



CPI Antitrust Chronicle

July 2011 (1)

The International Competition Network at Work

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I. INTRODUCTION

Over the past decade, the International Competition Network (“ICN”) has brought important changes to the substance, procedure, and administration of competition law. Founded in 2001 by 15 competition agencies as a virtual, practical, and results-oriented network of competition agencies to: (i) encourage the dissemination of antitrust experience and best practices; (ii) promote the advocacy role of antitrust agencies; and (iii) facilitate international cooperation among competition agencies, the ICN has since grown to 117 agencies from 103 jurisdictions.²

Since its inception, the ICN has contributed significantly to the harmonization and convergence of procedural and substantive antitrust law and policy. ICN work products now cover most of the daily work of competition agencies in the fields of merger control, anti-cartel enforcement, and unilateral conduct, as well as matters that relate to the way competition agencies operate in practical terms; in particular, advocacy and agency effectiveness. With the participation of non-governmental advisers (“NGAs”), including private practitioners, academics, representatives of international organizations, and industry and consumer groups, the ICN has developed an impressive body of recommended practices, enforcement manuals, templates, reports on rules and legislation in force, databases, explanatory notes, and other materials.

The private sector has a significant and immediate interest in the work of the ICN, in particular its efforts to minimize incompatible outcomes across jurisdictions and reduce unnecessary costs and burdens from duplicative or inconsistent antitrust and merger control procedures. Indeed, as one commentator has eloquently put it: “for business, manoeuvring a balkanized antitrust terrain is costly.”³ That interest is likely to increase over the years to come as ICN work products are migrating to superior standards and are progressively implemented in national competition law and policy across the world. This trend is already clearly visible. Recently, 39 ICN competition agencies have reported using the *ICN Anti-Cartel Enforcement Manual* in their cartel investigations, while the *ICN Recommended Practices for Merger Notification and Review Procedures* have been influential in reforming national merger control regimes in more than two-thirds of the jurisdictions where such changes have been made.

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² See, generally, <http://www.internationalcompetitionnetwork.org/>.

³ See Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT’L LAWYER 151 (2009), reproduced in THE INTERNATIONAL COMPETITION NETWORK AT TEN, ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS, ESSAYS at 105 (Paul Lugard, ed.) 2011, (“THE ICN AT TEN”).

Obviously, knowledge of the work of the ICN and agencies' involvement in ICN projects may also provide valuable insights into those agencies' policy agendas and may help to resolve individual cases. Finally, for private practitioners and other NGAs, the ICN offers a forum to make private sector experience and knowledge accessible to ICN-competition agencies and to interact with agency officials on those matters. This process of cross-fertilization also significantly contributes to the legitimacy of the ICN and the work product it produces.

II. THE ORGANIZATION AND FUNCTIONING OF THE ICN

The ICN unites a large number of national competition agencies in a network organization that offers agencies' officials a forum to informally exchange experiences and knowledge, to identify superior analytical approaches and better ways of working, and to help foster consensus and convergence in the areas of merger control, unilateral conduct, and cartels. Membership of the ICN is open for both experienced and newer agencies that are entrusted with the enforcement of competition law. NGAs support the work of the ICN by, among other activities, identifying projects, offering comments on work product, producing work products such as best practices, contributing to the policy dialogue at conferences and workshops, and helping disseminate ICN work product. In contrast to the OECD, the UNCTAD, and other international organizations that are involved in competition policy, the ICN is an informal, virtual organization without a permanent secretariat. Significantly, it only deals with competition law and policy matters; the credo of the organization is "All competition all the time,"⁴ which, according to commentators, contributes significantly to the strength of the ICN.⁵ As the organization concentrates on the implementation of competition law and policy consistently across jurisdictions, its role is complementary to that of—in particular—the OECD.⁶

The ICN strives to achieve its goals—the effective application of competition law in the jurisdictions of its member agencies and the stimulation of convergence among different national competition regimes—by formulating soft law in the shape of recommended practices, manuals, toolkits, explanatory memoranda, and other documents that are of practical use to competition agencies. It does not have the power to issue binding rules. Examples of these soft law instruments are: the *Anti-Cartel Enforcement Manual*,⁷ the *ICN Recommended Practices for Merger Analysis*,⁸ the *ICN Recommended Practices for Merger Notification and Review Procedures*,⁹ the *Report on Predatory Pricing*,¹⁰ and the *Report on Competition Agency effectiveness*.¹¹ While the ICN operates essentially on the basis of consensus, it is precisely the absence of any formally binding obligation to implement best practices or recommendations in national competition policy that enables many agencies to support the contents of those materials.

