products in different geographic areas.
  - b. Citation: RPII.D, comment 4; ICN Merger Guidelines Workbook, Worksheet A
3. Does your agency consider the role of imports and potential imports in determining a relevant geographic market?  
 Yes     No
  - a. Example: Your agency obtains and analyzes evidence regarding customers' views of imported products, how quickly imports may enter the market, the actual volume imported, and whether customers would buy an imported product given a SSNIP imposed by a hypothetical domestic monopolist.
  - b. Citation: RPII.D, Comment 3

**Questions, RP II.D, cont.**

4. Does your agency consider types of evidence related to geographic substitution from several sources?
- Yes     No
- a. Example: Your agency uses evidence of customer preferences, product characteristics, empirical analysis, sales margins, price changes in substitute products, legal or regulatory requirements, and time and costs required to switch products.
- b. Citation: RPII.D, Comment 4

**Recommended Practice**

**II. Market Definition**

- E. Where a hypothetical monopolist would profitably discriminate in prices charged to particular groups of customers or in particular geographic areas, agencies should consider whether a narrower relevant market, consisting of a product or group of products sold to certain groups of customers or in particular geographic areas, is appropriate.**

**Questions**

1. Does your agency analyze whether a hypothetical monopolist could price differently to particular groups of customers in particular locations?  
 Yes     No
  - a. Examples:
    - i. Your guidelines acknowledge that customers may differ in their ability and willingness to switch to other suppliers in other areas in response to a SSNIP.
    - ii. Your agency considers whether customers or third parties could undermine price discrimination through some form of arbitrage in which a product sold at lower prices to some customer groups is resold to customer groups intended by the firms to pay higher prices.
    - iii. Your agency considers whether price discrimination by the merged firm could permit or enhance the exercise of market power against particular buyer groups or customers in particular locations.
  - b. Citation: RPII.E, Comment 2; ICN Merger Guidelines Workbook, Worksheet A
2. Does your agency reconsider the relevant product and geographic markets after conducting its analysis of a hypothetical monopolist?  
 Yes     No
  - a. Example: When necessary, your agency adjusts the relevant product market to account for particular uses or particular locations where a hypothetical monopolist would profitably and separately impose at least a SSNIP.
  - b. Citation: RPII.E, Comment 1

## **Recommended Practice**

### **II. Market Definition**

- F. 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.**

### **Questions**

1. In defining the product and geographic dimensions of the market, does your agency consider supply-side substitutes?  
 Yes     No
  - a. Example: Your agency treats one product as a supply-side substitute for another in cases where all (or a virtually all) of the capacity for producing the product could profitably be switched to supply an effective substitute to the other product quickly and without significant investment in response to a price increase.
  - b. Citation: RPII.F Comment 1; ICN Merger Guidelines Workbook, Worksheet A
2. In assessing supply-side substitutes, does your agency determine whether a firm that can shift existing assets to produce and sell the relevant product would make sales profitably in response to a SSNIP?  
 Yes     No
  - a. Example: Your agency recognizes that the relevant question for analysis 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.
  - b. Citation: RPII.F Comment 2; ; ICN Merger Guidelines Workbook, Worksheet A
3. In assessing whether supply-side substitution is likely, does your agency consider evidence relating to the difficulties that a firm may face in participating in the relevant market?  
 Yes     No
  - a. Example: Your agency takes into account the following factors in assessing the likelihood of supply-side substitution:
    - the 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;
    - the extent to which customers would be willing to switch to products offered by the firm in the relevant market;

- the time it would take to enter into production or sale, including the time necessary to comply with any applicable legal or regulatory requirements;
- the costs of shifting or entering into production or sale relative to the profitability of sales at the elevated price; and
- whether the firm's capacity is elsewhere committed or elsewhere so profitably employed that such capacity likely would not be made available to respond to an increase in price in the relevant market.

b. Citation: RPII.F Comment 3

**Recommended Practice**

**III. Use of Market Shares: Thresholds & Presumptions**

**A. Market shares and measures of market concentration play an important role in merger analysis but are not determinative of possible competitive concerns. Agencies should give careful consideration to market definition and the calculation of market shares and market concentration.**

**Questions**

1. Does your agency analyze market shares and measures of market concentration?  
 Yes     No
  - a. Example: The practice and/or guidelines of your agency recognizes that market shares and measures of market concentration are useful, although imperfect, indicators of competition concerns. Your agency, in general, pays greater attention to a horizontal merger that significantly increases market concentration than to one that does not, or does so only marginally.
  - b. Citation: RP III.A, Comments 1 and 2
  
2. In analyzing the competitive significance of each merging party and the competitive concerns raised by the merger, do you treat the parties' market shares and market concentration as being good initial indicators but not conclusive evidence on their own?  
 Yes     No
  - a. Example: Your agency recognizes that market shares and measures of concentration are not by themselves determinative of competition concerns, but are considered together with all other relevant evidence.
  - b. Citation: RP III.A, Comments 1 and 2
  
3. Are market shares and concentration estimates used by your agency based on properly defined product and geographic markets?  
 Yes     No
  - a. Example: Your considers market shares and concentration as part of your analysis of the competitive effects of a merger after properly defining relevant markets and your agency uses reliable data and other sources of evidence.
  - b. Citation: RP III.A, Comment 3

