

The Handbook of Competition Enforcement Agencies

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Introduction

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The International Competition Network



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The ICN is a specialised yet informal network of competition agencies, enriched by the participation of non-governmental advisers (NGAs) (representatives from business, consumer groups, academics and the legal and economic professions) from around the world. It is a results-oriented, project-driven, consensus-based organisation with the common goal of addressing practical antitrust enforcement and policy issues. It seeks to achieve greater procedural and substantive convergence for antitrust agencies, supporting them in improving their enforcement capabilities and to develop a competition culture within their jurisdictions.

As the ICN enters its eighth year, membership has grown from 16 to 104 competition agencies in 93 jurisdictions. New members include the National Agency for the Protection of Competition in Moldova, the Vietnam Competition Authority and the Vietnam Competition Council.

The ICN was founded and it flourished in an environment in which markets were widely seen to be performing effectively. It was generally accepted that the often painful economic reforms of previous decades were bearing fruit in the form of sharply increased growth rates, high levels of job creation and in the new products and work processes of innovative firms. Few denied that the liberalised markets – global and national – that had been the signature of those economic reforms, underpinned the near-unprecedented prosperity that spanned the years surrounding the millennium. Competition authorities charged with promoting and defending national markets (in the context of this document references to national markets, national jurisdictions, national member agencies and national competition authorities include independent customs territories), a task which, with increasing frequency, presupposed attention to the conduct of firms on international markets, were important components of that prosperity and so the often elusive ‘competition culture’ took hold not only in a burgeoning number of national jurisdictions but even in the characteristically mercantilist world of international economic relations.

But much has changed and with extraordinary rapidity. In the eye of the global financial storm, it is no longer markets that are celebrated, but rather market failures that are excoriated; the conventional wisdom no longer calls for greater liberalisation but rather for more effective regulation. For a short while, these market failures appeared to be confined to financial markets and to the specialised regulatory agencies that bore responsibility for their performance. But there was little comfort to be had in denial. Not only did many aspects of conduct within financial markets fall within the jurisdiction of competition authorities, but the contagion from those markets that, when they are functioning effectively, are responsible for lubricating the wheels of all other markets, soon spread. Now failure is thought to characterise a range of important product markets and all the talk is of the need for greater regulation and more effective government support and intervention. This will be a challenging world for national competition authorities. And it is a challenge that their international network, the ICN, is obliged to engage with.

The ICN will play a constructive role in crafting a response to these new challenges. It has, in its short life, proved to be a nimble and flexible institution. It is not tied to any particular doctrinaire approach. It respects the diverse views of its members, and attempts to understand their diverse circumstances. It is not bound by any ancient treaty and it does not seek to bind its members. These features will stand the ICN in good stead because we are in a world that demands creative solutions to pressing new problems. This will demand all of the flexibility, tolerance and openness that has characterised the network to date. It will demand an engagement with industrial policy makers, with social policy makers, with those directly and intimately concerned with poverty alleviation including beleaguered consumers, and with business people and their employees deeply concerned with the very viability of their firms and their jobs.

This does not mean that we throw our mandate overboard. Far from it. In the midst of this storm, the ICN will continue to be an advocate for robustly competitive markets and it will continue, in the face of difficult odds, to contribute to the building of a competition culture. But if it is to succeed, then it will be willing to re-examine what it does and how it engages with the world outside, a world that is intimately concerned with the functioning of markets. I am convinced that our network will not only enable us to navigate this treacherous water, but that it will stand as an example of precisely a form of global dialogue and governance well disposed to the requirements of flexibility and responsiveness.

Key ICN achievements

I take this opportunity to highlight the continued success made through the ICN working groups and by the ICN vice chairs over the past year.

Advocacy

At the seventh annual conference of the ICN, held in Kyoto in 2008, members and non-governmental advisers (NGAs) acknowledged the importance of competition advocacy, and it was decided to reconvene the advocacy working group. That decision has proven to be timely given the economic crisis and the ‘new’ advocacy role of competition authorities in the crisis.

