

**ICN NOTIFICATION & PROCEDURES SUBGROUP
DRAFT SELF ASSESSMENT TOOL**

**EVALUATING MERGER NOTIFICATION PROVISIONS FOR CONFORMITY WITH
ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION & REVIEW PROCEDURES**

QUESTION	Examples of Conforming Criteria	N&P Recommended Practices Cite
RECOMMENDED PRACTICE I: NEXUS		
1. Do the merger notification thresholds require a "local nexus" with your jurisdiction, e.g. having a material presence and/or activities in your jurisdiction?	(a) At least two parties have local activities (b) If a single party test is used, the acquired business is required to have local activities	RP I.B. and C.
2. Do the merger notification thresholds require an appropriate level of materiality for the "local nexus"?	Material (i.e., significant) sales and asset levels within your jurisdiction	RP I.B. and comment 1.
3. If the activities of the target trigger notification, are these activities limited to the business(es) being acquired from the target?	Sales and assets of the target only (i.e. excluding the seller)	RPI.B. comment 3.
4. If the local activities of the target alone trigger notification in your jurisdiction, are the applicable notification thresholds sufficiently high?		RP I.C. comment 1 and 2.
5. If the local activities of the acquirer (rather than the target) alone trigger notification, does your agency lack jurisdiction to review non-notifiable transactions?		RP I.C. comment 3.
6. If the local activities of the acquirer (rather than the target) alone trigger notification, are your notification thresholds set at a very high level or do they contain objectively-based limiting filters?		RP I.C comment 4.

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RECOMMENDED PRACTICE II: NOTIFICATION THRESHOLDS/PRE-NOTIFICATION GUIDANCE		
1. Do the merger notification thresholds use objectively quantifiable criteria (and not subjective criteria, such as market share, which are disfavored)?	(a) Asset value (b) Sales (revenue or turnover) (c) Other objectively quantifiable criteria	RP II.B comment 1
2. Is the geographic scope for the measurement of the applicable criteria national (Note: ancillary thresholds are also acceptable)?		RP II.B comment 2
3. Is a time period used for the measurement of sales, revenue or turnover?	(a) Calendar year (b) Fiscal year (c) Annual financial statements (d) Most recent available	RP II.B comment 2
4. Is a specific point in time used for the measurement of the asset value?	(a) End of calendar year (b) End of fiscal year (c) Year-end balance sheet (d) Most recent available.	RP II.B comment 2
5. Does your agency provide guidance on how to calculate or determine whether your notification thresholds have been met?	(a) Formal (e.g. published) (b) Informal (e.g. orally, by telephone)	RP II.B comment 3; RP II.C comment 2.
6. Are local currency values or a generally-recognized global trading currency used to establish financial thresholds? Is there specific guidance regarding currency conversion?	Guidance where to find applicable official exchange rates (e.g., central bank exchange rates)	RP II.C. comment 3
7. If other local economic measures are used (e.g., minimum wage multiples), are they clearly defined (including applicable rules pertaining to currency conversion), transparent, and readily accessible by merging parties whether or not domiciled in the local jurisdiction?	Easily accessible guidance (e.g. on your agency's webpage) as to the current monetary value of minimum wage	RP II.C. comment 3

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8. Are pre-notification consultations available to provide advice to merging parties regarding whether a transaction may be subject to an obligation to notify and/or the information required for a notification?		
9. Are notification thresholds periodically adjusted?	Yearly adjustments	
10. If so, are they automatically adjusted (e.g., based on inflation or other economic indices)?	Inflation or GDP growth rates	
RECOMMENDED PRACTICE III: TIMING OF NOTIFICATION		
1. Are the parties permitted to provide formal notification when there is a good faith intent to consummate a transaction?	Filing permitted based, for example, on: (a) signed letter of intent (b) agreement in principle (c) public announcement of intention to make a tender offer	RP III.A and comment 2
2. If formal notification is not permitted until a definitive agreement is in place (a) are the parties afforded the opportunity for confidential pre-notification consultations with the agency to present and discuss the proposed transaction in advance in order to facilitate timely submission and review of the formal notification? (b) are the standards for determining when a "definitive agreement" has been reached clearly defined so that the parties can determine when their notification will be accepted for filing ?		RP III.A and comment 4

