

ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES

I. Definition of a Merger Transaction

- A. **Jurisdictions should consider carefully the types of transactions that are included within the scope of their merger laws and seek to include in the scope of their merger laws only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure.**

WORKING GROUP COMMENTS
Original Comments (May 2017)

Comment 1: Jurisdictions should not include in the scope of their merger laws transactions that are unsuitable for merger review. This applies, for example, to cooperative arrangements that can be reversed easily by the parties' future individual decisions, and other non-durable arrangements.

Comment 2: Group-internal or intra-person restructuring should not be included within the scope of merger review as it has no effect on market structure.

Comment 3: Acquisitions of a minority interest should not be included in the scope of merger review if they are unlikely to be competitively significant.

Comment 4: Jurisdictions may consider using exemptions to exclude from merger review transactions that, because of their nature, are unlikely to have durable effects on competition.

- B. **Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws. Such definitions may refer to categories of transactions, such as share acquisitions and acquisitions of assets, and/or to broader concepts, such as the acquisition of “control” or of a “competitively significant influence,” as defined by the reviewing jurisdiction.**

WORKING GROUP COMMENTS
Original Comments (May 2017)

Comment 1: When defining what types of share acquisitions are within the scope of merger laws, jurisdictions may establish objective, numerical thresholds, such as the acquisition of at least 25% or 50% of voting or equity rights in another entity.

Comment 2: Jurisdictions should seek to clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion within the scope of their merger laws. The definition should screen out asset acquisitions that are unlikely to affect competition.

Comment 3: Jurisdictions may also rely on broader concepts, such as the acquisition of “control” or of a “competitively significant influence” to determine what transactions are within the scope of

their merger laws. If so, they should seek to maximize legal certainty and predictability, in particular through a consistent and transparent decision making practice, and the use of guidelines or informal guidance.

Comment 4: Some jurisdictions may find it necessary to adopt a separate definition of joint ventures or acquisitions of interests in partnerships that fall within the scope of their merger laws. In this case, jurisdictions should use clear and predictable criteria to distinguish those transactions that are subject to merger review from those that are not.

II. Nexus to Reviewing Jurisdiction

A. **Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction.**

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Jurisdictions are sovereign with respect to the application of their own laws to mergers. In exercising that sovereignty, however, jurisdiction should be asserted only with respect to those transactions that have a material nexus to the reviewing jurisdiction.

Comment 2: Jurisdictions may limit the competition authority's ability to review and challenge mergers to those transactions that meet the mandatory notification thresholds. This approach provides legal certainty to the parties.

Comment 3: Jurisdictions may retain the ability to review transactions that do not meet the mandatory notification thresholds. Such "residual jurisdiction" may encompass all transactions with a material nexus to the jurisdiction or a subset of transactions with a material nexus to the jurisdiction that meet lower, non-mandatory notification thresholds. When a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority.

Comment 4: Jurisdictions may choose not to have mandatory notification thresholds and, instead, allow for voluntary notifications of proposed transactions. In these voluntary systems, jurisdictions may employ thresholds, either to provide guidance to the parties as to which transactions are viewed as likely to raise potential competition concerns and therefore should be notified or to limit the transactions that the competition authority can review. Jurisdictions employing a voluntary merger notification system should take steps to address the desire of the parties to the transaction for certainty.

B. **Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.**

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without a corresponding enforcement benefit. Merger notification thresholds should therefore incorporate a material nexus

requirement. A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction. The most common means of providing for a material nexus is by requiring significant local sales or local asset levels in the merger notification thresholds.¹

Comment 2: Jurisdictions may supplement their material nexus thresholds with additional, ancillary thresholds, but those thresholds alone should not be sufficient to trigger a merger notification requirement in the absence of a material nexus to the reviewing jurisdiction. Examples of such additional and cumulative screens include thresholds based on the worldwide activities of the parties or the value of the transaction.

Comment 3: Merger notification thresholds should provide that the material nexus to the reviewing jurisdiction be based on the entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and assets of the acquired party should be limited to the sales and assets of the business(es) that are being acquired (often referred to as the “target”). The sales and assets of the selling group or the selling party that are not being transferred to the acquiring party should not be considered in applying the merger notification thresholds.

Comment 4: Jurisdictions should periodically review their merger notification thresholds to determine whether to modify them based on knowledge gained through the application of the thresholds, experiences of other jurisdictions, input from stakeholders, and other pertinent developments.

C. Determination of a transaction’s nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (June 2003, May 2017)

Comment 1: Notification should not be required unless the transaction has a material nexus to the reviewing jurisdiction. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction.

Comment 2: Many jurisdictions require significant local activities by each of at least two

¹ As of the drafting of this revised recommended practice, some jurisdictions are examining or have examined whether certain high value transactions involving targets with no or low local sales may have a significant impact on competition in the jurisdiction and, if so, whether to modify their merger notification thresholds to address this limited class of transactions, with certain jurisdictions introducing supplementary thresholds to this end. Any such modifications to notification thresholds should ensure, inter alia, that the new thresholds are clear and understandable and that the transaction has a material nexus to the jurisdiction. It is premature to consider changes to these recommended practices in this light.

parties to the transaction as a prerequisite for mandatory merger notification. This approach represents an appropriate material nexus screen since the likelihood of adverse effects from transactions in which only one party has a significant local presence is sufficiently remote that the burdens associated with notification are normally not warranted. As previously discussed, in the case of a proposed acquisition, one of the two parties should be the acquired business (“target”) and the relevant activities of the acquired party should be limited to the sales or assets of the business(es) being acquired in the proposed transaction.

Comment 3: In transactions involving more than two parties, application of the “each of at least two parties” threshold approach should be adapted to the type of transaction to ensure that notification is required only when the transaction has a material nexus to the reviewing jurisdiction. An important example is the formation of a joint venture. Even if two or more of the parties forming the joint venture have significant activities in the jurisdiction, the proposed joint venture transaction is unlikely to have a material nexus to the jurisdiction unless the proposed joint venture will have significant assets in or sales in or into the reviewing jurisdiction.

Comment 4: A transaction in which the acquiring party lacks significant local activities is less likely to have adverse effects within the jurisdiction than a transaction in which both the acquiring party and the acquired business have significant local activities. Therefore, jurisdictions with notification thresholds based solely on the activities of the acquired business should set their thresholds at a substantially higher level to ensure that the transaction has a material nexus to the reviewing jurisdiction.

Comment 5: Notification should not be required solely on the basis of the acquiring firm’s local activities, for example, by reference to a combined local sales or local assets test that may be satisfied by the acquiring entity alone irrespective of any significant local activity by the business to be acquired.

D. Notification thresholds should be clear and understandable.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Clarity and simplicity are essential features of well-functioning notification thresholds. Given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions with merger notification requirements, the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable “bright-line” tests.

Comment 2: Competition authorities can assist parties by providing publicly available written guidance on the application of their merger notification thresholds and by enabling parties to obtain guidance by contacting the staff of the authority to discuss the application of the notification thresholds.

E. Mandatory notification thresholds should be based on objectively quantifiable criteria.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (*e.g.*, determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.

Comment 2: The specification of objective criteria will require a jurisdiction to explicitly identify several elements. First, the jurisdiction must identify the measurement tool – *e.g.*, assets or sales. Second, the jurisdiction must identify the scope of the geographic area to which the measurement tool is applied – *e.g.*, national or worldwide. Third, the jurisdiction must specify a time component. In the case of certain measurement tools, such as revenues, sales, or turnover, the time component will be a period over which the measurement should be taken – *e.g.*, a calendar year. In the case of other measurement tools, such as assets, the time component will be a particular date as of which the measurement should be taken. In either case, the above-referenced criteria may be defined by reference to pre-existing, regularly-prepared financial statements (such as annual statements of income and expense or year-end balance sheets).

Comment 3: The specified criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements. Guidance should also be given as to the proper geographic allocation of sales and/or assets. To facilitate the parties' ability to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt uniform definitions or guidelines with respect to commonly used criteria.

Comment 4: In jurisdictions utilizing a voluntary notification system, notification thresholds serve as a means to provide guidance as to which transactions are viewed as likely to raise potential competition concerns and therefore are appropriate for notification to the reviewing jurisdiction. Since such notification thresholds are a starting point for identifying potential competition concerns, it can be appropriate for voluntary notification thresholds to utilize guidance based on market share information or other more subjective criteria. However, when voluntary notification thresholds are used to determine whether the competition authority has jurisdiction to review the transaction or to provide safe harbors, competition authorities should use objective criteria or provide guidance to assist parties in determining which transactions meet the thresholds or qualify for the safe harbor protection.

F. Mandatory notification thresholds should be based on information that is readily accessible to the parties to the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (May 2017)

Comment 1: The information needed to determine whether notification thresholds are met should normally be of the type that is available to the parties in the ordinary course of business.

Comment 2: Notwithstanding *Comment 1*, the parties can reasonably be required to report their revenues or assets by jurisdiction even if they do not maintain data in that form in the ordinary course of business. As previously discussed, however, parties should be given appropriate guidance as to the methodology to be applied in developing the specified data. This is particularly important where information must be reported in a manner that is not consistent with a party's normal business practices.