**Questions, RP III.A, cont.**

4. Does your agency's merger analysis rely on market shares calculated with reliable data based on appropriate measures?
- Yes     No
- a. Example: Your agency uses economic measures to calculate market shares, such as sales, production, or capacity within a certain period.
- b. Citation: RP III.A, Comments 3 and 4; ICN Merger Guidelines Workbook, Worksheet B
5. Are the market share calculations used by your agency in merger analysis based on the best-available and reliable sources?
- Yes     No
- a. Example: Your agency analyzes market shares based on the measure of economic strength (e.g. sales, production, or capacity) most appropriate in the circumstances of the market. In addition to information received from merging parties, your agency relies on data (or if actual data are not available, best estimates) from other sources (such as competitors, customers, suppliers, trade associations, and market research reports) in calculating market shares.
- b. Citation: RP III.A, Comments 3 and 4
6. When there is more than one way to calculate market shares (for example, a choice between capacity or production, or between sales volume and sales value), does your agency try to determine which measure(s) is most likely to reflect the merging parties' future competitive significance?
- Yes     No
- a. Example: Your agency considers market characteristics (such as whether products are differentiated or undifferentiated, and how they are bought and sold) when considering different ways to calculate market shares.
- b. Citation: RP III.A, Comment 4
7. Before drawing conclusions from market share and concentration data, does your agency consider imminent or reasonably certain changes to the market?
- Yes     No
- a. Example: Your agency takes into account expected or reasonably certain future changes to the market, such as the introduction of additional capacity or the entry or exit of a competitor, before reaching any conclusions based on interpreting market share and concentration data. Your agency also takes into account changes in market conditions (for example growth in demand, innovation or level of vertical integration) and recent growth trends in the overall market and of suppliers' market shares when considering how strongly to rely on market shares.
- b. Citation: RP III.A, Comment 4; ICN Merger Guidelines Workbook, Worksheet B

**Questions, RP III.A, cont.**

8. Does your agency analyze changes in market shares and concentration over time?

Yes     No

a. Example: When appropriate, your agency uses historical data to analyze market shares over a period longer than one year, and it investigates any variance in market shares over time and the reasons for any variance.

b. Citation: RP III.A, Comment 4

**Recommended Practice**

**III. Use of Market Shares: Thresholds & Presumptions**

**B. Market shares and measures of market concentration can provide useful initial guidance to help identify mergers that may raise competitive concerns requiring further analysis.**

**Questions**

1. Does your agency have a process to identify quickly which mergers are unlikely to be anti-competitive that considers market share or concentration measures?  
 Yes     No
  - a. Example: Your agency uses market shares and measures of concentration to differentiate mergers that are unlikely to have anticompetitive consequences from those that require more detailed analysis.
  - b. Citation: RP III.B, Comments 1 and 2
  
2. If your agency considers generally that no concerns or further inquiry are warranted in cases where combined market shares are low (or the change in market share or concentration is small), does it leave room for exceptional cases?  
 Yes     No
  - a. Example: Law or guidelines explicitly state that market shares and levels of concentration below any given threshold should not be taken automatically to rule out possible concerns or further investigation. Your agency considers other relevant factors before closing or clearing the case, such as whether any of the merger parties have substantial pre-merger market power, very high market concentration, and customer complaints made to the authority.
  - b. Citation: RP III.B, Comment 2; ICN Merger Guidelines Workbook, Worksheet B
  
3. Does your agency provide initial guidance to merging parties regarding the likelihood of an in-depth review of the transaction based on thresholds of market shares and levels of concentration?  
 Yes     No
  - a. Example: Your agency consults with the parties after your agency considers thresholds for market shares and levels of concentration. You indicate to the parties whether the agency is likely to require an in-depth competition analysis of the proposed transaction.
  - b. Citation: RP III.B, Comment 3

### **Recommended Practice**

#### **III. Use of Market Shares: Thresholds & Presumptions**

**C. High market concentration and significant increases in market shares brought about by a merger are useful, but generally are not conclusive indicators that a merger is likely to harm competition significantly. Jurisdictions that use market concentration and/or market shares to presume competitive harm should ensure that any such presumption may be overcome or confirmed by a detailed review of market conditions.**

### **Questions**

1. Does your agency analyze market concentration and increases in market shares when assessing mergers?  
 Yes     No
  - a. Example: Your agency recognizes that market concentration and market share data can help to determine whether a merger is likely to harm competition significantly.
  - b. Citation: RPIII.C, Comment 1
2. Does your agency use high market concentration and significant increases in market shares as a useful, but not conclusive, indicator of potential competition concerns?  
 Yes     No
  - a. Example: Your agency's guidelines state that mergers that lead to high market shares for the merging parties and that result in significant increases to concentration levels are generally likely to raise competition concerns. However, your guidelines and/or practice recognizes that market concentration and market shares are not determinative in themselves.
  - b. Citation: RPIII.C, Comment 1
3. If your agency uses a presumption of competitive harm based on market shares or levels of market concentration, does your merger analysis process take into consideration other evidence to overcome or confirm the presumption?  
 Yes     No     N/A (no presumption of competitive harm)
  - a. Example: Law or guidelines state that market shares are used as a factor in the analysis and do not provide conclusive evidence as to whether or not a merger is anticompetitive. Your agency ultimately focuses on the effects of the merger, including whether the merger will materially alter firms' ability or incentives to raise prices unilaterally or in coordination with other competitors (see RPs V-VI), barriers to entry or expansion by rivals (see RP VII), countervailing buyer power of customers, and whether a merging party is a "failing firm" (see RP VIII).
  - b. Citation: RPIII.C, Comments 2 and 3; ICN Merger Guidelines Workbook, Worksheet B

