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The International Competition Network Cartel Working Group— Past, Present, and Future

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I. INTRODUCTION

The trend towards globalized economies and the increasingly global nature of product and service markets, perhaps unsurprisingly, has also led to cross-border and global-cartel activity. At its 3rd Annual Conference,² as a response to this development, the International Competition Network (“ICN”) decided to establish a new working group to organize the ICN’s anti-cartel enforcement activities in a way that would provide competition agencies with a much greater capacity to provide a coordinated response to globalized cartel activity.

The ICN Cartel Working Group (“CWG”) began its operation in 2004-2005. The CWG’s current mandate is to:³

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. At the heart of antitrust enforcement is the battle against hardcore cartels directed at price fixing, bid rigging, market allocation and output restriction.

II. THE STRUCTURE OF THE CWG

Since its inception, the CWG has been co-chaired by the European Commission and the Hungarian Competition Authority. On March 4, 2011, the Japan Fair Trade Commission was appointed under the ICN’s updated Operational Framework as a third co-chair.

Two subgroups operate under the CWG:

1. Subgroup 1 on “General Framework” (SG1) is co-chaired by the U.S. Department of Justice and the Brazilian Secretariat of Economic Law. The subgroup was created to encourage the exchange of views on the basic concepts related to the necessity and benefits of the fight against cartels. SG1 has built on the work already undertaken by other forums active in the field of anti-cartel enforcement (such as the OECD and WTO). The Subgroup deals with general legal framework issues and examines policy-level issues of the institutional and investigative frameworks for the detection and punishment of hard-core cartel conduct.

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² The conference was held in Seoul, South Korea, from April 20-22, 2004.

³ This mandate was adopted by the ICN Steering Group in 2005.

2. Subgroup 2 on “Enforcement Techniques” (SG2) is co-chaired by the Australian Competition and Consumer Commission and the Canadian Competition Bureau. The goal of SG2’s work is to improve the effectiveness of ICN members’ anti-cartel enforcement activities. To this end, SG2 identifies specific investigative techniques and advances the education and information sharing agenda of the CWG.

The CWG currently has 50 member agencies.

III. WORKING METHODS OF THE CWG

As with the ICN’s other working groups,⁴ the CWG developed a project-oriented working system. Agencies volunteer to undertake the projects set out in the ICN’s work plans for a given “ICN year.”

SG1 began its activity by identifying “building blocks” for effective anti-cartel regimes, focusing on the definition of hard-core cartel conduct and developing effective institutions and effective penalties (see the annex to this paper). During the years, SG1’s work has covered essential topics such as policies for pecuniary penalties, settlement, and inter-agency cooperation. From the 2009-2010 ICN year a new working method was applied by SG1, namely certain topics were discussed in the form of a series of telephone conferences. This form has been very effective and has remained the basic working method for SG1 discussions.

As an initial goal, SG2 sought to prepare an *Anti-Cartel Enforcement Manual*. Over the years, SG2 has created seven chapters for the *Manual* and a “Compilation of Good Practices” which summarizes key practices in the *Manual*. Four of the chapters have been updated in light of the developing experiences of agencies. From the outset, SG2 took over the organization of the Annual ICN Cartel Workshops.⁵ The “Anti-Cartel Enforcement Template” has proven to be a further ongoing project for SG2. To date, almost 60 ICN members have completed the Template. This is a useful resource providing information about member agencies and the cartel regimes in their jurisdictions.

IV. NGA INVOLVEMENT IN THE CWG

The ICN encourages the participation of non-governmental experts/advisers (“NGAs”) in its work, including private practitioners, academics, representatives of international organizations, and industry and consumer groups. In the CWG, NGAs, along with enforcement authorities such as public prosecutors and judges, have made valuable contributions.

There are many ways NGAs can get involved in the work of the CWG. The participation of NGAs is extremely valuable in the case of the series of SG1 telephone conferences, where they bring their different perspectives to discussions, thereby allowing a better understanding of the topics for participating ICN members. The interactive nature of these conference calls enhances the dialogue between NGAs and enforcement agency representatives on important issues. The same may be said for the Annual Cartel Workshops, where NGAs are encouraged to engage with agencies on the effectiveness of anti-cartel enforcement activities.