Comment 3: Local currency values will generally be superior to other economic measures for purposes of establishing financial criteria in notification thresholds – parties are more likely to maintain their financial data in the ordinary course by reference to currency values, and published data relating to currency values are generally readily accessible and available through standard international sources. It is recognized, however, that jurisdictions facing volatile local currency fluctuation may need to adopt more dynamic economic measures, such as monthly wage multiples. The general preference for local currency values is not intended to preclude a jurisdiction from expressing financial criteria in its notification thresholds by reference to a generally-recognized global trading currency if it chooses to do so. In all events, however, the relevant criteria should be clearly defined (including applicable rules pertaining to currency conversion), transparent, and readily accessible by parties whether or not domiciled in the local jurisdiction.

III. Timing of Notification

- A. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.**

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Parties should be permitted to notify transactions without undue delay. This will allow parties to make filings at the time they deem most efficient and facilitate coordination of multijurisdictional filings.

Comment 2: Competition agencies should not be required to accept filings with respect to transactions that are merely speculative, and parties may therefore reasonably be required to provide evidence that they intend to proceed with the transaction as a precondition to filing a notification. The vast majority of jurisdictions allow formal notification before a definitive agreement is signed, which provides the parties with flexibility to account for business constraints raised by the transaction.

Jurisdictions should permit filing before the parties conclude a definitive agreement, on the basis of, e.g., a letter of intent, agreement in principle, certification of good faith intention to consummate the transaction, or public announcement of the intention to make a tender offer.

Comment 3: Where formal notification is not permitted until a definitive agreement is in place, the standards for determining when a “definitive agreement” has been reached should be clearly defined so that the parties can determine when their notification will be accepted for filing. These jurisdictions should give the parties the opportunity, prior to such formal notification, to present and discuss the proposed transaction in order to facilitate timely submission and review.

Comment 4: In determining when notification will be permitted, jurisdictions may consider whether requests for confidentiality during the review period will impede the competition agency’s ability to conduct an effective investigation (as, for example, by contacting third parties) or otherwise conflict with applicable public disclosure requirements in the jurisdiction concerned. Competition agencies may condition formal acceptance of a filing upon publication of the fact of such filing or otherwise complying with the jurisdiction's public disclosure requirements.

B. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction (“suspensive jurisdictions”) should not impose a deadline upon the parties to file notification within a specified time after reaching an agreement. Parties have the incentive to file promptly after reaching an agreement since they are prohibited from closing their transaction until it has been cleared.

Comment 2: Elimination of filing deadlines facilitates coordination of multijurisdictional reviews.

C. Jurisdictions that do not prohibit closing pending review by the competition agency should nevertheless allow parties a reasonable time in which to notify the transaction following a clearly defined triggering event.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Certain jurisdictions require notification of transactions but do not prohibit the parties from closing pending competition agency review (“non-suspensive jurisdictions”). Such jurisdictions have a legitimate basis for requiring a filing within a time frame that will permit the competition agency to conduct a timely review. Where notification is required within a specified period following a triggering event, such period should accord the parties a period of time to prepare the necessary submissions that is reasonable in view of the information requirements to be satisfied.

Comment 2: The triggering event for purposes of calculating the filing deadline should be clearly defined to permit the parties to determine the timing of their notification obligation. The triggering event should also be defined to avoid requiring notification of transactions that are merely speculative. To that effect, some jurisdictions may also require an express certification by the notifying party or parties of a good faith intention to consummate the notified transaction.

D. Jurisdictions should provide for the possibility of pre-notification discussions with the parties.

WORKING GROUP COMMENTS
Amended (April 2018)

Comment 1: To facilitate clearance or resolution within a reasonable time frame, jurisdictions should consider offering merging parties the opportunity to have pre-notification discussions of whether their transaction will be subject to notification and on the scope of the information to be submitted. These discussions can also help the agency and the parties prepare for any required review. They should remain confidential, except if the parties and the agency otherwise agree.

IV. Review Periods

A. Merger reviews should be completed within a reasonable period of time.

WORKING GROUP COMMENTS
Original Comments (June 2003)
Amended (April 2018)

Comment 1: Merger transactions are almost always time sensitive, and the completion of merger reviews by competition agencies is often a condition to closing either by operation of law or contract. Merger reviews should therefore be completed within a reasonable time frame. However, merger transactions may present complex legal and economic issues. In such cases, competition agencies need sufficient time to properly investigate and analyze the transaction in order to reach a well-informed decision. A reasonable period for review should take into account, among other things, the complexity of the transaction and the competition issues raised, and the timeliness of the merging parties' responses to information requests.

Comment 2: Suspensive jurisdictions need to have timely review periods because parties are barred from proceeding with the transaction during the pendency of the agency's review. Completion of merger reviews within a reasonable time frame in non-suspensive jurisdictions also promotes effective enforcement because the passage of time likely renders it more difficult for the competition agency to conduct its investigation and to obtain effective post-closing remedies. Initial review periods should expire within six weeks or less, and extended review periods should be completed or capable of completion within six months or less following the submission of the initial notification(s). To facilitate multijurisdictional coordination, non-suspensive jurisdictions should consider conforming their initial review period to suspensive regimes.

B. Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.

WORKING GROUP COMMENTS
Original Comments (June 2003)
Amended (April 2018)

Comment 1: Given that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such transactions to proceed expeditiously. Many jurisdictions achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period (and in some cases an abbreviated notification form), and subjecting only transactions that raise material competitive concerns to more extended review periods. In order for merging parties to anticipate the review time frame, jurisdictions should make eligibility criteria for abbreviated initial review periods publicly available.

Comment 2: In some merger review systems, the initial review period is referred to as “Phase I,” while the extended review period is referred to as “Phase II.” Other jurisdictions employ single phase or multi-phase review procedures that likewise permit transactions that do not present material competitive concerns to proceed expeditiously following an abbreviated review and/or waiting period.

- C. In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.**

WORKING GROUP COMMENTS
Original Comments (June 2003)
Amended (April 2018)

Comment 1: In suspensive jurisdictions, the parties' ability to lawfully consummate notified transactions depends upon the expiration of applicable waiting periods. Accordingly, initial waiting periods should be subject to definitive and readily ascertainable deadlines to permit transactions that do not present material competitive concerns or present concerns that can be readily identified and effectively addressed in the initial period to proceed with minimal delay. While certain transactions will require more extended reviews, waiting periods associated with such reviews also should expire within determinable time frames, whether measured from the date of the initial filing, the commencement of a distinct second phase or similar proceedings, or from the merging parties' submission of information the competition agency requires to complete the extended review.

Comment 2: Competition agencies should ensure that notifying parties are informed within a reasonable time frame as to whether the filing is complete or whether there are deficiencies in their submissions. In the latter case, competition agencies should inform the parties of the specific details of the deficiencies to facilitate the prompt submission of corrective filings.

Comment 3: Some competition agencies have the power to issue requests for information that have the effect of interrupting or suspending the waiting period. To avoid unnecessary uncertainty, these agencies should identify the circumstances in which they will use this power. If the review periods are suspended pending receipt of additional information, competition agencies should seek to consolidate information requests in order to increase the predictability of the anticipated duration of the waiting period.

Comment 4: Parties should be free to consummate properly notified transactions upon the expiration of specified waiting periods unless the competition agency takes formal action to extend the waiting period (for example, by initiating second phase proceedings), to accept or impose conditions to closing, or to prohibit or enjoin the transaction. In certain jurisdictions, the expiration of applicable waiting periods does not bar subsequent challenge by the competition agency, but parties are nevertheless legally permitted to consummate transactions following such expiration. In order to ensure legal certainty and predictability, the scope of the power granted to competition agencies to challenge a transaction after the expiration of applicable waiting period should be clearly defined and publicly available.

Comment 5: The existence of specified waiting periods should not preclude competition agencies from granting early termination once they determine that a proposed transaction does not raise material competitive concerns. Accordingly, jurisdictions should have procedures that enable the competition agency to grant early termination of applicable waiting periods.

Comment 6: In certain situations, the specified waiting periods may not be sufficient for the competition agency to reach a determination. Additional time may be needed, for example, for particularly complex transactions or to finalize mutually acceptable conditions for clearance. To accommodate these situations, procedures should be sufficiently flexible to allow for a limited extension, with the consent of the notifying party(ies), of applicable waiting periods to avoid the initiation of second phase proceedings or an adverse enforcement decision where such a result might be avoided by a limited extension. Competition agencies should not invite or encourage such extensions unless they have reason to believe that the extension would avoid a more protracted, formal extension of the waiting period or an adverse enforcement decision.

D. In non-suspensive jurisdictions, initial merger reviews should be completed within a specified period following notification and any extended reviews should be completed within a determinable time frame.

WORKING GROUP COMMENTS
Original Comments (June 2003)
Amended (April 2018)

Comment 1: Although merging parties are not legally prohibited from consummating transactions following notification in non-suspensive jurisdictions, the pendency of review may nevertheless impact the parties' practical ability or willingness to close prior to competition agency clearance. As a consequence, many of the timing considerations applicable to suspensive jurisdictions also apply to review periods in non-suspensive jurisdictions.