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<p>3. If the jurisdiction is suspensive (where parties are not permitted to close notified transactions pending the expiration of specified “waiting periods”), are parties permitted to file at any time prior to closing the transaction (e.g., the jurisdiction does not impose a filing deadline for pre-merger notification)?</p>		<p>RP III.B and comment 1</p>
<p>4. If the jurisdiction is a non-suspensive jurisdiction (where parties are permitted to close notified transactions pending review by the competition agencies), does it impose a filing deadline for pre-merger notification?</p>	<p>(a) Provision of a clear definition of what constitutes a “triggering event” for the purposes of calculating the filing deadline</p> <p>(b) Definition of a “triggering event” does not lead to a notification deadline occurring at an early stage in the parties negotiations (e.g., before a signed definitive agreement)</p> <p>(c) Filing deadline is reasonable in view of the information requirements to be satisfied</p>	<p>RP III.C and comments 1 and 2</p>
<p>RECOMMENDED PRACTICE IV: REVIEW PERIODS</p>		
<p>1. Is the initial review period subject to definitive and readily ascertainable deadlines?</p>		<p>RP IV.C and comment 1</p>
<p>2. Is an extended review subject to determinable time frames?</p>		<p>RP IV.C and comment 1</p>
<p>3. Does the agency provide notifying parties with timely notice as to any deficiencies in their submissions and the specific details of any such deficiencies to facilitate the prompt submission of corrective filings?</p>		<p>RP IV.C and comment 3</p>

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4. Does the agency provide for expedited reviews of non-problematic transactions (e.g., can the agency grant early termination of a specified review deadline if the agency concludes that the transaction does not give rise to material competitive concerns)?	(a) A two phase review (preliminary review period and extended review period) (b) Early termination of review periods (c) Abbreviated waiting period	RP IV.B and comments 1, 2 and 5
5. In jurisdictions with a two phase review, does the agency complete its initial review within 6 weeks of notification?		RP IV.C and comment 2 RP IV.D and comment 2
6. In jurisdictions with a single review period or two phase review, does the agency complete its reviews in a determinable time period?	Six months or less	RP IV.C and comment 2 RP IV.D and comment 2
7. Do the review procedures allow for a limited extension of the applicable waiting periods (with the parties' consent) to avoid initiation of second phase review or an adverse enforcement decision?		RP IV.C and comment 6
8. May parties consummate a properly notified transaction upon the expiration of the specified waiting period (absent formal action being taken by the agency)?		RP IV.C and comment 4
9. Are there different procedures providing for accelerated review of non-consensual transactions (i.e. hostile takeovers)?	(a) Shortened review periods (or, where applicable, waiting periods) (b) Permitting the applicable initial review period to commence upon filing by the acquiring party only (c) Discretionary waivers of information requirements relating to the target in hostile situations (d) Discretionary derogations permitting the implementation of the bid during the review period	RP IV.E and comment 1 RP IV.E and comment 1 RP IV.E and comment 1 RP IV.E and comment 1

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10. Are there different procedures providing for accelerated review of transactions involving companies in financial distress which are subject to court supervised processes (e.g. bankruptcy or similar restructuring)?	(a) Shortened review periods (or, where applicable, waiting periods) (b) Permitting the applicable initial review period to commence upon filing by the acquiring party only	RP IV.E and comment 2 RP IV.E and comment 2
	(c) Discretionary waivers of information requirements relating to the company in financial distress (d) Discretionary derogations permitting the implementation of the transaction during the review period	RP IV.E and comment 2 RP IV.E and comment 2
Recommended Practice V: Requirements for Initial Notification		
1. Is the initial notification narrowly tailored to obtain the information sufficient to determine whether (a) the agency has jurisdiction, (b) the transaction raises issues meriting further investigation and (c) alternatively, the agency should not investigate the transaction further?		RP V.A.

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<p>2. Does the jurisdiction provide for flexibility with respect to the content of notifications, e.g., variation based on the complexity of the antitrust issues raised?</p>	<p>(a) simplified procedures (b) short/long forms (c) discretionary supplementation (d) discretionary waiver</p> <p>“If unable to answer any Item fully, give such information as is available and provide a statement of reasons for non-compliance If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars. Estimated data should be followed by the notation, "est.””</p>	<p>RP V.B.</p>
<p>3. If the jurisdiction uses a discretionary supplementation system, does the agency provide guidance on the types of information commonly requested, e.g., business reports and plans, transaction documents, customer lists?</p>		<p>RP V.B comment 4</p>
<p>4. Are parties permitted to submit substantially responsive information in a different format prepared in the ordinary course of business or for submission to another jurisdiction?</p>	<p>“All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.”</p>	<p>RP V.B. comment 5</p>