**Questions, RP III.C, cont.**

4. If your agency uses presumptions of competitive harm based on market shares or levels of market concentration, is your agency transparent about the meaning and use of the presumption?
- Yes     No     N/A (no presumption of competitive harm)
- a. Example: Law or guidelines clearly explain the indicator your agency will use in applying the presumption. For example, if your agency uses the Herfindahl-Hirschman Index (HHI), your law or guidelines explain how the HHI and change in HHI are calculated and explicitly state the HHI level above which a merger is presumed to result in competitive harm.
- b. Citation: RPIII.C, Comment 2
5. Does your agency consider all relevant factors other than market shares and levels of concentration, via a full consideration of competitive effects, before reaching a conclusion that a merger is likely to be anticompetitive?
- Yes     No
- a. Example: Your agency recognizes that an assessment of whether a merger is anticompetitive can only be made by considering all relevant merger factors (such as theories of unilateral and/or coordinated effects, vertical foreclosure, barriers to entry or expansion, countervailing buyer power, and failing firm analysis as per RPs IV-VIII).
- b. Citation: RPIII.C, Comments 2 and 3; ICN Merger Guidelines Workbook, Worksheet B

## **Recommended Practice**

### **IV. Competitive Effects Analysis in Horizontal Merger Review: Overview**

**A. 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 coordination with rivals.**

### **Questions**

1. Does your agency analyze the impact a merger will have on market conditions, including the incentives and ability of a merged entity to raise prices and reduce output, quality, service, or innovation or to reduce prices to suppliers below competitive levels for a significant period of time?  
 Yes     No
  - a. Example: Your agency's competitive effects analysis comprehensively assesses market conditions, allowing your agency to more reliably identify potential harm to competition and to identify mergers that create or enhance market power.
  - b. Citation: RPIV.A, Comments 1 and 4; ICN Merger Guidelines Workbook, Worksheet C
  
2. Does your agency consider evidence of competitive effects as part of its analysis?  
 Yes     No
  - a. Example: Your agency investigates whether and to what extent factors such as barriers to entry, imports, and countervailing power make it likely that a merger will not negatively influence prices, quality, service or innovation in the market concerned.
  - b. Citation: RPIV.A, Comment 2
  
3. Does your agency use counterfactual analysis when assessing possible competitive effects of the merger?  
 Yes     No
  - a. Example: During a merger investigation, your agency does not concentrate on static analysis of the present competition conditions but uses a forward-looking approach which focuses on a comparison of the anticipated state of competition in the relevant market(s) with and without the merger. Comparison of these two scenarios allows one to distinguish between effects specific to the merger and effects of natural evolution of the market.
  - b. Citation: RPIV.A, Comments 3 and 4; ICN Merger Guidelines Workbook, Chapter 2

## **Recommended Practice**

### **IV. Competitive Effects Analysis in Horizontal Merger Review: Overview**

- B. In conducting competitive effects analysis, agencies should consider whether a merger likely will result in anticompetitive 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.**

## **Questions**

1. Does your agency investigate possible unilateral effects of the merger?  
 Yes     No
  - a. Example: Your agency investigates whether the merger would result in a significant increase in the market power of the merged entity. Market power would allow the merged entity to unilaterally restrict capacity, raise prices, reduce quality or otherwise act to the detriment of customers.
  - b. Citation: RPIV.B, Comment 1; ICN Merger Guidelines Workbook, Worksheet C
  
2. Does your agency investigate possible coordinated effects of the merger?  
 Yes     No
  - a. Example: Your agency investigates whether the merger results in a substantial change of market structure. Under the new market structure, it is likely that market participants would collude or would easily start to coordinate their market behavior (either explicitly or tacitly).
  - b. Citation: RPIV.B, Comment 2; ICN Merger Guidelines Workbook, Worksheet D
  
3. Is it possible to establish that the merger may lead to both unilateral and coordinated effects?  
 Yes     No
  - a. Example: Establishment of possible unilateral effects of the merger does not preclude your agency from investigating possible coordinated effects. In some instances, merger may induce both unilateral and coordinated effects.
  - b. Citation: RPIV.B, Comment 3