Therefore, initial review periods should be subject to definitive and readily ascertainable deadlines to facilitate clearance of transactions that do not present material competitive concerns with minimal delay, and extended review periods should be subject to determinable deadlines.

E. Jurisdictions should adopt appropriately tailored procedures to accommodate particular circumstances associated with non-consensual transactions and sales of companies in financial distress.

WORKING GROUP COMMENTS
Original Comments (June 2003)
Amended (April 2018)

Comment 1: Notification procedures designed primarily to cover negotiated transactions may be ill-suited for non-consensual transactions such as public bids and tender offers. In such transactions, the acquired firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in a notification and review process.

These difficulties may be especially pronounced in jurisdictions where notifications must be filed by both the acquiring and acquired firms or where joint notification is required. Non-consensual transactions may also be particularly time-sensitive due to company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids.

Jurisdictions should adopt appropriately tailored procedures to account for the particular nature of these transactions. For example, jurisdictions have adopted some or all of the following measures designed to address specific issues raised by non-consensual transactions: shortened review periods (or, where applicable, waiting periods); permitting the applicable initial review period to commence upon filing by only the acquiring party (where filings by both the acquiring and acquired parties are normally required); waivers of information requirements relating to the target company in hostile situations; and derogations permitting the implementation of the bid before or during the review period, provided that the acquiring party does not exercise voting rights or does so only to maintain the full value of the shares. In hostile situations, competition agencies may exercise the power to request core information directly from the target when the acquirer cannot access it. In any case, these tailored procedures should be based on predictable principles in order to ensure legal certainty and due process for the notifying parties.

Comment 2: Jurisdictions should consider adopting procedures for expedited review of transactions involving sales of companies in financial distress (e.g., bankruptcy or similar restructuring), which would be the notifying parties' burden to demonstrate. The risks associated with the potential deterioration of the assets of such firms suggest that expedited review and/or waiting periods should be considered, whether by particularized rules or discretionary early termination. In suspensive jurisdictions, such situations may warrant allowing closing before the adoption of the final decision. Non-consensual sales by trustees in bankruptcy also may raise the difficulties set forth in the preceding Comment.

V. Requirements for Initial Notification

- A. **Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.**

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Because most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process. It should be used to collect information to verify that the transaction is properly before the competition agency in light of applicable jurisdictional requirements and notification thresholds and to determine whether the transaction raises competitive issues meriting further investigation. The initial notification also may be used to collect information that the competition agency needs for a clearance decision or to prepare other documentation required to terminate the review process.

Comment 2: The amount of information required in the initial notification may vary depending on the approach to notification thresholds taken by the jurisdiction. Jurisdictions that review transactions of limited value, transactions with limited local nexus, or large numbers of transactions due to low jurisdictional thresholds should be particularly sensitive to any disproportionate burdens arising from the breadth of their initial filing requirements.

- B. **Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.**

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Because the duty to notify applies to transactions covering a wide range of possible competitive effects, no single set of initial notification requirements will be optimal for all transactions. To enable the competition agency to accomplish its mission without imposing unnecessary burdens on merging parties, jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification and/or with respect to additional information requirements during the initial phase of the review.

Comment 2: There are various ways to provide flexibility in the initial review. Many jurisdictions use one or more of the following:

- *Alternative notification formats* – different initial notification formats varying with the likely complexity of competitive analysis of the transaction; examples include: (a) advance ruling certificates, which enable the merging parties to use a simplified advance procedure instead of a formal notification; and (b) short and long form notification options, enabling the merging parties to elect to submit abbreviated information in transactions that do not present material competitive concerns.
- *Discretionary waiver* – extensive initial notification requirements coupled with procedures providing competition agency staff discretion to waive responses to information specifications that are not sufficiently relevant to the agency’s disposition of the transaction to justify the burden that the responses would impose.
- *Discretionary supplementation* – abbreviated initial notification requirements coupled with procedures providing competition agency staff discretion to seek additional information during the initial review period.

Comment 3: Whichever mechanisms are used to provide flexibility, competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns. It is, however, legitimate for competition agencies to require the merging parties to provide information sufficient to demonstrate that the transaction does not present such concerns. At the same time, competition agencies should be flexible as to formal requirements where the merging parties are able to demonstrate the absence of material competitive concerns by reference to objectively quantifiable information maintained in the ordinary course of business, as opposed to the detailed market information sometimes required upon notification.

Comment 4: Competition agencies that use discretionary supplementation should consider providing guidance on the types of information (*e.g.*, business reports and plans, transaction documents, customer lists) that they commonly request for the purpose of determining whether a transaction presents material competitive concerns.

Comment 5: Competition agencies are entitled to expect notifications to contain specific original material relating to their jurisdiction. Where a jurisdiction’s notification requirements specify the format in which information is to be submitted, the competition agency should consider accepting substantially responsive information in a different format prepared by parties in the ordinary course of business or for submission to another jurisdiction. Examples of circumstances in which such consideration might be warranted include: (a) where parties that maintain records on a fiscal year basis are notifying in a jurisdiction that ordinarily requires calendar year data; and (b) where parties that maintain data on a geographic basis that does not conform precisely to the format required by the notification form of the jurisdiction concerned.

Comment 6: Competition agencies should allow merging parties voluntarily to provide information beyond that required in the initial filing to assist the agencies in narrowing or resolving potential competitive concerns or engaging in a focused inquiry into such issues.

C. Competition agencies should provide for the possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: It is generally in the interest of competition agencies and merging parties to clarify the legal and factual issues related to the notification of intended transactions as early as possible. Guidance is likely to be particularly valuable for transactions that present complex jurisdictional or competition issues. Jurisdictions should consider making available pre-notification consultations upon the request of the merging parties in order to advise the parties on whether their transaction will be subject to notification obligations and, if so, what information will be needed for their intended notification.

Comment 2: In jurisdictions that use discretionary waiver as a mechanism for flexibility, pre-notification consultations should provide merging parties with the opportunity to seek a waiver of the obligation to produce requested information on the grounds that the burden of compiling and submitting the information outweighs its value the competition agency.

D. Jurisdictions should limit translation requirements and formal authentication burdens.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: While it is appropriate for jurisdictions to require notifications to be in an official language (although they may choose to accept them in additional languages), they should not require extensive translation of supporting documents, such as transactional materials and annual reports, submitted as part of the notification. Competition agencies should accept translated summaries, excerpts, and other means of reducing translation burdens, without prejudice to their ability to require full translations if the transaction appears to present competitive concerns.

Comment 2: Jurisdictions are entitled to reasonable assurance of the validity of notifications and supporting information. These assurances can and ordinarily should be achieved without requiring the parties' senior officials to provide for notarization or consularization personally. Many jurisdictions allow notification to be perfected based on representations by counsel or simple signatures of company personnel. Jurisdictions that require formal authentication should allow notification to be perfected on the basis of an appearance by duly authorized persons residing in the jurisdiction.

VI. Conduct of Merger Investigations

- A. Merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process.**

WORKING GROUP COMMENTS

Original Comments (April 2004)

Comment 1: Effectiveness, efficiency, transparency and predictability are fundamental attributes of a sound merger control regime, and these objectives should be pursued at all stages of the merger review process. During the investigative stage, achieving these objectives can be facilitated by adopting procedures that address recurring issues encountered by the competition agency and merging parties in the merger review process and by adopting practices designed to focus the investigation on relevant legal and factual issues as promptly as possible and to resolve any perceived competitive concerns expeditiously.

Comment 2: These objectives can best be achieved if there is a frank and open dialogue between the competition agency and the merging parties. The cooperation of the merging parties is a key factor in the competition agency's ability to pursue these objectives most effectively.

- B. Merger investigation procedures should include opportunities for meetings or discussions between the competition agency and the merging parties at key points in the investigation.**

WORKING GROUP COMMENTS

Original Comments (April 2004)

Comment 1: The competition agency should be 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. Although scheduling meetings may not be necessary in non-complex cases, in appropriate cases merging parties should be afforded an opportunity to meet with the competition agency at key points of the investigation. For example, wherever possible, merging parties should have an opportunity to meet with the competition agency prior to the agency's decision to initiate a second stage inquiry (in jurisdictions with two-phase review procedures), to impose conditions, or to challenge or prohibit the transaction.

Comment 2: As early as feasible, the competition agency should be prepared to discuss its current evaluation of the transaction with the merging parties and attempt to identify potentially dispositive issues. Some jurisdictions find it valuable to hold pre-notification guidance sessions in appropriate cases, for example, where the competition agency has experience in the sector and/or where the parties have provided sufficient information prior to notification to permit the competition agency to formulate preliminary views. While the competition agency should endeavor to identify such issues as soon as possible, certain issues may not come to light until later in the process. Such discussions therefore would not limit the competition agency's

discretion to pursue new or additional theories of competitive harm that may emerge during the investigation.