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5. Are parties allowed to submit information beyond that required in the initial filing voluntarily, to help narrow or resolve potential competitive concerns?	“Any person filing notification may, in addition to the submissions required ..., submit any other information or documentary material which such person believes will be helpful ... in assessing the impact of the acquisition upon competition ...”	RP V.B. comment 6
6. Does the agency provide for the possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification?		RP V.C.
7. If the jurisdiction uses the discretionary waiver mechanism, do the pre-notification consultations provide the parties with the opportunity to seek a waiver of the obligation to produce requested information?		RP V.C. comment 2
8. Does the agency limit translation requirements for supporting documents?		RP V.D.
9. Does the agency accept informal authentication by written representations by counsel or senior officials of the parties?		RP V.D. comment 2
10. If formal authentication is required in the jurisdiction, can notification be perfected on the basis of an appearance by a duly authorized person residing in the jurisdiction?		RP V.D. comment 2
RECOMMENDED PRACTICE VI: CONDUCT OF MERGER INVESTIGATIONS		
1. Is the agency available for consultation with the merging parties to inform them of any significant legal or practical issues that arise during the course of the investigation?	For example, prior to: (a) Notification? (b) Decision to initiate a second stage inquiry? (c) Imposition of conditions? (d) Challenge transaction? (e) Prohibit transaction?	RP VI.B, Comments 1 and 2
2. Does the competition agency	At the minimum a short and	RP VI.C, Comment 1

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provide the merging parties, no later than at the beginning of a second stage inquiry, an explanation of the competitive concerns that motivate an in-depth review?	plain (either oral or written) statement of the competitive concerns	
3. Where investigation periods <i>are not</i> subject to definitive deadlines, does the agency have procedures to ensure that the investigation is completed without undue delay?	<p>For example, timing agreements comprising</p> <ul style="list-style-type: none"> (a) scheduled meetings between the agency and the merging parties; (b) timetables for possible modification / compliance with information requests; (c) dates for depositions or interviews of company representatives; (d) dates for exchange of economic information and theories; (e) dates for discussions among economists; (f) dates by which the parties may submit briefing memoranda (g) or other formal submissions; (h) anticipated timing of recommendations to senior agency officials; (i) timetable for submission of, and reactions to, proposed remedies; and (j) the date before which the parties will not close the transaction. 	RP VI.D, Comment 1
4. If the investigation is tolled or otherwise measured by reference to the merging parties' date of compliance with compulsory notification requirements, are there limits on the number or scope of requests?		RP VI.D, Comment 2
5. Does the legal framework prevent tolling of investigation periods based upon the issuance or pendency of third-		RP VI.D, Comment 3

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party information requests?		
6. Where investigation periods <i>are</i> subject to definitive deadlines, are there procedures enabling the agency to grant early termination of applicable waiting periods?	When the agency concludes that a transaction does not give rise to material concerns by reason of, either (a) as originally proposed; or (b) as modified pursuant to commitments made by the merging parties	RP VI.D, Comment 4
7. Are there procedures that aim at avoiding the imposition of unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations?	For example (a) requests related only to aspects of the transaction that raise potential competitive concerns; (b) proposed formal requests should be subject to appropriate internal review procedures prior to issuance; (c) agency staff responsible for conducting the investigation permitted to promptly discuss with the parties and modify information requests; (d) parties permitted to submit information and documents as maintained in the ordinary course of business; (e) parties not required to supply information that is not in their custody, control or not reasonably accessible to them; and (f) translations required only for documents relevant to legal or factual issues raised by the transaction	RP VI.E, Comment 1 to 4
8. Are there timely review mechanisms to resolve disagreements between the case team and a (merging or third) party as to whether a request is reasonable or unduly burdensome or whether the merging party has adequately	For instance (a) resort to an independent tribunal; or (b) internal review procedures within the agency	RP VI.E, Comment 5