**Recommended Practice**

**IV. Competitive Effects Analysis in Horizontal Merger Review: Overview**

- C. 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.**

**Questions**

1. Does your agency use economic theories and models to analyze possible effects of the merger?  
 Yes     No
  - a. Example: Your agency does not limit itself to formulaic analysis of notified mergers and applies appropriate economic tools during the investigation. Economic theories and models may be very useful to explain the potential effects of the merger. For example, auction models may be used to evaluate likely unilateral effects of a merger by estimating parameters that describe the auction process in a differentiated oligopoly. These parameters can then be used to predict the hypothetical effects of a merger.
  - b. Citation: RPIV.C, Comment 1
2. When applying economic theories and models, is your agency aware of their limits?  
 Yes     No
  - a. Example: Economic theories and models are tools designed for specific purposes and they require accurate data in order to bring correct results. The choice of econometric tools should be adjusted to available data and the character of investigated merger (e.g., the UPP Index would not be useful in assessing the effects of vertical mergers).
  - b. Citation: RPIV.C, Comment 2
3. Is your agency open to change, and does your agency adjust the economic tools it uses during an investigation if the collected evidence, data, and information about the market requires it to do so?  
 Yes     No
  - a. Example: When starting the investigation, the agency follows the initial assessment of the effects of the merger and applies economic tools to verify preliminary theories of harm. However, together with collection of new pieces of evidence, initial theories of harm may no longer hold, and the theories of harm must be modified. This is reflected with the change of economic tools used to analyze the effects of the merger.
  - b. Citation: RPIV.C, Comment 3

**Recommended Practice**

**V. Unilateral Effects**

**A. In analyzing the potential for a horizontal merger to result in anticompetitive 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.**

**Questions**

1. Does your agency assess whether the merged firm would have the ability to exercise unilateral market power?  
 Yes     No
  - a. Examples: Your agency applies a “Substantial Lessening of Competition,” “Significant Impediment of Effective Competition,” or similar test which permits unilateral effects as a basis to challenge anticompetitive transactions; your guidelines specify unilateral effects as a separate basis for evaluating anticompetitive effects; or, in the absence of law or guidelines, your agency’s merger review process routinely conducts unilateral effects analysis by considering whether the merged entity could profitably raise prices.
  - b. Citation: RP V.A, Comment 1
  
2. Does your agency assess whether the merged firm would have the incentive to exercise unilateral market power?  
 Yes     No
  - a. Example: Your agency considers whether a hypothetical post-merger price increase would lead to entry or repositioning by other firms in such a way as to deter such a price increase.
  - b. Citation: RP V.A, Comment 2; ICN Merger Guidelines Workbook, Worksheets C and H
  
3. Does your agency consider whether there are sufficient competitive constraints on the merged entity to deter the unilateral exercise of market power?  
 Yes     No
  - a. Examples: Your analytical framework includes an evaluation of the existence and effectiveness of other competitors; your agency gathers evidence from customers to help identify relevant competitors and to gain a view as to the effectiveness of those competitors. Common questions used to assess effectiveness of competitors might include whether competitors’ prices have constrained

**Questions, RP V.A, cont.**

the prices of the merging parties, whether competitors' products or services are close functional substitutes for the merging firms' products or services, and whether competitors have forced the pace of innovation by the merging firms.

b. Citation: RP V.A, Comment 2 and RP V.C; ICN Merger Guidelines Workbook, Worksheets C and H

4. Does your agency look to specific features of the market, beyond market shares, to assess whether the merged entity unilaterally could exercise market power?

Yes     No

a. Examples: Your agency evaluates whether:

- i. the market shares of the merging entities overstate or understate their potential market power; the likelihood that lost sales by one of the merging parties are likely to be diverted to the other merging party and other competitors; the features and functionality of the products renders them more or less similar as compared to other products in the relevant market.
- ii. any regulatory conditions or restrictions applicable to the merged firms affect its ability to exercise market power.
- iii. historical relevant market strength and position of competitors is likely to reflect future relevant market strength and position.

b. Citation: RP V.A, Comment 2; ICN Merger Guidelines Workbook, Worksheets C and H

**Recommended Practice**

**V. Unilateral Effects**

**B. In conducting unilateral effects analysis, agencies should apply the economic theory or model that best fits the characteristics of the market(s) at issue.**

**Questions**

1. Does your agency consider various economic models that may be useful in assessing the merged firm's ability to exercise unilateral market power, and does your agency select the economic model which best fits the characteristics of the market at issue?  
 Yes     No
  - a. Examples: Your agency evaluates the aspects of the market, determining whether: the products at issue are in differentiated or undifferentiated product markets; competition occurs primarily in a bidding or auction setting; and the transaction represents a merger to monopoly. Based on this information, your agency selects the best economic model(s) to help understand the market dynamics and assess the competitive effects of the merger.
  - b. Citation: RP V.B, Comment 1
  
2. If your agency uses merger simulation models, do you ensure in each case that the model is based on sound economic principles, fits the facts of the relevant market, and uses reliable data to calibrate the model?  
 Yes     No     N/A (agency does not use merger simulation models)
  - a. Example: In evaluating a merger of rivals in an auction market, the agency obtains and tests the bidding history of the merging parties, customers, and other bidders to gain a robust understanding of auction outcomes before reaching conclusions about the transaction.
  - b. Citation: RP V. B, Comment 2
  
3. Do your simulation models reflect all of the evidence available?  
 Yes     No     N/A (agency does not use merger simulation models)
  - a. Examples:
    - i. In an auction evaluation, the agency considers trend data on the relative strength of bidders as well as raw auction results in reaching its conclusions.
    - ii. The agency compares its simulation to available data on the relative cost of production of various competitors to ensure that the results of the simulation are sustainable in light of production costs.
  - b. Citation: RP V.B, Comment 2