The current mission of the working group is to develop practical tools and guidance to improve the effectiveness of member agencies competition advocacy. The working group has been engaged in a review and update of existing ICN advocacy work, and is examining in greater detail members’ experiences conducting market studies, with the goal of developing procedures and evaluation criteria for conducting studies.

Cartels

The cartel working group addresses the challenges of anti-cartel enforcement, both domestically and internationally, across the entire range of ICN members and among agencies with differing levels of experience.

Between 2008 and 2009, the cartel working group held a series of substantive calls on the multi-jurisdictional challenges of coordination in cross-border cartel cases on coordination and cooperation issues for anti-cartel enforcers. These calls were well attended and the discussions have

addressed a number of issues such as: settlements, including settlements by cartel participants in multiple jurisdictions; international cooperation and coordination; and ‘double jeopardy’ and ‘double counting’ issues when cartel participants are charged and sanctioned in multiple jurisdictions.

The working group has also examined important legal and policy topics in anti-cartel enforcement. The most recent reports address cartel settlements and the setting of fines for cartels in ICN jurisdictions.

The working group continues to develop the Anti-Cartel Enforcement Manual, a practical tool to assist ICN members, with varying levels of experience, in building an effective cartel case. The manual includes a compilation of investigative approaches used at various stages of a cartel investigation including chapters on searches, leniency, case initiation, investigative strategy and interviewing. The working group has begun to review and update two of the existing chapters in the Manual on Searches Raids and Inspections and Leniency.

The highly successful series of ‘hands-on’ interactive ICN cartel workshops continues to focus on assisting agencies in enhancing their capacity to investigate and enforce competition laws. They provide a venue for agencies’ cartel staff to share experiences, recommended practices and approaches to building an effective case, from the detection and investigation of a cartel to the adjudication and punishment of cartel members. In addition, the workshops provide a forum for agencies’ cartel staff to discuss ways to strengthen international cooperation and coordination in the fight against cartels.

The latest workshop took place in Lisbon, from 28 to 30 October 2008. The workshop included discussions on specific phases of the enforcement process, namely detection, investigation and prosecution. Through debate, case presentations and a hypothetical case, participants had an opportunity to exchange views and analyse concrete enforcement issues. Topics included proactive and reactive detection tools; the development of an investigation plan; the management of leniency programmes; and the prosecution of cartel cases, including devising cartel sanctions and negotiated settlements. The workshop was attended by 200 participants from over 40 agencies. The Egyptian Competition Authority will host the cartel working group’s 10th anniversary workshop from 27 to 29 October 2009.

Competition policy implementation

The competition policy implementation working group was established to identify the key elements that contribute to successful capacity building and competition policy implementation in developing and transition economies.

The working group completed a report on Agency Effectiveness, which identifies both operational and organisational aspects of competition agencies that are important for successful competition policy implementation. Building upon this report, the working group is in the process of further analysing the relation between the definition of priorities and resource allocation and effectiveness of the agency decisions (eg, payment of fines, settlements, accomplishment of behavioural and structural remedies imposed, such as divestitures, amendments to contracts, etc). The working group is also assessing authorities' ability to obtain compliance with those decisions. The focus of this analysis is on decision-making procedures; however, other key issues will be analysed including monitoring of decisions and assessments of the institutional powers for the non-compliance.

On 22 and 23 January 2009, the DG Competition of the European Commission hosted a high-level seminar in Brussels on the effectiveness of competition law enforcement for competition agency heads and senior officials who are responsible for strategic planning within their agencies. Through interactive plenary and breakout sessions, this forum allowed participants to exchange ideas and brainstorm on various organisational and planning approaches and methods used by competition agencies.