- C. Merging parties should be advised not later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period.**

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The competition agency should provide the merging parties with an explanation (either orally or in writing) of the competitive concerns that give rise to the need for an in-depth review. In jurisdictions that use a two-phase review procedure, this explanation should be provided not later than the beginning of a second-stage inquiry. In single-phase jurisdictions, the competition agency should advise the merging parties of perceived competitive concerns as promptly as possible. At a minimum, the explanation should consist of a short and plain statement of the competitive concerns. Any such statement would not limit the competition agency's discretion to pursue new or additional theories of competitive harm that may emerge during the investigation.

Comment 2: Providing such an explanation has several beneficial effects. First, it promotes transparency and predictability of agency action. Second, it promotes efficiency and reduces transaction costs in the review process by allowing the merging parties to focus on issues identified as problematic, thereby facilitating resolution of these issues as quickly as possible. Third, it reduces the potential for unnecessary delay.

- D. Where investigation periods are not subject to definitive deadlines, procedures should be adopted to ensure that the investigation is completed without undue delay.**

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Where the investigation period is not subject to a definitive deadline, notional timetables (*e.g.*, service standards) for the general conduct of investigations should be issued and/or, in appropriate cases, "timing agreements" between the reviewing agency and the merging parties should be considered. Such agreements would set out a prospective plan and proposed schedule for the investigation of particular transactions. Where such an agreement is appropriate, examples of possible commitments include: (i) scheduled meeting dates between the competition agency and the merging parties; (ii) timetables for possible modification of and compliance with information requests; (iii) dates for depositions or interviews of company representatives; (iv) dates for exchange of economic information and theories; (v) dates for discussions among economists; (vi) dates by which the parties may submit briefing memoranda or other formal submissions; (vii) anticipated timing of recommendations to senior agency

officials; (viii) a timetable for submission of, and reactions to, proposed remedies; and (ix) the date before which the parties commit not to close the transaction.

Comment 2: Where the investigation period is tolled or otherwise measured by reference to the merging parties' date of compliance with compulsory information requests, the competition agency should avoid issuing seriatim requests for information to the fullest extent practicable, to promote certainty as to the anticipated duration of the applicable review period and to avoid duplicative effort by and undue burden on the merging parties.

Comment 3: Investigation periods should not be tolled based upon the issuance or pendency of third-party information requests, given that third parties may have no incentive to facilitate timely review and may even be hostile to the transaction. However, third parties should be required to comply with compulsory information requests within a reasonable period of time to facilitate timely completion of the investigation. Competition agencies also should consider adopting specific measures to limit delay that target companies might otherwise cause in the context of non-consensual transactions, such as hostile tender offers.

Comment 4: The existence of specified investigation periods should not preclude the competition agency from closing its investigation prior to specified review deadlines once it concludes that a transaction – either as originally proposed or as modified pursuant to commitments made by the merging parties – does not raise material competitive concerns. Competition agencies should have procedures enabling them to grant early termination of applicable waiting periods under such circumstances.

E. Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Recognizing that merger analysis often requires substantial amounts of information, competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in conducting merger investigations. Information requests should be reasonably tailored to obtain the information the competition agency needs to complete its investigation and to take any necessary enforcement actions. Such requests should be focused on the aspects of the proposed transaction that raise potential competitive concerns. Requests for information unrelated to such concerns should be avoided. Proposed formal information requests should be subject to appropriate internal review procedures prior to issuance.

Comment 2: Applicable laws and rules should permit the case team (*i.e.*, agency staff responsible for conducting the investigation) to modify information requests in an effort to avoid unnecessary or unreasonable costs and burdens. The case team should be willing to consider

possible modifications proposed by the parties. Issues relating to proposed modifications should be resolved promptly to avoid delay and potentially unnecessary information-gathering.

Comment 3: To the extent it does not prejudice the conduct of the investigation, competition agencies should consider permitting the parties to submit information and documents in the manner in which the company maintains such information and documents in the ordinary course of business. Parties should not be required to supply information that is not in their custody or control or not reasonably accessible to them. Under such circumstances, parties may be required to submit a statement explaining why they are unable to supply requested information.

Comment 4: While recognizing that full-text translations of certain pre-existing foreign language documents may be necessary to permit the reviewing agency to conduct its investigation, competition agencies should be sensitive to the significant costs and burdens involved in providing full-text translations of voluminous documentary submissions and should be selective in imposing full-text translation requirements. Translations should, absent unusual circumstances, be required only for categories of documents that are relevant to legal or factual issues raised by the transaction under review. Where translation burdens will be substantial notwithstanding this general limitation, competition agencies should be willing to consider reasonable proposals by responding parties aimed at reducing these burdens, such as providing translations of relevant excerpts of voluminous documents, without prejudice to the competition agency's ability to subsequently require full translations where the agency determines that such translations are needed to complete its investigation, to initiate enforcement proceedings, or otherwise discharge its responsibilities.

Comment 5: Disagreements between the case team and a merging party relating to whether a request is reasonable or unduly burdensome or whether the merging party has adequately complied with the request should be subject to timely review mechanisms. Although applicable review mechanisms in some jurisdictions include resort to an independent tribunal, resolution of such disputes may appropriately be handled through internal review procedures within the competition agency, for example, by permitting the merging party to raise disputed issues with senior agency officials. Appropriate review mechanisms relating to the reasonableness of compulsory information requests and adequate compliance with such requests should likewise be available to third parties subject to information requests.

F. Merger investigations should be conducted with due regard for applicable legal privileges and related confidentiality doctrines.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: In responding to information requests, parties should not be required to disclose materials and information that are subject to applicable legal privileges and related confidentiality doctrines (such as the attorney work-product doctrine) in the requesting jurisdiction. When information requests are directed to persons or facilities in other jurisdictions, competition agencies should give due consideration to similar legal privileges and

doctrines applicable in those jurisdictions unless such consideration is precluded by applicable laws in the requesting jurisdiction or by the competition agency's responsibilities under those laws.

Comment 2: Parties may be required to identify and describe materials and information withheld on the basis of legal privilege and related confidentiality doctrines to permit the competition agency to assess the legitimacy of privilege claims. Procedures relating to the identification of materials and information withheld on the basis of legal privilege and related doctrines should not impose unreasonable burdens on the parties.

Comment 3: Competition agencies should also establish and maintain policies pertaining to the handling of privileged materials and information in connection with exchanges of such materials and information with other competition agencies, including any exchange pursuant to a voluntary waiver. Competition agencies should promote transparency with respect to their policies and practices relating to legal privileges and related confidentiality doctrines.

VII. **Procedural Fairness**

- A. Procedural fairness should be afforded to merging parties and third parties with a legitimate interest in the merger under review.**

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Procedural fairness should be a basic attribute of all merger review procedures. Procedural fairness comprises many factors, including elements of practices discussed elsewhere in these Recommended Practices (*e.g.*, transparency, timeliness of review, conduct of merger investigations). This Recommended Practice focuses on procedural fairness as it relates to providing the merging parties and third parties with a legitimate interest in the merger under review, as recognized under applicable laws in the reviewing jurisdiction (hereinafter “third parties”), with a meaningful opportunity to express their views.

Comment 2: Laws and practices regarding procedural fairness may provide for safeguards at different stages in the merger review process, depending on whether the jurisdiction uses a prosecutorial or administrative merger review system. In a prosecutorial system, the competition agency generally investigates the merger and decides whether to challenge it, but an independent judicial body decides whether to prohibit the transaction. In an administrative system, powers to investigate and to prohibit a merger are generally entrusted to a single authority or to two different administrative authorities, subject to the possibility of review by an independent adjudicative body.

Comment 3: Foreign firms should be treated no less favorably than domestic firms in like circumstances in all aspects of the merger review process, including with respect to procedural fairness.

- B. Prior to a final adverse enforcement decision on the merits, merging parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the proposed adverse decision and should have a meaningful opportunity to respond to such concerns.**

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: If a competition agency reviewing a merger identifies material competitive concerns arising from the transaction, it should provide the merging parties the opportunity to respond to these concerns prior to a final adverse enforcement decision on the merits – *i.e.*, in an administrative system, a decision to prohibit the transaction or to clear it subject to conditions or, in a prosecutorial system, a decision to institute a legal action to challenge or prohibit the transaction. Providing this opportunity serves the public interest in ensuring well-informed enforcement decisions, as well as the interests of the merging parties.

Comment 2: Merging parties should have sufficient information on the material competitive concerns raised by the transaction. Information disclosed to the merging parties should allow them to ascertain the legal, economic and factual bases on which the competitive concerns are founded. Such disclosure should be subject to reasonable confidentiality protections and any applicable legal privileges.

Comment 3: Merging parties should have information on the competitive concerns in a timely manner. Without compromising the effectiveness of an investigation or the outcome of enforcement proceedings, the competition agency should consider apprising merging parties of specific concerns as soon as feasible during the investigation, so the parties can express their views. In any event, the communication of such competitive concerns should be made in time for the merging parties to have an opportunity to respond to these concerns and to consider and propose remedies to address these concerns prior to the issuance of a final enforcement decision. Similarly, if merger laws allow the competition agency or a court to clear a transaction subject to conditions, the competition agency or court should afford the merging parties the opportunity to comment before imposing such remedies.