## **Recommended Practice**

### **V. Unilateral Effects**

- C. In conducting unilateral effects analysis, agencies 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).**

## **Questions**

1. Does your agency consider all available sources of information in identifying factors relevant to the ability of the merged firm to exercise market power?  
 Yes     No
  - a. Example: To assess factors relevant to competition, your agency:
    - i. Reviews sources of information that include key business documents of the merging parties, customers, and competitors;
    - ii. Communicates with the parties, competitors, customers, and relevant third parties, and weighs their comments accordingly, to gain a complete view of the factors relevant to competition; and
    - iii. Collects quantitative data and economic analyzes from the merging parties in order to gain an understanding of the effects of various internal and extraneous factors on competition and the ability and incentive of the firms to act competitively or anticompetitively.
  - b. Citation: RP V.A, Comment 1 and RP V.C
2. Does your agency assess the market conditions and competitive constraints, including countervailing power or buyer power that will exist after the merger?  
 Yes     No
  - a. Examples: Your agency considers whether:
    - i. Customers will have a sufficient number of alternative suppliers after the merger and are willing and able to turn to those suppliers;
    - ii. The prospect of entry by new competitors, or expansion or repositioning by existing competitors, would be sufficient in time, scope, and likelihood to deter the unilateral exercise of market power by the merged firm;
    - iii. The merger might raise the barriers to entry facing new competitors or barriers to expansion or repositioning by existing competitors; and
    - iv. Customers have sufficient ability and incentive to defeat the exercise of market power by virtue of their bargaining strength, to induce or sponsor new entry or repositioning by existing competitors, or to produce the relevant product themselves.
  - b. Citation: RP V.C, Comment 2; ICN Merger Guidelines Workbook, Worksheets C and H

**Questions, RP V.C. cont.**

3. Does your agency evaluate whether the market conditions and competitive constraints are sufficient to deter a unilateral exercise of market power by the merged firm?
- Yes     No
- a. Example: Your agency evaluates whether the magnitude of the factors outlined in the previous question are sufficient to deter a unilateral exercise of market power by the merged firm.
- b. Citation: RP V.C, Comment 2; ; ICN Merger Guidelines Workbook, Worksheet D
4. Does the agency carefully assess any claims that the merger will generate efficiencies sufficient to prevent or mitigate anticompetitive unilateral effects from the merger?
- Yes     No
- a. Example: Your agency evaluates whether cost reductions may reduce a merged firm's incentive to raise price and considers whether efficiencies may also result in benefits in the form of new or improved products, even when price is not immediately and directly affected.
- b. Citation: RP V.C, Comment 2; ICN Merger Guidelines Workbook, Worksheet F
5. Does the agency consider the impact of substantiated efficiencies that are unlikely to be achieved absent the merger?
- Yes     No
- a. Example: Your agency evaluates the static and dynamic efficiencies claimed by the merging parties and attempts to verify and quantify the claimed efficiencies in light of the potential unilateral anticompetitive effects.
- b. Citation: RP V.C, Comment 2; ICN Merger Guidelines Workbook, Worksheet F
6. Does the agency consider the effect of the substantiated efficiencies mentioned in Question 5 on the merged firm's ability and incentives to compete and whether these efficiencies may preserve or intensify competition?
- Yes     No
- a. Example: Your agency evaluates whether substantiated, merger-specific efficiencies enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers -- for instance by lowering prices, increasing output, or introducing new or improved products or services - -thereby counteracting the unilateral anticompetitive effects that otherwise may have occurred.
- b. Citation: RP V.C, Comment 2; ICN Merger Guidelines Workbook, Worksheet F

**Recommended Practice**

**VI. Coordinated Effects**

- A. 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 behaviour or strengthen existing coordination in a manner that harms competition significantly.**

**Questions**

1. Does your agency assess whether market conditions are conducive to coordination in the relevant market(s) affected by the merger and analyze firms' abilities or incentives to make coordination more likely post-merger?  
 Yes     No
  - a. Example: Case investigators identify whether market conditions are present which may indicate a likelihood of coordinated conduct, such as few competitors, transparent pricing, frequency of price adjustments, opportunities to meet and discuss, homogenous products, and high barriers to entry.
  - b. Citation: RP VI.A, Comment 1 and RP VI.B
  
2. Does your agency determine whether the merger will make coordination easier or more likely, considering the specific features of the market that affect the merged firm's ability and incentives to exercise market power in coordination with rivals?  
 Yes     No
  - a. Example: Your agency identifies specific factors that are relevant to coordinated conduct and recognizes that changes in market concentration and market share are relevant, but not determinative, factors in assessing whether a merger is likely to further or enhance coordinated interaction.
  - b. Citation: RP VI.A, Comments 2 and 3; ICN Merger Guidelines Workbook, Worksheets D and H

## **Recommended Practice**

### **VI. Coordinated Effects**

**B. In conducting coordinated effects analysis, agencies should assess whether the conditions that are generally necessary for successful coordination are present: (a) the ability to identify terms of coordination, (b) the ability to detect deviations from the terms of coordination, and (c) the ability to punish deviations that would undermine the coordinated interaction.**