The working group has conducted a series of 'competition dialogue' conference calls providing a forum in which its member agency case handlers at various levels can share experiences and expertise. To date, calls have been conducted on mergers, abuse of dominance, cartels, competition advocacy and building a competition culture in government processes. The level of participation and interest has been quite high. Among other things, the working group has learned that there is value in exchanging experience between agencies at similar levels of development as well as between those at different levels.

Although this group was initially conceived of as a mechanism for assisting newer agencies, the dynamism of the environment in which

competition authorities work has compelled all agencies to continuously evaluate their practices and approaches and to examine and re-examine their efforts to ensure maximum efficiency and effectiveness. This has inevitably enhanced the relevance of the work of the competition policy implementation working group for all ICN member agencies and will undoubtedly be reflected in a broadening of the mandate of this group.

Mergers

The ICN merger working group promotes the adoption of best practices in the design and operation of merger review systems to enhance the effectiveness of each jurisdiction's merger-review mechanisms, to facilitate procedural and substantive convergence and to reduce the public and private cost and time spent for multi-jurisdictional reviews.

The working group continues to build upon its Recommended Practices for Substantive Merger Analysis, focusing this year on the development of recommended practices on competitive effects analysis, covering both unilateral and coordinated effects. The working group has begun a project on initial information requests, and the various ways agencies provide flexibility in the initial notification of a merger.

On 10 and 11 March 2009, a Regional Merger Workshop was held in Taipei, Taiwan. The workshop was hosted by the Taiwan Fair Trade Commission with the support of the merger working group. Drawing upon the ICN's Recommended Practices for Merger Notification and Review Procedures, the Recommended Practices for Merger Analysis, the Merger Guidelines Workbook, the Merger Investigative Techniques Handbook, and the Merger Remedies Report, participants explored substantive issues in merger review making use of a hypothetical merger case. Topics covered in the plenary and breakout sessions included merger notification and initial review; merger investigations and investigative planning; market definition, market shares and concentration; and competitive effects.

Unilateral conduct

The unilateral conduct working group was established to examine the challenges involved in addressing anticompetitive unilateral conduct of dominant firms, and to promote greater convergence and sound enforcement of

laws governing unilateral conduct. At its 2008 conference, the ICN adopted Recommended Practices on the Assessment of Dominance and the Application of Unilateral Conduct Rules to State-Created Monopolies.

The working group continues to examine specific practices including tying and bundled discounting and single-product loyalty discounts and rebates. As with its prior work on predatory pricing and exclusive dealing, the working group will produce reports on agencies' approaches to assessing the conduct and the tests used to distinguish pro-competitive from anticompetitive conduct. These reports will be presented at the ICN annual conference to be held in Zurich in June 2009.

At the time of writing the working group was scheduled to hold its first workshop in Washington, DC from 23 to 24 March 2009, designed to promote implementation of the ICN's recommended practices and greater understanding of the group's conduct work. The workshop will be interactive and will include panel and breakout sessions on assessing dominance and substantial market power and anticompetitive effects in unilateral conduct cases, technical sessions on entry and expansion, and case studies on exclusive dealing and predatory pricing.

Advocacy and implementation, international coordination and outreach

The vice chair of advocacy and implementation, supported by a designated resource person, is responsible for developing and implementing a workplan to promote and advocate for the adoption of ICN benchmarks and use of ICN work products by competition authorities around the world.

The vice chair of international coordination, assisted by a designated resource person, is responsible for developing and implementing a workplan to enhance relations and the coordination of activities between the ICN and other international organisations and, within these international fora, promote the work products and activities of the ICN. The vice chair's main goal is to explore mechanisms whereby the selected international organisations can begin coordinating activities and building an agenda with the ICN to enhance competition advocacy at the international level.

The vice chair of outreach, along with a designated resource person, is responsible for encouraging widespread engagement of ICN member agencies and NGAs.