Comment 4: The timing of access to specific information gathered and relied on by the competition agency in arriving at a final adverse enforcement decision may vary among merger review systems. For example, in some systems, merging parties have the right to review the agency's investigation file prior to the adverse enforcement decision. In other systems, parties are entitled to such information only during court proceedings.

C. Third parties should be allowed to express their views during the merger review process.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Competition agencies have used the following complementary methods, among others, to obtain views from third parties: (a) inviting third parties to express their views on the merger through publication, *e.g.*, in an official gazette or on a website; (b) contacting third parties likely to be affected by the merger, such as customers, suppliers, or competitors of the merging parties; (c) circulating information requests to third parties potentially affected by the transaction; (d) affording third parties an opportunity to comment on proposed remedies; and (e) permitting third parties to apply for formal admission to the proceedings.

D. The competition agency should manage the merger review process to ensure that the process is implemented fairly, efficiently, and consistently.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The competition agency should make certain that there are safeguards, or “checks and balances,” ensuring that merger reviews are handled in a fair, efficient, and consistent manner, procedurally and substantively. Consistent application of the merger review process is important to enhance the predictability, fairness, and acceptance of merger review.

Comment 2: Given the variety of merger review procedures among jurisdictions, different methods may be used to achieve these goals. Examples of safeguards that have been applied include: (a) assigning a particular unit to review the legality and consistency of proposed enforcement actions; (b) establishing an economics section within the competition authority to advise decision-makers on the merits of the case; (c) developing internal operational guidelines; (d) supervisory mechanisms to oversee the staff’s handling of merger reviews; (e) ensuring a separate review of preliminary findings and/or the results of the in-depth investigation; (f) creating separate investigation and enforcement units; and (g) decision-making by a collegiate body.

E. Merger review systems should provide an opportunity for timely review by a separate adjudicative body of a competition agency’s final adverse decision on the merits of a merger.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Once an adverse decision has been taken with respect to a merger, it is often difficult for the transaction to remain viable. Accordingly, judicial review in merger cases should aim to permit resolution of the case within a time frame during which the merger remains viable. Competition agencies should take appropriate steps that are consistent with their respective enforcement responsibilities to facilitate such timely judicial review. Such steps may include cooperating in available procedures for expedited review or expedited evidence gathering.

VIII. Transparency

- A. Merger control laws should be applied with a high level of transparency, subject to the appropriate protection of confidential information.**

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: “Transparency” refers to the ability of the public to see and understand the workings of the merger review process. Transparency is important to achieve consistency, predictability and, ultimately, fairness in applying merger control laws, thereby enhancing the credibility and effectiveness of merger control enforcement. Transparency also allows merging parties to better understand and predict the likely outcome of particular cases and the time and costs the review is likely to entail.

Comment 2: Transparent application of merger control laws entails making all relevant laws, regulations, and other materials relevant to merger control law, policy, and practice readily available to the public in a timely manner.

Comment 3: Transparency requirements are limited by the obligation to protect confidential information. When a competition agency or other institution makes information pertaining to a merger publicly available, it should provide for the protection of confidential information.

- B. Merger control regimes should be transparent with respect to, at a minimum, the jurisdictional scope of the merger control law, the competition agency’s decision-making procedures, and the principles and criteria the competition agency uses to apply the substantive review standard.**

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: With respect to the jurisdictional scope of the merger control law, publicly available materials should permit ready determination of: (i) the types of transactions to which the merger control law applies; (ii) any exemptions or exclusions from the merger control law; and (iii) the precise tests or thresholds that govern whether the parties must notify the transaction or whether the competition agency has jurisdiction over a transaction.

Comment 2: With respect to the procedures applicable to merger review, publicly available materials should permit ready determination of: (i) the identity and contact details of the competition agencies; (ii) any filing deadlines; (iii) notification procedures, including the information to be provided in the initial filing; (iv) any filing fees; (v) review periods; (vi) suspensive periods and any limits on implementing the transaction prior to clearance; (vii) investigative procedures; (viii) any deadlines that the merging parties, third parties, or the competition agencies must obey during the review period; (ix) procedures and deadlines for appealing adverse decisions or for challenging a merger; (x) procedural rights of merging and

third parties; and (xi) enforcement procedures pertaining to violations of the merger control laws (e.g., failure to notify) or merger review decisions (e.g., breach of conditions or obligations); (xii) measures for protecting confidential information.

Comment 3: Merger control laws and regulations are often written in general terms, and the principles and criteria used to apply the substantive standard of review set forth in the basic legislation are often developed through administrative practice and case law. Accordingly, to achieve transparency, publicly available materials should include not only the basic legislation, but also the relevant case law, enforcement policies, and administrative practices that clarify and develop the basic legal framework. In particular, these supplemental materials should provide insight into the substantive principles and criteria (i.e., the analytical framework) that the competition agency uses in applying the law. If a jurisdiction's merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent.

C. Competition agencies should promote transparency by making information about the current state of merger control law, policy, and practice readily available to the public.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: There are many appropriate ways for competition agencies to promote transparency. These include, among others: publishing general guidelines and notices on substantive law and procedure; publishing individual enforcement and non-enforcement decisions; issuing press releases on important decisions; issuing statements explaining actions or non-actions that signify a change in enforcement policy; delivering speeches; and publishing informational materials. Methods can be combined for increased effectiveness.

Comment 2: A reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice. Some competition agencies issue a reasoned decision at the end of each merger review, while others do so when enforcement action is taken. What matters is that the available information should allow the public to monitor consistency, predictability, and fairness in the application of the merger review process.

Comment 3: After acquiring sufficient experience, competition agencies may wish to consider publishing guidelines on merger analysis, procedure, and/or jurisdiction to assist interested parties in handling future merger cases. Many competition agencies find it useful to obtain public input prior to issuing such guidelines. To the extent that competition agencies formally rely on guidelines, policies, or precedents from other jurisdictions, the scope and nature of such reliance should be publicly disclosed. If such guidelines are issued, they should be reviewed periodically to reflect current practice.

Comment 4: Materials published to achieve transparency should be made available on a publicly accessible, dedicated website. They should be published in a timely manner and updated regularly to reflect the current state of law, policy, and practice.

Comment 5: To facilitate transparency for foreign firms, competition agencies are encouraged, to the extent permitted by available resources, to consider making available an English translation of basic merger laws, regulations, guidelines, and interpretive notices.

IX. Confidentiality

- A. Business secrets and other confidential information received from merging parties and third parties in connection with the merger review process should be subject to appropriate confidentiality protections.**

WORKING GROUP COMMENTS Original Comments (April 2004)

Comment 1: Public disclosure of business secrets and other confidential information received by competition agencies in connection with the merger review process may prejudice important commercial interests and may have adverse effects on competition. The prospect of potential disclosure may also discourage parties from submitting all relevant information to and fully cooperating with the reviewing agency. Confidential information that merging parties and third parties submit in connection with the merger review process should therefore be subject to appropriate confidentiality protections. In the absence of statutory protection, competition agencies should establish policies and procedures to ensure that confidential information will be subject to appropriate confidentiality safeguards.

Comment 2: Confidentiality rules should strike an appropriate balance between commercial interests and other considerations, including the need to ensure procedural fairness for the merging parties, the public interest in protecting the decision-making process, and transparency of the merger review process.

Comment 3: Confidential information submitted by merging parties and third parties should not be used except in connection with the competition agency's review of the merger and other authorized law enforcement purposes. With respect to the use of such information for merger review purposes, it should not be disclosed outside the competition agency except for the purposes of allowing the agency to discharge its merger review mandate effectively (including the initiation and conduct of enforcement proceedings) and to provide merging parties with adequate procedural fairness. Such information may also be disclosed outside the competition agency for purposes of its merger review: (1) where authorized pursuant to international treaties, agreements, or protocols where reciprocal confidentiality protections are specified; (2) in response to requests for judicial assistance by other competition agencies pursuant to national legislation that authorizes such disclosure, provided that confidential treatment by the requesting agency is ensured; and (3) with the submitting party's consent – for example, disclosure to other competition agencies pursuant to a waiver.

Comment 4: To the extent that the competition agency is charged with deciding on requests for confidential treatment, submitting parties may be required to identify confidential information in their submissions and to demonstrate that the information meets applicable standards for confidentiality protection. Where the competition agency denies a request for confidential treatment, it should provide the requesting party with timely notice of the agency's determination and the reasons for the denial. Such notice may be formal or informal, but should be provided in

a form that will permit the requesting party to take appropriate steps to contest the determination prior to disclosure.

B. Competition agencies should promote transparency of the confidentiality laws, policies, and practices applicable to their merger control procedures.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: As discussed more fully in Recommended Practice VIII, transparency can be achieved by various means including policy statements, guidance notes, notices, instructions to notification forms and information requests, rules of practice, published decisions, and other communications that are readily accessible to affected parties. Such communications might include summaries of the competition agency's confidentiality policies and practices (with references to applicable confidentiality laws and rules), including any steps that submitting parties must take to invoke confidentiality protections and exceptions to the competition agency's ability to preserve confidentiality, such as freedom of information laws, judicial proceedings, and legislative or administrative inquiries. The competition agency's practice regarding retaining, destroying, or returning confidential documents at the end of an investigation should also be publicly available.

