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A Clear Vision for the ICN's Second Decade

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I. INTRODUCTION

The tenth annual conference of the International Competition Network (“ICN”) held in The Hague, The Netherlands, in May 2011, marked an important milestone in the ICN’s development. It provided an opportunity to celebrate the ICN’s success in its first decade and to consider the network’s goals and future priorities. It also ushered in an era of greater inclusiveness and diversity in the ICN’s working methods and a shift to a longer-term strategic approach to the network’s work planning.

This contribution looks at why the ICN matters to competition agencies, businesses, consumers, and other participants in the international competition community. It looks ahead to the ICN’s second decade, with a revised mission and set of high-level goals to guide the ICN’s future work. It also focuses on the ICN’s work in the area of competition advocacy and market studies, while other contributions in this issue of the *CPI Antitrust Chronicle* focus on the ICN’s work in the areas of cartels, mergers, and unilateral conduct.

II. WHY DOES THE ICN MATTER?

The ICN created a wealth of work products in its first decade.² ICN work products range from consensus recommended practices on matters such as merger notification and review procedures, and dominance/substantial market power analysis under unilateral conduct laws, to practical guidance on how to conduct a cartel investigation or market study, as well as comparative reports, templates, and databases with information on legal frameworks, agency practice, and cases from around the world.

The ICN’s work has influenced agency practice and policy reforms in a number of ICN member jurisdictions. For example, two-thirds of ICN members that made changes to their merger control regimes cited the ICN’s *Recommended Practices for Merger Notification and Review Procedures* as having influenced their reforms;³ and 39 ICN members have reported using the *Anti-Cartel Enforcement Manual* to advance their cartel enforcement programs.⁴

¹ ICN Counsel, Office of Fair Trading (U.K.). The views expressed are personal and do not necessarily reflect those of the Office of Fair Trading.

² Available on the ICN website at www.internationalcompetitionnetwork.org. Key work products are listed in the ICN Work Products Catalogue, available at www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf.

³ To give a recent example, the U.K. Government launched a consultation on reform of the U.K. competition regime in March 2011. One of the options under consideration was the introductory of a mandatory notification regime for mergers. In seeking views on an appropriate jurisdictional threshold in a mandatory notification regime, the consultation document notes, “The International Competition Network (ICN) recommends that notification thresholds should be based on objectively quantifiable criteria, which favours sales and assets tests over market share-based thresholds.” (Department for Business Innovation and Skills, *A Competition Regime For Growth: A Consultation on Options for Reform*, ¶ 4.23 (March 2011). Available at www.bis.gov.uk/Consultations.)

⁴ See *The ICN’s vision for its second decade*, available on the ICN website at www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf.

What is perhaps less visible, but certainly no less significant, is the huge amount of work put in behind the scenes by competition agency staff and non-governmental advisers (“NGAs”) from the legal, business, economic, academic, and consumer communities, and the strong working relationships that have developed as a result.

One of the first things that strikes a newcomer to the ICN is that competition agencies do not work solely within domestic “silos” but also have strong working relationships with their peers all over the world. The ICN is a forum where competition agency heads and staff from different jurisdictions work together, jointly developing recommendations and sharing their experience in pursuit of better standards, convergence, and cooperation. These officials meet regularly by telephone and email, at ICN workshops, and during annual conferences. In 2010, ICN members from 87 different jurisdictions met in person at ICN events.⁵ Their discussions ranged from high-level issues, such as the objectives of unilateral conduct laws, to the intensely practical, such as how to conduct an effective interview as part of a cartel investigation.

When ICN members and NGAs were asked in 2010 what they saw as the main benefits of participating in the ICN, networking and experience-sharing were by far the benefits cited most often by agencies and NGAs alike.⁶ Agencies also referred to the support that the ICN provides to their competition advocacy activities; to the fact that participation lends them greater legitimacy (both at home and internationally); to the training opportunities the ICN offers; and to the ICN’s “value for money.” Among the ICN’s work products, consensus recommended practices and other guides to good practice were mentioned most often by members, followed by workshops, teleseminars, and the annual conference. There was also praise for the new ICN Curriculum (on which more below) even before the first modules had been completed.