In August 2008, the vice chair of advocacy and implementation established a system to encourage and support amendments of competition laws and agency policies that are consistent with ICN recommended practices to member agencies that seek assistance from the ICN. The basic principle of the system is that support is demand-driven consistent with ICN objectives and based on the principle that ICN operates on a voluntary basis.

The vice chair of international coordination has begun working with three major international organisations, the Inter-American Development Bank (IADB), the World Bank and UNCTAD to develop cooperation initiatives between the ICN and each of these organisations.

The vice chair of outreach and the vice chair of advocacy and implementation worked together to hold a series of focus groups, to better understand the needs of ICN member agencies and to enhance its effectiveness. The lessons learned will be presented at the annual conference in Zurich, and will help shape the work of the network in the coming years.

In addition, the vice chair for outreach is examining new ways to reach out to ICN members including preparing a bulletin-type publication to update ICN members and stakeholders of current projects and future plans. The vice chair will also look at the possibility of creating a web blog for members.

Looking ahead

The eighth annual conference of the ICN will be taking place in Zurich, Switzerland from 3 to 5 June 2009, and is being hosted by the Swiss Competition Commission. At the conference, sessions will include: plenary and breakout sessions held by the advocacy, cartel, competition policy implementation, merger and unilateral conduct working groups; a plenary session to discuss the results of a special project, 'Competition Law in Small Economies'; breakout sessions on the work of the vice chairs; and a report on past and future work by the working groups and vice chairs.

The above recounts an extraordinary output by a body that is effectively reliant on the voluntary commitment of its members. As the ICN approaches its 10th anniversary in October 2011,

it maintains its virtual character, reliant for its day-to-day functioning, including the output of its working groups, on e-mail and telephone. There are three major challenges facing the ICN.

Firstly, the ICN leadership is intent upon deepening the influence of the ICN among the ‘rank and file’ of the national agencies who are its members and the mainstay of its working groups. As noted, much has been achieved through, for example, the workshops examining ICN work product in the area of cartels, mergers and unilateral conduct. The steering group and the working groups are well into the process of examining additional forms of communication and the utilisation of additional electronic technologies and methodologies in order to ensure that the ICN work product becomes an accessible and living reference point that meets the daily operational requirements of its members, especially those who have recently embarked on the technically and politically demanding task of enforcing competition rules and promoting a competition culture.

Secondly, effective competition agencies are not built on a sophisticated understanding of competition law and economics alone. Building effective institutions demands attention to a range of factors including the ability of its national member agencies to clearly identify and pursue their strategic priorities, to develop and retain the human resource capacity that is essential to the task of effective enforcement, and to develop mechanisms and approaches that enable clear evaluation and assessment of their achievements and shortcomings. The workshop hosted by the European Commission earlier this year that focused precisely on the task of building effective agencies has made significant strides in this direction and will doubtlessly come to constitute a key priority for the ICN, with its wealth of experience in institution building.

Thirdly, the competition agencies, as with every other instrument of economic and social policy has, like it or not, been thrown into the maelstrom of the economic crisis. In these circumstances, ICN member agencies can no longer claim the luxury of focusing on its field alone when developments in every aspect of policy and regulation in the fields of finance, international trade and industrial and social policy impinge upon, and raise pertinent questions for, the appropriate conduct of competition law and policy. The ICN would risk undermining its own relevance if it ignored these critical developments. It will no doubt take up the challenge of assisting its member agencies to develop appropriate responses to these challenges.

The ICN working groups and executive structures, including the three active vice chair portfolios, have demonstrated their ability to take on an extraordinary workload at an impressive level of sophistication. Each of the challenges listed above is being actively confronted and will find its place on the agenda of the coming annual conference in Zurich and in the various engagements – virtual and corporeal – that characterise the functioning of an organisation that has with remarkably little fuss or budget, but with considerable hard work and dedication, already made a significant contribution to the development of competitive national and international markets.

For detailed information on how to join the ICN and membership requirements, please visit: www.internationalcompetitionnetwork.org/index.php/en/get-involved