Comment 2: Competition agencies should clearly explain the nature and extent of possible public disclosure involved in the merger review process, including any publication requirements and the general nature and scope of any potential disclosure of confidential information in connection with contacting third parties.

Comment 3: Competition agencies should promote transparency with respect to policies or practices on exchanging merger-related information with other government agencies in the jurisdiction concerned and with other competition agencies in the context of interagency coordination.

C. Competition agencies should seek to defer contacts with third parties until the proposed transaction becomes public where such deferral would not adversely affect the reviewing agency's ability to conduct its investigation effectively or complete its review within applicable deadlines.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Premature public disclosure of a pending transaction may have an adverse affect on the merging parties' commercial interests – negotiations may be disrupted, employee morale may suffer, and commercial relationships may be jeopardized. The possibility that the competition agency will contact third parties prior to public announcement may also reduce the parties' willingness to initiate early discussions with the competition agency regarding proposed transactions. Accordingly, competition agencies should seek to defer contacts with third parties

prior to public announcement of the transaction in cases in which such deferral will not adversely affect the reviewing agency's ability to conduct its investigation effectively or complete its review within applicable deadlines.

Comment 2: In many jurisdictions, upon receipt of a notification, the competition agency routinely publishes a notice of the fact of notification inviting third parties to submit comments. In such jurisdictions, because merging parties are on notice that notification is tantamount to public announcement, the practical import of this Recommended Practice is that the competition agency should normally defer marketplace contacts with third parties regarding non-public transactions until notification has, or should have, occurred. Where competition agencies in such jurisdictions contemplate contacting third parties regarding non-public transactions prior to notification, they should consider giving the merging parties advance notice of their intention to initiate such contacts and the agency should be willing to consider reasonable requests by merging parties to defer such contacts until notification has occurred or the transaction has otherwise become public.

Comment 3: In jurisdictions where the fact of notification is not made public, merging parties should be on notice that the competition agency may contact third parties following notification notwithstanding that the pending transaction has not been publicly disclosed. Consistent with the considerations set forth in *Comment 1*, however, competition agencies in such jurisdictions should be willing to consider reasonable requests by notifying parties to defer such contacts for a limited time for good cause, again provided that such deferral would not prejudice the competition agency's ability to conduct its investigation effectively or to timely complete its review.

D. Confidentiality rules should strike an appropriate balance between protecting the confidentiality of third-party submissions and procedural fairness considerations.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Because limitations on the merging parties' ability to obtain access to third-party submissions may implicate procedural fairness considerations, confidentiality rules applicable to third-party submissions should strike an appropriate balance between these procedural fairness considerations and the need to protect confidential information contained in such submissions.

Comment 2: Mechanisms to facilitate access to such submissions might include requesting third parties to submit non-confidential versions of any submissions that may be subject to disclosure, with the understanding that such versions may be subject to disclosure for specified purposes, or requesting submitting parties to prepare non-confidential versions or otherwise make appropriate confidentiality designations prior to disclosure.

Comment 3: Additional safeguards may be necessary where a third party is willing to comment only on an anonymous basis or where the nature of the comment itself could serve to identify the party who has requested anonymity.

Comment 4: In jurisdictions where the competition agency challenges mergers through the judicial system, such that the merging parties will have an opportunity to seek access to confidential third-party submissions under applicable civil discovery rules, access to such submissions might be deferred until the initiation of judicial proceedings.

E. Competition agencies should avoid unnecessary public disclosure of confidential information in public announcements, court or administrative proceedings, decisions, and other communications respecting a pending transaction.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Competition agencies should avoid unnecessary public disclosure of confidential information. Confidential information that is not relevant to the merger review should not be publicly disclosed. For example, non-public financial terms agreed between the merging parties would not normally be relevant to a competitive assessment of the transaction and, therefore, should not normally be publicly disclosed as part of the merger review process.

Comment 2: Where competition agency procedures provide for public and non-public versions of certain documents, parties should have an opportunity to review the public version prior to issuance to ensure that it does not include confidential information. Where parties do not have such an opportunity, competition agencies should consider other measures that would permit a submitting party to take appropriate steps to prevent or limit public disclosure of information that the submitting party has designated confidential where that party has not previously consented to the intended disclosure (for example, pursuant to a voluntary waiver). Such measures might include putting the submitting party on notice that public disclosure of such information is contemplated or, in prosecutorial systems, submitting filings that contain sensitive information under seal to enable the affected party to seek appropriate protective orders from the reviewing tribunal.

X. Interagency Enforcement Cooperation

A. Competition agencies should seek to cooperate in their review of mergers that may raise competitive issues of common concern or involve remedial coordination.

WORKING GROUP COMMENTS

Original Comments (April 2004)

Amended (April 2018)

Comment 1: Interagency cooperation occurs in a number of contexts. This Recommended Practice concerns cooperation between competition agencies in the assessment of mergers under parallel review (“enforcement cooperation”). Enforcement cooperation is beneficial in the review of transactions that raise similar competition issues or remedial concerns, in particular but not exclusively in cases that raise competition concerns in cross-border or global markets. Enforcement cooperation may also be beneficial in transactions that raise different competition concerns in different jurisdictions but where remedies in one jurisdiction may impact another jurisdiction.

Comment 2: The goals of enforcement cooperation include: (1) fostering efficient merger review by reducing unnecessary duplication of work, delays, and burden for merging parties and agencies; (2) promoting effective merger enforcement, in particular by reducing gaps in information available to agencies and thereby leading to more informed agency decision making and enhanced analytical robustness; and (3) consistent, or at least non-conflicting, outcomes in the cooperating jurisdictions.

Comment 3: Convergence toward recognized best practices in merger review can help to facilitate effective enforcement cooperation, for example, through more consistent timetables and procedural rules, as well as a common understanding of the substantive assessment.

Comment 4: Enforcement cooperation is voluntary; competition agencies that are requested to cooperate in merger reviews are generally encouraged, but are not obligated, to do so. Enforcement cooperation does not limit an agency’s ability to make enforcement decisions independently, nor imply that the agency should consider competitive effects that may occur outside its jurisdiction. A competition agency should not delay its merger decision based on reviews pending in other jurisdictions unless appropriate in light of common substantive or remedial issues that require continued enforcement cooperation.

Comment 5: Enforcement cooperation increases familiarity among agency staff and understanding of one another’s merger review processes, which in turn may help foster trust and facilitate future cooperation, and greater procedural and analytical convergence.

B. Enforcement cooperation should be conducted in accordance with applicable laws and other legal instruments and doctrines.

WORKING GROUP COMMENTS

Original Comments (April 2004)

Amended (April 2018)

Comment 1: Enforcement cooperation should be conducted in accordance with applicable national

laws, including rules regarding the treatment of confidential information and privileged communications, and applicable cooperation treaties and agreements.

Comment 2: Enforcement cooperation may take place pursuant to formal cooperation treaties or agreements, or informal memoranda of understanding or protocols, such as the ICN's Framework for Merger Review Cooperation (2012) and the OECD's Council Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014).¹ Cooperation can also take place in the absence of a formal agreement or other written arrangement.

Comment 3: When two or more competition agencies engage in enforcement cooperation in merger reviews on a recurring basis, it may be useful for them to develop formal agreements, memoranda of understanding, or other protocols to facilitate such cooperation.

C. Enforcement cooperation should be tailored to the particular transaction under review and the needs of the competition agencies conducting the merger investigations.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: The scope and depth of enforcement cooperation will depend on the facts and issues raised in the transaction under review. Accordingly, enforcement cooperation should be sufficiently flexible to accommodate differences in agencies' investigations. Similarly, the degree and type of enforcement cooperation in a particular transaction may differ among cooperating agencies.

Comment 2: When a competition agency becomes aware that a merger review is likely to benefit from enforcement cooperation, that agency should contact other relevant competition agencies as soon as practicable. Agencies should consider the expected nature and scope of engagement as early as practicable during their reviews.

Comment 3: Depending on the complexity of the merger review, the applicable legal frameworks, and the potential for competitive or remedial issues of common concern, agency cooperation typically involves identifying case team liaisons; identifying and, if necessary, coordinating the timing of reviews; and engaging on analyses. Enforcement cooperation may also include coordinating information requests; conducting joint interviews of merging parties and third parties; coordinating site visits; and cooperating in remedy design and implementation.

Comment 4: When agencies decide to coordinate closely during the review of a case, it is helpful for them to communicate at regular intervals throughout their respective processes and, in particular, at key decision-making stages. This includes agencies communicating the outcome of their investigation to other cooperating agencies who may have already completed their review or who may still be investigating.

¹ The ICN and other organizations also have guidance for practical cooperation, such as the ICN's Practical Guide to International Enforcement Cooperation in Mergers (2015).