⁴ The ICN currently has four other working groups for advocacy, agency effectiveness, mergers, and unilateral conduct.

⁵ Prior to the establishment of the CWG there were cartel workshops organized in Washington (1999), in Brighton (2000), in Ottawa (2001), in Rio de Janeiro (2002), and in Brussels (2003).

The CWG tries to involve NGAs in a broad range of its work, which, in addition to the Annual Cartel Workshops and conference calls, includes written work products that may be of interest to NGAs including, for example, the *Anti-Cartel Enforcement Manual*.

V. DISSEMINATION OF CWG WORK PRODUCTS

The ICN is a valuable forum for the discussion of enforcement experience and best practices in achieving compliance with competition laws. It seeks to promote convergence toward sound competition policies and practices, cooperation, and better understanding among agencies.

The CWG facilitates the active participation of members in its work and aims to reach the broadest audience possible. The Annual ICN Conferences provide good opportunities for the CWG to present its work products, while the Annual Cartel Workshops enable the agencies' anti-cartel enforcers to share their experiences and best practices and engage in dialogue and debate about how to achieve their common goals. In 2010, the number of participants attending the cartel workshop reached 150 and represented more than 50 jurisdictions.

In 2011, the CWG prepared a new chapter for the *Anti-Cartel Enforcement Manual* on "Case Resolution," the *Compilation of Good Practices*, and an online compilation of cartel-related awareness and outreach materials based on its call series project on Cartel Awareness and Outreach. The CWG also hosted the Annual Cartel Workshop in Yokohama, Japan, with the theme "The Efficient Detection, Investigation and Punishment of Cartel Conduct: Making the Best Use of Agency Resources". A list of all of the work products of the CWG is set out in the annex to this paper, and most products can be found on the CWG page of the ICN website.⁶

The CWG is exploring new ways to improve the accessibility of its work products, including via the ICN website, use of online discussions, webinars and blogs, periodic updates, the translation of work products, and online training tools.

VI. THE UTILIZATION OF CWG WORK PRODUCTS

In 2010, in preparation for its "Long Term Work Plan," the CWG interviewed its members about how they utilized the knowledge they had accumulated through the CWG's activities.⁷ In response, 39 ICN members reported using the *Anti-Cartel Enforcement Manual* to advance their cartel regimes. Of these, ten competition agencies used the chapter on "Drafting and Implementing an Effective Leniency Program" to shape the design or modification of their leniency programs.⁸ Five competition agencies utilized the chapter on "Searches, Raids and Inspections" to develop cartel investigation tools.⁹ Chapters of the *Anti-Cartel Enforcement Manual* have also been used for staff training by a few agencies.¹⁰

VII. FUTURE PLANS

In the lead up to the 10th Annual ICN Conference held in The Hague in May 2011, the ICN Steering Group launched a consultation with its stakeholders, including ICN members and

⁶ The ICN's website is at <http://www.internationalcompetitionnetwork.org>.

⁷ A summary of the results of the survey is available on the ICN website.

⁸ These were the competition agencies of Argentina, Brazil, Chile, Croatia, Egypt, Mexico, New Zealand, Portugal, South Africa, and Turkey.

⁹ The competition authorities of Bulgaria, Chile, Mexico, Portugal, and Sweden.

¹⁰ For example, in Bulgaria, Greece, Mexico, Portugal, Romania, and Russia.

NGAs. It sought feedback on its performance during its first ten years in operation, as well as views on how it should be focusing its efforts for the next ten years. Feedback specific to the CWG indicated that there is broad support amongst ICN members for continuing the CWG's current work and identified work plans for the future. These include continued experience sharing through the Annual Cartel Workshops, teleseminars, and projects focused on particular topics, such as new chapters for the *Anti-Cartel Enforcement Manual*.

The CWG has articulated its immediate and long-term work goals in its 2011/2012 Work Plan and 2011-2016 Long Term Work Plan.¹¹ The CWG's overall goal for the next five years, as set out in the Long Term Work Plan, is to:

actively contribute to the improvement of anti-cartel enforcement across the whole membership (irrespective of the level of experience in anti-cartel enforcement and resources available), by promoting dissemination and implementation of the work products and encouraging broader member[ship], in particular new enforcement agencies, and NGA engagement in the CWG's work.