The original motivations behind the ICN’s formation are well-documented.⁷ It was launched in 2001 with the aim of being “a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.” The ICN would “encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation.”⁸

As incoming Chair of the ICN Steering Group, John Fingleton⁹ identified four key sources of consumer harm arising from the present “patchwork” of predominantly national competition regimes in a world of increasingly globalized markets; namely, a failure to address:

- Private anticompetitive behavior (that is, cartels, abuse of unilateral market power, anticompetitive mergers, and other private restrictions on competition);

⁵ *Id.*

⁶ *Id.*

⁷ For a short history of the ICN, see www.internationalcompetitionnetwork.org/about/history.aspx. For further details, see M.E. Janow & J.F. Rill, *The Origins of the ICN*, in *THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS* (P. Lugard ed.) (2011) (“The ICN at Ten”); E. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT’L L. 151 (2009), also reproduced in *The ICN at Ten*.

⁸ Memorandum on the Establishment and Operation of the International Competition Network, available at www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf.

⁹ J. Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead* (June 2009), available at www.ofc.gov.uk/shared_ofc/speeches/2009/spe0909paper.pdf.

- public restrictions on competition (for example, state restrictions on entry, protectionism, etc.);
- different or inconsistent substantive standards and policies that give rise to a risk of “chilling” conduct that could be pro-competitive; and
- duplicative and inconsistent procedures across national competition regimes that create additional burdens for business that are ultimately passed on to consumers.

The ICN, like other international organizations with a focus on competition policy such as the OECD¹⁰ and UNCTAD,¹¹ provides a means for addressing the gaps and inconsistencies arising from this “patchwork” of competition regimes, with positive outcomes for consumers and economies around the world.

What sets the ICN apart from these other organizations are its inclusive and virtual nature, the fact that its members are competition agencies not governments, and the close involvement of non-governmental experts. Because the ICN lacks a permanent “bricks-and-mortar” secretariat it is entirely dependent on its member agencies and NGAs to set the agenda, organize events, and develop the work product. This has encouraged the enthusiastic and energetic participation of competition agencies and NGAs from around the world, including those from developed and emerging economies and from a mixture of young and mature competition policy systems.

This virtual model also presents challenges. With a membership representing more than one hundred jurisdictions and comprising agencies of vastly differing sizes and budgets, the ICN needs to work hard to ensure that its agenda does not gravitate towards the interests of the larger, better-resourced jurisdictions simply because they are able to contribute more resources. The ICN also recognizes the need to work to ensure that its work products are balanced, reflect a range of views, and are relevant to the broad membership.

Recent changes to the ICN’s working methods were designed to maximize the ICN’s diversity and inclusiveness, while maintaining continuity—the latter presenting another challenge for an organization without a permanent staff. When the ICN Steering Group set out in 2010 to develop an overarching vision to guide the ICN’s work in its second decade, almost every single ICN member was interviewed individually and a conference call was held which was open to all NGAs to give their views on the ICN’s future. Additional leadership positions have been created in the ICN working groups and in the Steering Group and procedures have been put in place for rotating those positions, to help spread the resource burden and encourage a broader range of agencies to participate.

The format of this year’s ICN Annual Conference was also designed to maximize diversity of participation and discussion. The conference allowed more time for discussion in breakout sessions and shorter, more interactive plenary sessions. It also introduced optional specialist breakout sessions for participants to discuss issues of interest to smaller groups of ICN members, and a dedicated session for NGAs. Such developments have led a number of attendees to comment favorably on the increasing diversity of participation and debate at ICN conferences.

¹⁰ Organisation for Economic Cooperation and Development. *See* www.oecd.org/competition.

¹¹ United Nations Conference on Trade and Development. *See* www.unctad.org/competition.

Conference participants also adopted a new mission and set of high-level goals for the ICN, based on the wide-ranging consultation with ICN members and NGAs carried out in 2010. This initiative ensures that the ICN has a rich and focused program of future work, outlined in the following section.

III. WHAT NEXT? PRIORITIES FOR THE ICN'S SECOND DECADE

In May 2011, the ICN published a paper, *The ICN's Vision for its Second Decade*, setting out a long-term vision and strategy for the ICN.¹² According to the vision paper, the ICN will help its members achieve four principal outcomes in the next decade:

- better addressing private anticompetitive behavior;
- better addressing unwarranted public restrictions on competition;
- minimizing incompatible outcomes across jurisdictions; and
- reducing unnecessary cost and burdens from duplicative or inconsistent procedures.

The ICN has also revised its mission, which is “to advocate the adoption of superior standards and procedures in competition enforcement and policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.” The wording of the mission statement reflects the ICN’s commitment to convergence and cooperation and emphasizes its role in advocating superior standards.