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complied with the request?		
9. In responding to information requests, are parties free to not disclose materials and information that are subject to applicable legal privileges and related confidentiality doctrines in the requesting jurisdiction?		RP VI.F, Comment 1
10. Does the agency maintain policies pertaining to the handling of privileged materials and information in connection with exchanges of such materials and information with other competition agencies?	For instance exchange pursuant to a voluntary waiver	RP VI.F, Comment 3
RECOMMENDED PRACTICE VII: PROCEDURAL FAIRNESS		
1. Are merging parties given the opportunity to respond to material competition concerns prior to the agency making a final adverse enforcement decision on the merits?	Administrative systems: (a) Before a decision to prohibit a transaction? (b) Before a decision to clear a transaction subject to conditions? Prosecutorial systems: (c) Before a decision to institute a legal action to challenge or prohibit the transaction?	RP VII.B, Comment 1
2. Are merging parties provided with sufficient information on the basis for the agency's material competition concerns?	Including: (a) Legal basis? (b) Economic basis? (c) Factual basis?	RP VII.B, Comment 2
3. Are merging parties provided with such information in a timely manner?	Prior to enforcement decision: (a) Opportunity to respond to concerns? (b) Opportunity to consider and propose remedies?	RP VII.B, Comment 3
4. Are third parties permitted to express their views on a merger during the merger review process?		RP VII.C

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5. Does the review system provide safeguards ensuring that the review (procedurally and substantively) is fair, efficient, and consistent?	For example: (a) designated “scrutiny” unit? (b) economics section? (c) internal operational guidelines? (d) supervision of staff? (e) separate review of preliminary findings? (f) separate investigation and enforcement units? (g) collegiate decision-making?	RP VII.D, Comment 1 and 2
6. Is there an opportunity for external review of decisions?	For example: (a) judicial review?	RP VII.E
RECOMMENDED PRACTICE VIII: TRANSPARENCY		
1. Is the following information made readily available to the public?	(a) Available online via the agency website (e.g. for download) (b) Available by telephone if someone calls up the agency to ask for information (c) Written material available to pick up at the agency or sent by post if requested	
(a) Information regarding the jurisdictional scope of the merger law?	(i) the definition of transactions caught by the merger regime (ii) the relevant thresholds above which a transaction must be notified (and any exceptions)	RP VIII B. comment 1
(b) Procedural information?	(i) how, where and when (i.e. deadline) to file a notification (ii) whether there are filing fees (ii) whether the transaction must be suspended and cannot be implemented while your authority is	RP VIII B. comment 2

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	investigating, either only domestically (in your jurisdiction), or worldwide	
(c) The competition agency's decision-making procedures?	<ul style="list-style-type: none"> (i) timetable and major steps (ii) rights of merging parties and third parties (iii) mechanisms to appeal decisions (iv) penalties and sanctions 	RP VIII B. Comment 2
(d) The principles and criteria that the competition agency uses to review whether the transaction creates competition concerns	<ul style="list-style-type: none"> (i) the substantive standard by which the merger is assessed (SLC, Dominance) (ii) guidelines (iii) published decisions (iv) notice of what non-competition factors may be taken into account 	RP VIII B. Comment 3
2. Are any of the following methods employed by the competition agencies to promote transparency?	<ul style="list-style-type: none"> (a) Publishing general guidelines and notices on substantive law and procedure (b) Publishing individual enforcement decisions (c) Publishing individual non-enforcement decisions or at least those that set a precedent or represent a shift in enforcement policy or practice (d) Issuing press releases on important decisions (e) Issuing statements explaining actions or non-actions that signify a change in enforcement policy (f) Delivering speeches (g) Publishing information 	<ul style="list-style-type: none"> RP VIII C. Comment 1

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	materials	
3. If guidelines are issued, are they reviewed periodically to reflect current practice?		RP VIII C. Comment 3
4. Does the agency have a website?		RP VIII C. Comment 4
RECOMMENDED PRACTICE XII: AGENCY POWERS		
1. Does the agency have the power to:	(a) Sanction non-compliance with formal requests for documents, testimony or other information? (b) Seek sanctions for non-compliance with legal requirements, decisions, and orders? (c) Accept conditions to closing	RP XII A. Comment 1 RP XII A. Comment 2 RP XII A. Comment 2
RECOMMENDED PRACTICE XIII: PERIODIC REVIEW		
1. Has the jurisdiction reviewed the substantive and/or procedural aspects of its merger review process within the last few years?	Review in the last 5 years or after new legislation enters into force	RP XIII A. Comment 1
2. Does the agency enter into such review on a periodic basis?		
3. Has a recent review incorporated (or is it intended that a new review will incorporate) international best practice (e.g. according to ICN principles and recommendations)?		RP XIII B. Comment 1