In 2011/2012 the CWG will aim to improve anti-cartel enforcement across its membership through five major projects selected by its members. The first two, which will be carried out by SG1, are to (i) continue compiling contributions for the Cartel Awareness and Outreach compilation and (ii) begin a new project on Bid-Rigging involving a call series with CWG members to share member experiences in bid-rigging enforcement. The project will explore issues specific to bid-rigging involving detection, investigation, prosecution, sanctions, prevention, and training initiatives with procurement officials. The discussion series will include participation of NGAs. The other three projects, to be carried out by SG2, are to (iii) prepare a new chapter for the *Anti-Cartel Enforcement Manual* or a tool kit on Cartel Awareness, Outreach, and Compliance (iv) compile charts summarizing the information sharing mechanisms available to CWG members and (v) organize the Annual Cartel Workshop in October 2011 in Bruges, Belgium with the theme "Enhancing the Effectiveness of the Fight Against Cartels." The CWG will also continue the Anti-Cartel Enforcement Template project.

In undertaking its work, and consistent with the ICN's vision for its second decade, the CWG will continue to cooperate with other ICN working groups and international organizations, such as the OECD, to promote convergence and the dissemination of competition experience and best practices. The CWG will also seek to better involve younger agencies and groups of agencies with common interests in the work of the CWG, and improve promotion and accessibility of its work products. Finally, in keeping with its founding purpose, the CWG will work towards developing an effective global response to international cartels, building on the momentum of the last seven years and drawing on the dedication of its members and the anti-cartel enforcement community worldwide.

¹¹ These are available on the ICN website.

VIII. ANNEX: CWG WORK PRODUCTS (MAY 2004 – JUNE 2011)

A. Subgroup 1—General Framework

- Defining hard-core cartel conduct, effective institutions, effective penalties (June 2005, Bonn)
- Obstruction of justice in cartel investigations (May 2006, Cape Town)
- Co-operation between competition agencies in cartel investigations (May 2006, Cape Town; May 2007, Moscow)
- Interaction of public and private enforcement in cartel cases (May 2006, Cape Town; May 2007 Moscow)
- Cartel Settlements (April 2008, Kyoto)
- Setting of fines for cartels in ICN jurisdictions (April 2008, Kyoto)
- Benefits of criminal sanctions beyond deterrence—enforcer roundtable discussions in the form of series of conference calls (2009-2010)
- Retrospective survey on experiences and developments in anti-cartel enforcement among ICN members over the early 2000s (May 2010, Istanbul)
- Cartel awareness and outreach—enforcer roundtable discussions in the form of series of conference calls (2010-2011)

B. Subgroup 2—Enforcement Techniques

- Annual Cartel Workshops
 - 2004: Sydney, Australia
 - 2005: Seoul, Korea
 - 2006: The Hague, Netherlands
 - 2007: San Salvador, El Salvador
 - 2008: Lisbon, Portugal
 - 2009: Cairo, Egypt
 - 2010: Yokohama, Japan
 - 2011: Bruges, Belgium
- *Anti-Cartel Enforcement Manual*
 - Chapter 1: Searches, raids and inspections (June 2005, Bonn) [review: June 2009, Zurich]
 - Chapter 2: Drafting and implementing an effective leniency program (June 2005, Bonn) [review: June 2009, Zurich]
 - Chapter 3: Digital evidence gathering (May 2006, Cape Town) [review: May 2010, Istanbul]
 - Chapter 4: Cartel case initiation (May 2007, Moscow) [review: May 2010, Istanbul]
 - Chapter 5: Investigative strategy (June 2009, Zurich)
 - Chapter 6: Interviewing techniques (April 2008, Kyoto)
 - Chapter 7: Case resolution (May 2011, The Hague)
 - Compilation of “Good Practices” (May 2011, The Hague)
- Anti-Cartel Enforcement Templates (June 2005, Bonn: completion, revision and calls for completion of new templates by ICN members)