## **Questions**

1. Does your agency analyze evidence on a variety of types of coordinated behavior?  
 Yes     No
  - a. Example: Your merger analysis process analyzes the merger's impact on the likelihood of tacit or explicit agreements regarding prices, quantities, and geographic distribution.
  - b. Citation: RP VI.B, Comment 1
  
2. Does your agency assess whether it is likely that participants could achieve terms of coordination that would result in significant harm to competition, noting that coordination may not necessarily be achieved on all aspects of competition?  
 Yes     No
  - a. Example: Factors which affect firms' ability to achieve terms of coordination include the number of firms in a market, the frequency of orders, the homogeneity of the products and firms, the degree of transparency over potential points of coordination (e.g., price, output) and cross-shareholdings.
  - b. Citation: RP VI.B, Comment 2 and 3; ICN Merger Guidelines Workbook, Worksheet D
  
3. Does your agency assess the extent to which firms would have the ability to monitor the important terms of coordination and to detect deviations from the terms of coordination in a timely manner?  
 Yes     No
  - a. Example: Factors which affect the ability of firms to detect deviation from the terms of coordination include (i) the degree of transparency of information necessary to verify compliance by other firms with the terms of coordination and (ii) the homogeneity or heterogeneity of the relevant products and firms, which may make monitoring of compliance with the terms of coordination and detection of deviations more or less difficult.
  - b. Citation: RP VI.B, Comment 4; ICN Merger Guidelines Workbook, Worksheet D

**Questions, RP VI.B, cont.**

4. Does your agency assess whether there will be a sufficiently credible and severe punishment when a deviation from the coordinated outcome by one firm is detected?
- Yes     No
- a. Example: Factors which assist in analyzing whether there will be sufficiently credible and severe punishment when a deviation by one of the firms is detected include the effectiveness of the deterrent mechanism, the speed at which the mechanism can be implemented, and the costs of implementing the mechanism relative to the long term benefits of coordination.
- b. Citation: RP VI.B, Comment 5; ICN Merger Guidelines Workbook, Worksheet D

## **Recommended Practice**

### **VI. Coordinated Effects**

**C. In conducting coordinated effects analysis, agencies should assess the extent to which existing competitive constraints and other factors would likely deter or disrupt effective coordination. 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.**

### **Questions**

1. Does your agency assess whether market conditions following a merger will prevent the creation or enhancement of coordinated interaction?  
 Yes     No
  - a. Example: Your guidelines identify factors which are relevant to assessing whether market conditions following a merger will prevent the creation or enhancement of coordinated interaction.
  - b. Citation: RP VI.C, Comment 1; ICN Merger Guidelines Workbook, Worksheet D
  
2. Does your agency take into account the past behavior of firms in assessing the likelihood of coordinated effects?  
 Yes     No
  - a. Example: Your agency considers evidence of past coordination as a strong indicator that the conditions for and likelihood of successful coordination are present post-merger (if market conditions have not or are not likely to change appreciably).
  - b. Citation: RP VI.C, Comment 1
  
3. Does your agency consider the existence, or threat of entry, of disruptive or “non-coordinating” competitors who may make coordination unlikely or impossible?  
 Yes     No
  - a. Example: Your agency considers the existence of barriers to entry and expansion into the relevant market as an indicator of whether coordination is likely to be possible.
  - b. Citation: RP VI.C, Comment 1

**Questions, RP VI.C, cont.**

4. Does your agency consider the impact a maverick firm has on the likelihood of coordination?
- Yes     No
- a. Example: Your agency pays particular attention to mergers that would remove a firm with a greater economic incentive to disrupt coordination because such mergers may make coordination more likely, more successful, or more complete.
- b. Citation: RP VI.C, Comment 1; ICN Merger Guidelines Workbook, Worksheet D
5. Does your agency consider whether the actions or characteristics of customers may affect coordination?
- Yes     No
- a. Example: Your agency considers whether customers could undermine coordination by sponsoring entry or expansion, by purchasing imported products, or by exercising countervailing buying power.
- b. Citation: RP VI.C, Comment 1
6. Does your agency consider substantiated claims of efficiencies that would arise from a merger that could disrupt coordination?
- Yes     No
- a. Example: Your agency considers how cost reductions may enhance a merged firm's incentives to lower prices, in turn reducing incentives to coordinate.
- b. Citation: RP VI.C, Comment 1; ICN Merger Guidelines Workbook, Worksheet F
7. Does your agency recognize that no single factor or group of factors is always determinative of coordination?
- Yes     No
- a. Example: Your policy or guidelines state that in assessing market conditions which are conducive to coordination, the presence of one or more factors is not determinative that a merger will result in coordination or make coordination more likely, more successful, or more complete.
- b. Citation: RP VI.C, Comment 2

**Recommended Practice**

**VII. Entry & Expansion**

- A. 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 (*e.g.*, the merged firm could raise prices or reduce output, quality, or innovation).**