The organizational "management" of the ICN lies with the 15-person ICN Steering Group, which is composed of representatives of ICN member agencies. The current Chair of the ICN Steering Group is John Fingleton, the Chief Executive Officer of the U.K. Office of Fair

⁴ See <http://www.internationalcompetitionnetwork.org/members/join.aspx>.

⁵ See, for instance, *Slaughter, Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L. L. 283 (2004).

⁶ See, in particular, Jenny, *The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities*, in *THE ICN AT TEN*, *supra* note 3, at 93.

⁷ See <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>.

⁸ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>.

⁹ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

¹⁰ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf>.

¹¹ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc376.pdf>.

Trading. Most notably, the Steering Group formulates the long-term strategy of the ICN, defines projects to establish recommended practices, establishes Working Groups, and approves their work plans.¹²

The substantive work of the ICN takes place in a number of Working Groups that are comprised of representatives of ICN member agencies as well as a number of NGAs. Each Working Group is chaired by three ICN member agencies that serve staggered three-year terms. Currently, there are five ICN Working Groups. Three Working Groups concentrate on the substance of competition law, i.e. the Cartel Working Group, the Merger Working Group, and the Unilateral Conduct Working Group. One working group, the Advocacy Working Group, addresses public restrictions on competition and ways to build support for competition. Finally, the Agency Effectiveness Working Group looks at the institutional and operational characteristics of competition agencies that concern the efficient and effective enforcement of competition rules. The Working Groups operate on the basis of a short-term (2011-12) Work Plan and a long-term (2011-2016) Plan.

The Working Groups determine the nature and ambit of their activities within the mandate specified by the Steering Group. For instance, the mandate of the Cartel Working Group is “to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct, both domestically and internationally, across the entire range of ICN members with differing levels of experience and resources.” Working Groups may establish Subgroups. As an example, the Cartel Working Group consists of two subgroups: the Cartel Working Subgroup 1 on Legal Framework (“SG1”) that addresses legal and conceptual challenges of anti-cartel enforcement. The focus of SG1 is to examine policy-level issues of the institutional and investigative framework for the detection and punishment of hard-core cartel conduct. The Cartel Working Subgroup 2 on Enforcement Techniques (“SG2”) aims to improve the effectiveness of anti-cartel enforcement by identifying and sharing specific investigative techniques and advancing the educative and information sharing agenda of the Cartel Working Group. While SG1 has, over the past years, concentrated on the definition of hard-core cartel conduct as well as the cooperation among competition agencies in cartel investigations, settlements, and effective penalties, ICN-member agencies of SG2 have identified and discussed specific investigative techniques. For instance, SG2 has compiled best practices with respect to the scope and implementation of leniency programs, digital evidence gathering, the initiation of cartel cases, and interviewing techniques.

The members of the Working Groups generally communicate through e-mail, telephone conferences, and teleseminars. In addition, the working groups tend to annually organize one or two workshops in different locations to discuss the work of the working group. For instance, in December 2010 the Unilateral Conduct Working Group organized a workshop in Brussels to discuss a number of case studies and evaluate how margin squeeze and loyalty rebates could best be evaluated. At the plenary ICN Annual Conference, ICN member agencies discuss the results of the Working Groups and Subgroups of the past year; approve the reports, best practices and other ICN work product; and discuss future work.

¹² See <http://www.internationalcompetitionnetwork.org/about/operational-framework.aspx>.