Comment 5: Cooperation involves the exchange of investigative information, usually, though not exclusively, through oral communications. It may occur based only on sharing publicly available information, as well as “agency non-public information,” *i.e.* information that the agencies are not statutorily prohibited from disclosing, but normally treat as non-public, such as analyses of relevant market definition, or the timing of the investigation, and theories of harm. In closely coordinated reviews, cooperation typically involves voluntary waivers of confidentiality by the merging parties, which allows the agencies to exchange the parties’ business confidential information. In some cases, agencies may also seek waivers from third parties to allow for a more fulsome discussion.

Comment 6: Enforcement cooperation typically involves discussions between investigative staff. Where beneficial, consultation as to investigative approaches and assessments may take place among senior officials or agency heads.

D. Competition agencies should encourage and facilitate the merging parties’ support in the merger enforcement cooperation process.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: Merging parties’ support is important for facilitating effective enforcement cooperation. Examples of such support include identifying where and when the transaction will be filed (mandatory and voluntary filings) and, as appropriate, granting voluntary confidentiality waivers. To facilitate timing alignment of merger notifications across jurisdictions, agencies should promote flexibility by eliminating filing deadlines in suspensive jurisdictions, as discussed in the Recommended Practice on Timing. To encourage the merging parties’ support, competition agencies should strive to further the transparency of the enforcement cooperation process, *e.g.*, by informing parties of the benefits of enforcement cooperation and addressing concerns raised by the exchange of information pursuant to voluntary confidentiality waivers. A competition agency may wish to consider publishing a brief description of its enforcement cooperation policies and practices, including the categories of information that would likely be exchanged pursuant to a voluntary confidentiality waiver, or consider informing merging parties of the basic form of cooperation that may take place in the review of their transaction.

Comment 2: Competition agencies should seek to develop a model waiver form; the model can provide that it may be modified to suit specific circumstances. The waiver should provide the terms on which the merging party agrees to waive statutory confidentiality protections *vis-à-vis* the agency that originally received the merging party’s confidential information, as well as to describe the agency’s policy regarding how it will treat the information it receives from another agency pursuant to a waiver. The ICN Model Waiver Form can serve as a useful starting point.

Comment 3: Where enforcement cooperation would be facilitated by the discussion of confidential information, the competition agency should request the parties provide confidentiality waivers on a voluntary basis. The cooperating agencies should make clear that a decision not to provide a waiver will not prejudice the outcome of the investigation.

E. Reviewing agencies should seek remedies tailored to address domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: To the extent consistent with their respective law enforcement responsibilities, cooperating agencies should strive to ensure that the remedies they accept to address domestic competitive concerns do not impose inconsistent obligations on the merging parties. Remedies offered by the merging parties may not be identical in each jurisdiction, *e.g.*, because a transaction may have different competitive effects in the various jurisdictions in which it is reviewed. However, because a remedy accepted in one jurisdiction may have an impact in another jurisdiction, the competition agencies should invite the merging parties to consider coordinating the timing and substance of their remedy proposals. Where possible and appropriate, cooperating agencies should discuss remedy choice and design, such as the structure and content of the remedy, specific purchaser criteria, whether a single purchaser should be required, the viability of the assets, the duration of divestiture periods and transitional services, the use of monitors or trustees, and potential remedy implementation risks. Competition agencies should also be prepared to discuss with the merging parties any cross-border implications of remedies under consideration.

Comment 2: Enforcement cooperation on remedies may avoid unnecessary costs and burdens resulting from duplicative remedies. Subject to relevant confidentiality and nondisclosure rules, cooperating agencies should keep one another informed as early as possible of remedies under consideration to the extent that they may affect the other competition agency's review or consideration of remedies.

Comment 3: To the extent consistent with applicable legal frameworks and agency enforcement obligations, in some circumstances cooperation may result, and in many cases has resulted, in one authority closing its investigation without remedies after taking another authority's remedies into account. The benefits of this approach include conserving the agency's resources, eliminating the risk of inconsistent implementation of the remedy, and avoiding the imposition of unnecessary costs or delays on the parties. The potential drawbacks include that the deferring agency may relinquish its ability to enforce the remedy directly and the possibility that the other jurisdiction could modify or terminate the remedy.

Comment 4: Where possible, cooperating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens. Such aspects might include, for example, arranging common timetables for compliance with undertakings, appointing common trustees to effectuate required divestitures, and harmonizing reporting requirements.

Comment 5: Where possible and appropriate, enforcement cooperation should also extend to substantive aspects of remedy implementation, such as the purchaser approval process for divestiture remedies.

XI. Remedies

A. A remedy should address the identified competitive harm arising from the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (June 2005)
Amended (May 2017)

Comment 1: The object of a remedy should be to maintain or restore competition otherwise likely to be lost due to the proposed transaction. A remedy should be considered only if the agency has a sound basis to believe that the proposed transaction, if implemented, would contravene the applicable merger review law. The remedy should adequately address the potential competitive harm identified, but should not have the object of improving upon premerger competition. Tailoring the remedy to the competitive harm allows competition agencies to require the least intrusive remedy while permitting, if possible, the realization of the merger's efficiencies.

Comment 2: To address competitive concerns identified by a competition agency, merging parties should be permitted to propose alternative resolutions, modifications, conditions, and/or obligations that would permit the transaction to proceed while maintaining or restoring competition otherwise likely to be lost due to the proposed transaction, consistent with the applicable merger review law. Before pursuing or adopting an outright prohibition, agencies should consider such alternative resolutions. In addition, the agency may take the initiative to propose alternative resolutions. However, there may be instances where only an outright prohibition can adequately address the competitive concerns arising from the proposed transaction.

Comment 3: The proposal, discussion, and adoption of remedies should be conducted in a manner consistent with other Recommended Practices, particularly those on Conduct of Merger Investigations, Procedural Fairness, Transparency, and Interagency Coordination and be informed by the Merger Remedies Guide and the Practical Guide on International Cooperation.

B. The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.

WORKING GROUP COMMENTS
Original Comments (June 2005)
Amended (May 2017)

Comment 1: Information on the jurisdiction's procedures for proposing, discussing, and adopting remedies should be readily available to those involved in merger review proceedings. Such information may include, as applicable, when, how and to whom remedies should be proposed, the types of remedies that the agency generally prefers, how a remedy proposal may be evaluated, and any standard terms or implementation provisions the remedy would be expected to include.

Comment 2: In the event the competition agency identifies competitive concerns, the agency should provide the merging parties with timely and substantiated information on those concerns so the parties have sufficient time to consider and propose remedies to address those concerns prior to the final enforcement decision. Merger review procedures should provide means to ensure that competition agencies have adequate time to discuss suitable remedies with the merging parties, evaluate the proposed remedies, and consult appropriate third parties on the effectiveness of the remedies.

C. Procedures and practices should be established to ensure that remedies are effective and easily administrable.

WORKING GROUP COMMENTS

Original Comments (June 2005)

Amended (May 2017)

Comment 1: Remedies should be effective in maintaining or restoring competition otherwise likely to be lost due to the proposed transaction and be easily administrable. Remedies should not require significant administrative intervention by the agency after the transaction is consummated.

Comment 2: Remedies can take two basic forms: (a) structural remedies, which involve a direct change to the competitive market structure (such as commitments to divest assets), and (b) non-structural remedies, which involve modifications or constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses). Certain remedies, such as commitments involving licensing of intellectual property rights or access to facilities, may be characterized as structural or non-structural, depending on the circumstances. An effective remedy package may consist of structural and/or non-structural components, including short-term transitional arrangements that support a structural remedy.

Comment 3: Structural remedies are generally preferred over non-structural remedies, particularly for horizontal mergers, because they directly maintain or restore the competitive structure of the market, have a durable impact, are easier to administer and do not require medium or long-term monitoring to ensure compliance. Structural remedies can take several forms. The preferred structural remedy is typically the divestiture of an ongoing, stand-alone business unit, including the sale of all the infrastructure and components, and the support of human resources necessary for the divested business to compete effectively after the remedy is implemented. The divestiture of less than an existing business carries more risk, and requires more agency scrutiny, but may constitute an effective remedy if, taking into account the scope of the remedy package, the nature of the business at issue, and the resources already owned and operated by a prospective purchaser, the divested assets are sufficient to allow the purchaser to compete successfully in the relevant market. While short-term assistance from the merging parties can be necessary to transition assets to an independent purchaser, remedies should avoid creating ongoing relationships between the merged entity and the purchaser of divested assets that may impede competition.

Comment 4: The remedy's effectiveness may depend on the identity of the prospective purchaser of the assets to be divested, particularly where less than an ongoing business unit

is being divested. For a remedy to be effective, it should enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified. Competition agencies should evaluate prospective purchasers for their financial strength, managerial expertise and operational capabilities, as well as for their independence and intention to compete with the merged firm in the affected market after divestitures. An acquisition by the prospective purchaser should not in itself adversely affect competition. The agency should ensure that it has the authority and the appropriate procedures in place to approve a prospective purchaser.