**Questions**

1. Does your agency consider whether entry or the threat of entry by potential competitors can be a competitive constraint on the conduct of the merged firm?  
 Yes     No
  - a. Examples: Your agency gathers evidence on and analyzes whether entry and expansion are feasible. Considerations regarding likelihood of entry include: sunk cost of inputs and equipment, regulatory or licensing costs, excess capacity at current producers or suppliers, ability and timeliness of existing companies to change production, entry by a new competitor or through imports, access to distribution channels, and the threat of entry by a potential competitor.
  - b. Citation: RP VII.A, Comment 1
  
2. Does your agency's analysis consider whether rival firms are or will be able to expand their capacity in a timely manner?  
 Yes     No
  - a. Examples: Your agency analyzes each rival firm's existing spare capacity and their ability to switch capacity from one use to another by inquiring about expansion plans, barriers to expansion, and the profitability of expansion.
  - b. Citation: RP VII.A, Comment 2; ICN Merger Guidelines Workbook, Worksheet E
  
3. Does your agency assess whether likely anticompetitive effects of a merger are deterred or offset by entry and/or expansion?  
 Yes     No
  - a. Examples: Your case team identifies several elements to assess whether entry is an effective competitive constraint and analyzes the entry and expansion that would happen independent of the merger. According to your assessment criteria, entry that is not able to sufficiently deter or offset anticompetitive effects does not represent a competitive constraint and may be excluded from the analysis.
  - b. Citation: RP VII.A, Comment 3; ICN Merger Guidelines Workbook, Worksheet E

**Questions, RP VII.A, cont.**

4. Does your agency evaluate entry and expansion in both the post-merger scenario as well as independently of the merger?
- Yes     No
- a. Example: Your agency collects and analyzes evidence regarding the ability and plans for entry and expansion if the merger did not occur.
- b. Citation: RP VII.A, Comment 3

## **Recommended Practice**

### **VII. Entry & Expansion**

**B. In assessing whether entry and/or expansion would effectively constrain the merged entity, competition agencies should consider whether entry and/or expansion would be: (a) likely; (b) timely; and, (c) sufficient in nature, scale and scope.**

### **Questions**

1. Does your agency evaluate entry and/or expansion in terms of its likelihood?  
 Yes     No
  - a. Example: Law or guidelines explicitly provide that entry must be likely, and your agency analyzes whether expansion by competitors would be profitable.
  - b. Citation: RP VII.B, Comment 1; ICN Merger Guidelines Workbook, Worksheet E
2. Does your agency inquire into the history of entry into and/or exit from the relevant market by using available evidence, including information on firms that have recently entered or exited the market?  
 Yes     No
  - a. Example: Your case team gathers and analyzes evidence on this point by interviewing executives of new entrants and/or former executives of firms that exited the market recently, by analyzing the incumbents' reactions when they faced new entry, and by understanding the plans of others to enter or exit the market.
  - b. Citation: RP VII.B, Comment 1
3. In assessing the likelihood of entry and/or expansion, does your agency request and analyze information about past and expected market growth?  
 Yes     No
  - a. Example: Your agency requests that the parties provide financial and accounting data related to (i) their plans for growth and (ii) their analyses of potential entrants.
  - b. Citation: RP VII.B, Comment 1
4. Does your agency gather evidence of planned entry and/or expansion, of the costs, risks, and benefits associated with entry, and information from firms identified as potential entrants?  
 Yes     No
  - a. Example: The case team gathers this evidence and information from identified potential entrants.
  - b. Citation: RP VII.B, Comment 1

**Questions, RP VII.B, cont.**

5. In assessing the likelihood of entry, does your agency identify barriers to entry and expansion?
- Yes     No
- a. Example: Your agency considers the advantages enjoyed by incumbent firms over the potential entrants that may prevent or delay new firms from entering the market or actual competitors from expanding output.
- b. Citation: RP VII.B, Comment 2
6. Does your agency analyze and identify a reasonable time horizon within which entry must have a competitive impact in order to mitigate the competitive harms of the proposed transaction?
- Yes     No
- a. Examples: Law or guidelines provide that it will analyze entry that occurs within a specific period of time, noting that the time may vary based on characteristics of the market.
- b. Citation: RP VII.B, Comment 3
7. In assessing the sufficiency of entry, does your agency consider whether entry and/or expansion would be sufficient in scale to compete effectively with the merged entity?
- Yes     No
- a. Example: Your agency determines whether entry or expansion is large enough to constrain the behavior of the merger firm.
- b. Citation: RP VII.B, Comment 4; ICN Merger Guidelines Workbook, Worksheet E
8. Does your agency consider whether entry and/or expansion would be able to counteract any specific anticompetitive effects resulting from the merger?
- Yes     No
- a. Example: Your agency assesses the ability of entry and/or expansion to counteract any anticompetitive effects resulting from the merger, including localized effects (e.g. effects in specific geographic areas or affecting specific customer categories).
- b. Citation: RP VII.B, Comment 4

## **Recommended Practice**

### **VIII. Failing Firm/Exiting Assets**

**A. A merger is not likely to create or enhance market power if one of the merging parties is likely to fail and its assets are likely to exit the market in the imminent future. 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.**