ICN members have agreed to pursue four high-level goals in the network over the next decade, namely:

- to encourage the dissemination of competition experience and best practices;
- to formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure;
- to support competition advocacy; and
- to facilitate effective international cooperation.

With a view to encouraging the dissemination of competition experience and best practices, the ICN will continue its program of workshops and teleseminars and will develop written work products comparing legal frameworks and agency practice around the world. And a new ICN initiative, the ICN Curriculum Project, brings together experts in competition law and policy in an open-source “virtual university” for competition agency officials. The first four training modules, covering the origins and aims of competition policy, major characteristics of competition policy, market definition, and market power, are available on the ICN website.¹³ The modules were presented at the ICN’s 2011 Annual Conference to tremendous acclaim.

In pursuit of greater convergence of standards and procedures in international competition policy, the ICN will continue to seek suitable topics for new consensus recommended practices. The ICN will also assist members in understanding its work products and implementing its recommendations, to help ensure that the work products translate into real outcomes. The focus of the ICN’s convergence efforts will be on the gaps and overlaps arising

¹² *Supra* note 4.

¹³ Available at www.internationalcompetitionnetwork.org/working-groups/vice-chair/outreach/icncurriculum.aspx

from the current patchwork of competition regimes, starting with those areas with the biggest impact on consumers, business, and economies around the world.

An important feature of the ICN is that opting in to its recommendations is voluntary. This encourages members to agree on recommended practices even where their own standards and procedures currently diverge. In areas where convergence is not feasible in the near term, the ICN will instead seek to foster “informed divergence”: identifying the nature and sources of apparent divergence and understanding and respecting any underlying divergent rationale.¹⁴ This greater understanding can offer business and consumers greater clarity and transparency and can lay the groundwork for possible convergence over the longer term.

The ICN has already done much to support effective international cooperation. The trusted working relationships formed between staff in competition agencies around the world by working together in the ICN provide a firm foundation for cooperation in cross-border cases,¹⁵ complemented by the ICN’s experience-sharing and convergence work. The ICN has also engaged in specific cooperation projects in the past, such as the 2007 report on cooperation between competition agencies in cartel investigations.¹⁶

Given the strong demand from members for the ICN to do more work in this area, the ICN will engage in a more systematic analysis of where the network can most usefully focus its efforts in the area of international cooperation. The ICN’s first initiative was to hold a one-day Roundtable on Enforcement Cooperation in Washington, D.C. in March 2010. The program addressed enforcement cooperation in merger, unilateral conduct, and cartel matters. Participants identified cooperation-related issues for further consideration by ICN working groups, including: facilitating and promoting informal cooperation and exchange of non-confidential materials, which may help to foster better inter-agency relations and indirectly promote future formal cooperation; developing tools to facilitate identification of agencies reviewing or investigating matters and contacts in those agencies; promoting the exchange of experience and identifying and disseminating practical tips relevant to cooperation through the ICN blog¹⁷ and webinar programs; developing advocacy materials on the value of cooperation; and creating ICN guidance, such as investigational checklists and/or model cooperation agreements or confidentiality provisions, for use by ICN members.¹⁸

The ICN’s future work in support of members’ competition advocacy activities is outlined in the following section.

¹⁴ See further Fingleton, *supra* note 9, ¶¶ 38-39.

¹⁵ John Fingleton, in *Competition Agencies and Global Markets: The Challenges Ahead* (*supra* note 9), gives the example of the marine hose cartel in 2007-08. The cartel took place across jurisdictions and involved all major suppliers of marine hose (used to transfer oil and petroleum products into and out of tankers). Parallel and coordinated investigations took place between the U.K. Office of Fair Trading, the European Commission, the U.S. Department of Justice, the Japanese Fair Trade Commission, and other competition agencies around the world. The United States arrested eight individuals, including three U.K. citizens. In relation to the U.K. individuals, the United States and United Kingdom worked closely together and the U.S. plea agreement allowed the individuals to serve their sentence in the United Kingdom, where the OFT brought prosecution under the U.K.’s criminal cartel offence.

¹⁶ Available at www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf.

¹⁷ www.icnblog.org/

¹⁸ See *The ICN’s vision for its second decade*, *supra* note 4.