III. IS THE ICN USEFUL? AND IS IT SUCCESSFUL?

Undoubtedly, by offering a specialized, informal forum for discussion and the exchange of knowledge and experience in the fields of merger control, cartels, unilateral conduct, agency effectiveness, and advocacy, the ICN meets an important need of a still expanding number of both younger and more established competition agencies to address practical competition concerns. During the first 10 years of its existence, it has issued an impressive body of work product that helps competition agencies establish and streamline national competition policy regimes, adequately evaluate potentially anticompetitive business conduct, and work together more efficiently. In doing so, the ICN has been instrumental in elevating the quality of competition agencies' performance around the world, deepening the understanding among those agencies, and promoting international convergence of antitrust norms and standards. In sum, established in response to the failed attempts in 2003 to agree upon a worldwide system of binding competition rules in the context of the WTO, and building on the recommendations of the U.S. International Competition Policy Advisory Committee ("ICPAC"), the ICN has now, 10 years after its inception, become a major and valuable actor on the international competition scene.¹³

While the accomplishments and role of the ICN are highly valued by its member agencies and NGAs, it is tempting to try to measure the practical impact of the organization in more concrete, quantifiable terms. However, this is difficult for two reasons. First, while changes to merger control regimes may be traced back directly to ICN recommended practices;¹⁴ many other changes that the ICN may have brought about do not lend themselves to be measured with accuracy. For instance, how could one reliably quantify the impact of ICN practices on the organization of the Egyptian competition agency and its investigation into the Egyptian construction sector?

Second, while there is a natural tendency to judge the effectiveness of the ICN and the organization's added value by reference to the extent to which ICN work products are implemented in national policy and law, ICN activities were—as set out in the Memorandum on the Establishment and Operation of the ICN—not meant to extend to implementation.

Interestingly however, as part of its reflection on the ICN's vision for its second decade, the organization seems to have modified its original mission and is now poised to clearly advocate the adoption of superior standards and procedures in competition enforcement and policy around the world.¹⁵ It appears that, while individual ICN member agencies remain free to implement ICN recommendations, the suggested three-stage process towards the adoption of widely-accepted norms and standards may result in a progressively broader adoption of ICN recommendations in the years to come. The potential benefits of more focus on use and implementation of existing ICN work product are manifold. Indeed, increased peer pressure to actually bring national practices in line with widely accepted norms (for example, with regard to

¹³ See on the origins of the ICN, in particular, Janow & Rill, *The Origins of the ICN* at 21; Souty, *From the Halls of Geneva to the Shores of the Low Countries: The Origins of the International Competition Network* at 39; and Fox, *THE ICN AT TEN*, *supra* note 3.

¹⁴ See, in particular Coppola & Lagdameo, *Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures*, *THE ICN AT TEN*, *supra* note 3 at 297.

¹⁵ See ICN Steering Group, *The ICN's Vision for Its Second Decade*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>.

the evaluation of non-horizontal mergers or the prioritization of cases) may: (i) improve the administration of competition law overall; (ii) stimulate participation of agency officials and NGAs in ICN activities and the quality of work product; (iii) increase the legitimacy of the work of the ICN; and (iv) be helpful to steer the future activities of the organization.

IV. FUTURE DIRECTIONS

The future of the ICN seems bright. Indeed, in the past decade, the organization has grown exponentially and has had a major influence on the international antitrust landscape. While it may be difficult to evaluate and quantify the precise impact of the organization, it is obvious that the ICN has contributed significantly to a more unified and economically rational regime of competition law on a worldwide scale. There is no reason to assume that the organization would not be able to continue to meet its objectives in the years to come

However, there are a large number of both practical and fundamental issues that the ICN will need to address in the future. These include: How can the ICN ensure that it remains well-suited to best serve the demands of an increasing number of both developed and newer, less diversified competition agencies? Should the ICN endeavor to bring about even more convergence, for example in the area of unilateral conduct, or would it be preferable to stop short at some arbitrary point of “informed divergence”? How active can and should the ICN be in ensuring that the “three stage process” towards convergence (i.e., (i) experimentation and decentralized implementation of ICN- processes and standards, (ii) experience sharing and consensus building, and (iii) opting-in to the consensus norms) brings about tangible results? Would an increased focus on the use and implementation of ICN work product indeed be conducive to the legitimacy of the organization, or perhaps have unintended consequences? Would there be, as some ICN activities migrate towards more technical, substantive discussion and implementation, more to gain from closer coordination with the OECD, the UNCTAD, and, potentially, a number of regional organizations, such as the Inter-American Competition Alliance or Caricom? How can NGAs be best mobilized to help building the organization? And, on a more fundamental level, will the ICN eventually migrate towards a forum for case allocation, in some respects similar to the ECN?

The First Decade of the ICN proved to be visionary, constructive, and accomplished. Given its aspirations, the Second Decade of the ICN should prove to be an even more interesting and, hopefully, productive one.