## **Questions**

1. Does your agency consider whether the acquired firm may be a failing firm either as part of the competitive effects analysis or as a party's defence?  
 Yes     No
  - a. Example: You gather evidence on and analyze merging parties' claims that the acquired firm and its assets would have exited the market absent the merger (therefore, the competitive situation post-merger may be no worse than the competitive situation absent the merger).
  - b. Citation: RP VIII.A, Comments 1 and 2
2. Do you consider a full range of counterfactual scenarios when evaluating a failing firm defence?  
 Yes     No
  - a. Example: You consider the alternative scenario that the firm fails and its assets exit the market, as well as the alternative that the firm is bought by a different, less competitive firm, or that it is bought by a new entrant.
  - b. Citation: RP VIII.A, Comment 2
3. Does your agency review claims of failing firm only when there would otherwise appear to be competition concerns with the transaction?  
 Yes     No
  - a. Example: Your agency first identifies whether the target firm would create or enhance the acquiring firm's ability to exercise market power; if yes, you then analyze a failing firm defence. If there are no competitive concerns, a failing firm analysis is likely not necessary.
  - b. Citation: RP VIII.A, Comment 3

**Recommended Practice**

**VIII. Failing Firm/Exiting Assets**

**B. In assessing claims that a merger will not harm competition because one of the merging parties is failing, agencies should determine whether: (a) the firm is unable to meet its financial obligations in the imminent future; (b) there would be no serious prospect of reorganizing the business; (c) there would be no credible less anticompetitive alternative outcome than the merger in question; and, (d) the firm and its assets would exit the market in the imminent future absent the merger.**

**Questions**

1. Do you consider claims that a firm is in financial distress but does not meet the conditions of a failing firm (a “flailing” firm) as part of your analysis?  
 Yes     No
  - a. Example: Financial and accounting data show that the target firm is in financial distress, and the agency considers whether the firm’s poor financial condition makes it less likely to compete effectively, thereby lessening the merger’s effect on competition.
  - b. Citation: RP VIII.B, Comments 1 and 8
  
2. In evaluating whether a firm is failing, does your agency’s analysis go beyond profits and accounting losses to evaluate the true economic losses, that is, to examine the factors that go to the firm’s fundamental ability to compete effectively in the future?  
 Yes     No
  - a. Example: You recognize that a firm’s lack of profitability does not mean it cannot compete effectively in the future, if, for example, the firm changed its strategy or management, or if certain portions of the business were sold off or reorganized.
  - b. Citation: RP VIII.B, Comment 2; ICN Merger Guidelines Workbook, Worksheet G

**Questions, RP VIII.B, cont.**

3. When conducting a failing firm analysis to determine whether the firm is unable to meet its financial obligations in the imminent future, do you require merging parties to provide current, historical, and, when available, future financial information about the target firm?
- Yes     No
- a. Example: You ask for documents produced in the ordinary course of business such as documents showing profit, loss, and cash flow, recent balance sheets, presentations to management, and the current and future availability of key inputs.
- b. Citation: RP VIII.B, Comment 3
4. When conducting a failing firm analysis, do you consider whether there is a credible prospect of reorganizing the business?
- Yes     No
- a. Example: If the firm is in bankruptcy, you consult with the administrator to see whether there is any serious prospect that a reorganized firm could emerge from bankruptcy. If the firm is approaching bankruptcy, you consult with an accounting or financial specialist to help analyze strategic and financial documents.
- b. Citation: RP VIII.B, Comment 4; ICN Merger Guidelines Workbook, Worksheet G
5. Do you consider whether there is a credible alternative outcome that poses fewer competitive concerns?
- Yes     No
- a. Example: You consider whether the failing firm has sought credible alternative offers that are above the liquidation value of the assets (and both retain the assets in the relevant market and pose less harm to competition than the merger).
- b. Citation: RP VIII.B, Comment 5
6. Do you consider whether the firm and its assets would exit the market in the imminent future absent the merger?
- Yes     No
- a. Example: You consider whether the assets are economically viable, and if not, whether any changes in the market would make the assets economically viable absent the merger.
- b. Citation: RP VIII.B, Comment 6

## **Recommended Practice**

### **VIII. Failing Firm/Exiting Assets**

- C. In assessing claims that a merger will not harm competition because a division of a firm is failing, agencies may assess whether the following conditions are met: (a) the division has a negative cash flow on an operating basis; (b) the division and its assets would exit the market in the imminent future absent the merger; and, (c) there is no reasonable less anticompetitive alternative outcome than the merger in question.**

## **Questions**

1. When evaluating a claim that the acquired assets are a failing division (or a group of related assets) of an otherwise financially sound company, do you assess whether that division: has a negative cash flow on an operating business; the division and its assets would exit the market in the imminent future absent the merger; and there is no reasonable less anticompetitive alternative outcome than the proposed merger?  
  
 Yes     No
  - a. Example: You consider the ability of the division to recover from temporary losses, the role the division plays in the company, and the amount of money that the parent could be expected to invest in the division absent the merger.
  - b. Citation: RP VIII.C, Comments 1, 2, and 3
  
2. Does your agency evaluate the procedures used to calculate revenues and costs at the company?  
  
 Yes     No
  - a. Example: You evaluate the accounting practices of the parent company and request evidence demonstrating the likelihood that the division is failing. You review the accounting practices of the parent company, ensuring that correct revenues and costs are considered.
  - b. Citation: RP VIII.C, Comment 2