IV. HOW THE ICN SUPPORTS COMPETITION ADVOCACY

One of the ICN's first initiatives was to establish the Advocacy Working Group in 2001.¹⁹ Its report, *Advocacy and Competition Policy*,²⁰ presented at the ICN's first annual conference in 2002, set out a conceptual framework for competition advocacy, based on a survey of more than 50 ICN member agencies, and adopted a definition of competition advocacy which has often been cited subsequently.²¹ In recent years, the Advocacy Working Group held a number of experience-sharing teleseminars and created an advocacy postings page on the ICN website,²² allowing competition agencies and NGAs to share information on their competition advocacy activities and learn from the experience of others.

The Advocacy Working Group is also engaged in a substantial project on market studies. Its first output was the *Market Studies Project Report* of 2009,²³ which analyzed 37 ICN members' experience and practices relating to the definition and purpose of market studies, powers to conduct studies, their selection, processes and outcomes, and measurement of the studies' impact.

The report was followed by the development of a *Market Studies Good Practice Handbook*,²⁴ which identifies good practices in conducting market studies that member agencies have found to be useful. Topics covered include project management, stakeholder engagement, selection of market studies, information collection, outcomes, and evaluation. The Advocacy Working Group presented a draft of the handbook at the ICN annual conference in 2010 and, in the following year, "road-tested" the draft handbook by inviting member agencies which were engaged in carrying out market studies or setting up or reviewing their market study regimes to report on their experience of referring to the handbook in that context, and to suggest any necessary revisions in the light of their experience. The handbook will be revised in 2011-12 in light of the results of the road-testing, resulting in a useful, practical reference tool benefiting from the input of a broad range of competition agencies and NGAs.

To complement the handbook, the group compiled a Market Studies Information Store in 2010,²⁵ which provides an online reference source of market studies conducted within the previous five years by 34 ICN member agencies, organized by jurisdiction and by sector. The aim of the information store is to help with identifying issues for study; the cross-fertilization of ideas about market issues; identifying approaches to particular market problems; and identifying ICN members who may be able to share their experience of conducting market studies in particular sectors. The information store is the first freely available database of market studies carried out by competition agencies around the world.

¹⁹ For information on the work of the Advocacy Working Group and links to its key work products, see www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx.

²⁰ Available at www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf.

²¹ The definition adopted in the report is as follows: "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."

²² At www.internationalcompetitionnetwork.org/working-groups/current/advocacy/postings.aspx.

²³ Available at www.internationalcompetitionnetwork.org/uploads/library/doc363.pdf.

²⁴ English and Spanish language versions of the handbook are available at www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx.

²⁵ Available at www.internationalcompetitionnetwork.org/working-groups/current/advocacy/msis.aspx.

In 2011, taking into account feedback received from ICN members and NGAs engaged in the Advocacy Working Group, and as part of the consultation on the ICN's second decade, the Advocacy Working Group agreed on a new mission. The group's mission is as follows: "to undertake projects, to develop practical tools and guidance, and to facilitate experience sharing among ICN member agencies, in order to improve the effectiveness of ICN members' advocacy activities in advocating the adoption of competition principles in government and promote the development of a competition culture within society."

Future projects of the Advocacy Working Group planned for 2011-2016 include: a project on raising awareness of the benefits of competition, in which the group will learn how agencies explain the benefits of competition; gathering existing learning on methods of measuring or evaluating the benefits of competition agency interventions; and drawing together the existing learning on the role of competition policy in driving growth and innovation.

The group will also carry out a project on "promoting competition culture" which will: seek to define what is meant by a competition culture; learn how members interact with the constituent parts of a competition culture; and consider developing guidance or tips for member interaction with constituents in promoting a competition culture.

The group will also be a forum for the identification and discussion of important competition policy issues or hot topics in competition advocacy, in response to demand for the ICN to play a more visible role in the global competition policy debate.²⁶

V. CONCLUSION

The ICN enters its second decade with a clear vision as to the outcomes it is seeking to bring about and the areas it will prioritize in doing so. Long-term strategic planning is now embedded in the ICN's working methods, helping to ensure that its work is focused and makes the best use of the resources contributed by member agencies and non-governmental advisers. Recent governance changes will also help to make the ICN a stronger and more effective organization, bringing positive outcomes for consumers, businesses, and economies around the world.

²⁶ The long-term plan of the ICN Advocacy Working Group for 2011-2016 is *available at* www.internationalcompetitionnetwork.org/uploads/library/doc763.pdf.