Comment 5: When a competition agency has concerns about the availability of a suitable purchaser or viability of the proposed remedy, it should consider requiring approval of a pre-identified purchaser of the divested assets before the merger is consummated. Pre-identified purchasers should also be considered when there are concerns about a lengthy divestiture process resulting in deterioration of the divested assets.

Comment 6: Where structural remedies are either not possible or not appropriate to address the competitive harm, a non-structural remedy may be appropriate to address the competitive concerns. Non-structural remedies that facilitate or protect competition (such as reducing switching costs and opening up tender processes) are generally more effective than those that aim to control prices or output levels (such as price controls, service level agreements, and supply commitments). In crafting non-structural remedies, competition agencies should consider whether ongoing monitoring of the remedy is feasible and be wary of high implementation costs associated with monitoring, terms that restrain potentially pro-competitive conduct, and terms that are vulnerable to circumvention and manipulation. Competition agencies should consider other alternatives before imposing price controls as remedies, as price controls can most directly distort market forces and harm competition, require a great deal of market insight that is typically not readily available, and will likely require regulatory oversight and intervention to implement and maintain.

Comment 7: Market testing, involving either a formal or informal process by which a competition agency obtains views and comments from third-party customers, suppliers, and/or competitors, should be encouraged when it helps to determine if the proposed remedy will adequately address competitive concerns. Third-party views and comments should be evaluated by an agency, while remaining attuned to self-interest or any other motives that might attempt to influence the agency's views.

Comment 8: Timing is a critical factor in determining whether a merger remedy is effective. Remedies should be implemented in a prompt and timely manner. Remedies should have a specified end date or termination provision.

D. Remedies should provide appropriate means to ensure implementation, monitoring of compliance, and enforcement of the remedy.

WORKING GROUP COMMENTS

Original Comments (June 2005)

Amended (May 2017)

Comment 1: Competition agencies may have different terminology or mechanisms for formalizing and enforcing remedies. Regardless of the terminology used (“remedy order” or other), a formal and written form of imposing remedies should identify, provide notice, and bind the entities subject to its terms. The terms should be sufficiently clear and precise to provide the parties adequate guidance in implementing the remedy. The remedy order should also include provisions that will enable the competition agency to monitor compliance and ensure the order is fully implemented.

Comment 2: As part of a structural remedy, whether through a formal provision of the remedy order or otherwise, a competition agency should require merging parties to maintain and preserve the assets pending divestiture to ensure that there is no deterioration of the assets’ competitive strength. Such requirements (often called “hold separate” or “asset preservation” measures) can help to ensure the independence and viability of divested assets by maintaining their value and goodwill, protecting sensitive information, encouraging employees to remain with the entity until divestiture, and otherwise ensuring the divested assets are not allowed to deteriorate. A competition agency may wish to appoint a hold separate manager who can oversee implementation of hold separate measures.

Comment 3: In a remedy order, it may be appropriate to include terms permitting the competition agency to select one or more independent trustees who can oversee the divestiture process or the conduct of the merging parties over the duration of a non-structural remedy. Monitoring trustees can help to oversee implementation of remedies and provide regular reports or updates to the competition agency. A divestiture trustee may take over the divestiture process from the merging parties if they fail to sell the divested assets within the required time period.

Trustees should be independent of the merging parties, should have appropriate qualifications for the role, and should not be subject to conflicts of interest. The scope and limits of the trustee’s responsibilities and authority should be clearly set out in a mandate provided or approved by the competition agency, which should also state that the trustee cannot accept instructions from or be dismissed by the merging parties. Nevertheless, the parties can be required to compensate the trustee. The competition agency should maintain oversight over trustees.

Comment 4: The competition agency should have the means to investigate compliance with the remedy order, including the ability to inspect and copy records, conduct reviews, and to require periodic or one-time reporting obligations by the parties and/or the trustee(s) on the implementation of the remedy. The ultimate decision regarding compliance with the remedy order should rest with the agency or court, and not with the trustee.

Comment 5: Competition agencies are unable to control or predict every factor capable of impacting the implementation of remedies. Significant and permanent changes in market

conditions may impact the effectiveness of a remedy, especially in cases where a non-structural remedy continues over a long duration. Revision clauses or other procedures, which would permit remedies to be removed or modified upon demonstration of specified objectives or criteria, may provide flexibility to address unanticipated factors. Modifications can range from extensions of implementation deadlines to remedy substitutions or waivers to implement certain commitments.

Comment 6: When a party fails to comply with the terms of a remedy order, the competition agency should seek to enforce the order directly or through the courts. In some jurisdictions, the merger clearance may automatically lapse. Depending on the circumstances, violations of remedy orders that are deliberate or intentional may be treated more severely than inadvertent violations. If non-compliance results from the remedy order being impossible to implement, competition authorities can consider whether modifications or alternative remedies may be effective to address the relevant competitive concerns.

XII. Competition Agency Powers

A. Competition agencies should have the authority and tools necessary for effective enforcement of applicable merger review laws.

WORKING GROUP COMMENTS

Original Comments (June 2005)

Comment 1: Merger review is fact-intensive; competition agencies therefore require the ability to obtain information relevant to their review of proposed transactions. Competition agencies should be provided with appropriate investigative tools and mechanisms by which the agency can compel merging and third parties to produce relevant information, for example, by providing the competition agency with the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information.

Comment 2: For the merger review process to operate effectively, the competition agency must have the ability to initiate enforcement actions against proposed mergers and to seek sanctions for non-compliance with applicable legal requirements and agency decisions and orders. Competition agencies should therefore have the enforcement tools needed to achieve these objectives.

Comment 3: Competition agencies should have the authority to permit proposed transactions to proceed subject to conditions that address perceived competitive concerns in the jurisdiction concerned. Where conditional clearance is authorized, the agency should also have effective means to ensure compliance with specified conditions and to seek sanctions for non-compliance.

Comment 4: The merger review process should be subject to appropriate procedural safeguards to govern competition agencies in the exercise of their investigative authority and enforcement powers.

B. Competition agencies should have sufficient staffing and expertise to discharge their enforcement responsibilities effectively.

WORKING GROUP COMMENTS

Original Comments (June 2005)

Comment 1: Competition agencies should have funding, staffing and expertise commensurate with their merger enforcement responsibilities, including detecting anticompetitive transactions, bringing appropriate enforcement actions, and avoiding unnecessary costs and delay with respect to transactions that do not contravene applicable legal prohibitions.

Comment 2: In order to employ a sufficient number of qualified personnel and to fund investigations and other enforcement activities necessary to discharge their enforcement responsibilities efficiently and effectively, competition agencies require adequate financial resources. Competition agencies should seek to optimize their use of available resources by

prioritizing their merger enforcement based on the transaction's potential competitive impact in the jurisdiction.

Comment 3: Agency staff should include professionals with training and experience in competition law and economics, including merger analysis. Subject to applicable confidentiality safeguards, competition agencies should also be able to consult with independent industry, legal, and economic experts in other agencies and the private sector.

Comment 4: Competition agencies should encourage continuing legal and economic training of their professional personnel. This may be accomplished through in-house and inter-agency training programs, as well as through academic institutions and training activities sponsored by private sector organizations (such as bar associations and legal societies).

C. Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger review laws.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: The objective application of competition standards in merger enforcement promotes consistency, predictability, and legal certainty. Lack of objectivity – or even a perceived lack of objectivity – tends to frustrate these objectives and, moreover, may undermine public confidence in the competition agency and the merger review process. Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents.

Comment 2: Competition agencies should also seek to avoid any perception that their enforcement activities are motivated by considerations other than those in the relevant merger review legislation. Means of achieving this objective include transparency in the merger review process and providing an opportunity for timely review of the competition agency's final decision on the merits by a separate adjudicative body.

XIII. Review of Merger Control Provisions

- A. Jurisdictions should periodically review their merger control provisions to seek continual improvement in the merger review process.**

*WORKING GROUP COMMENTS
Original Comments (June 2003)*

Comment 1: Merger control laws and procedures should be reviewed periodically in an effort to seek continual improvement in the merger review process. Such reviews should include all substantive and procedural aspects of the merger review process, including notification thresholds, notification procedures, and enforcement practices. The frequency and nature of the review may depend on its subject matter.

Comment 2: In certain jurisdictions, periodic review of the merger control process is expressly required by the relevant legislation itself, for example, by requiring the competition agency to conduct and publish periodic evaluations of the efficacy of existing laws and procedures. In some jurisdictions, monetary notification thresholds are periodically adjusted by operation of law based on relevant inflation or other economic indices. Such automatic indexing is particularly useful in jurisdictions where the local currency value is subject to significant inflationary fluctuation.

- B. Jurisdictions should consider reforms to their merger control laws and procedures that promote convergence towards recognized best practices.**

*WORKING GROUP COMMENTS
Original Comments (June 2003)*

Comment 1: Convergence of merger control regimes towards recognized best practices will promote international cooperation, efficiency, and the elimination of unnecessary transaction costs in the multi-jurisdictional merger review process. Jurisdictions should therefore seek to enact reforms of their merger control laws and procedures that promote convergence towards recognized best practices.