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ICN CWG: Past Achievements and Future Challenges – European Commission's Perspective

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Over the last decade, the fight against cartels was amongst the priorities of many competition enforcers, and we have witnessed the flourishing of anti-cartel enforcement regimes throughout the world. The tough line against cartels has allowed us to uncover and sanction many cartels. But let us be frank: there are many more cartels out there restricting competition, slowing down innovation and penalising the consumers. Moreover, these cartels have become more sophisticated, and simultaneously, economic globalisation and the development of instantaneous communications have dramatically changed the way cartels operate. These developments have facilitated the creation of cartel agreements between companies from different countries and continents, and have made the work of competition authorities harder.

These developments leave no doubt that cooperation between enforcers is essential. The Cartel Working Group of the International Competition Network is the framework that allows us to share experiences, learn from each other, and ultimately increase the effectiveness of our fight against cartels.

Since the creation of the Cartel Working Group in 2004, the Directorate-General for Competition of the European Commission has been playing a very active role in the functioning of the Working Group. Throughout the years, the European Commission has been strongly involved in the governance and the work products of the Working Group: initially as a co-chair of the Group (2004-2012) and since April 2012 as co-chair of its Subgroup 1. From this longtime participant in the working group, this column presents first the structure of the Cartel Working Group, and then the main achievements of the Cartel Working Group, and finally, the challenges ahead.

Structure:

The Cartel Working Group consists of two Subgroups: Subgroup 1: Legal Framework ('SG1'), which addresses legal and conceptual challenges of anti-cartel enforcement and Subgroup 2: Enforcement Techniques ('SG2'), which focuses on improving the effectiveness of anti-cartel enforcement by identifying and sharing specific investigative techniques and advancing the education and information sharing agenda of the Cartel Working Group.

Since the 2012 ICN Annual Conference in Rio de Janeiro, there are seven agencies involved in the governance of the Cartel Working Group: three agencies act as co-chairs of the Working Group and another two agencies chair co-chair each of the two Subgroups. This model aims at designing a more dynamic governance of the

ICN's Working Groups ensuring rotation and inclusiveness of the membership while preserving continuity and a capacity to continue delivering high quality work products.

The seven agencies involved in the governance of the Cartel Working Group at present are: the United States Department of Justice (US DoJ), the German Bundeskartellamt (BKartA) and the Japan Fair Trade Commission (JFTC) which have been nominated to lead the Working Group during a rolling three years mandate. The European Commission and the Colombian Superintendent act as co-chairs of Subgroup1 and the Canadian Competition Bureau and the Australian Competition and Consumer Commission (ACCC) are the agencies co-chairing Subgroup2.

The present governance structure allows for a geographic balance as well as a balance between younger and older agencies, as well as reflection of the important difference of administrative and criminal enforcement systems in the governance of the Working Group.

Achievements of the CWG

Over the years, the Cartel Working Group has developed many very useful and practical work products,¹ the most important ones being the Annual Cartel Workshop, the Anti-Cartel Enforcement Manual, and the Enforcers roundtable discussions (call-series).

The Annual Cartel Workshop has become the reference event for anti-cartel enforcers all over the world to share their experience, exchange best practice, and discuss ways of strengthening international cooperation. An important feature of the Cartel Workshop is that it consistently offers a good mix of young and more experienced agencies as well as a good balance of representatives from criminal and administrative regimes.

Nine annual workshops have been organized to date. The most recent workshop took place in Panama City in October 2012, and the next one, celebrating the tenth anniversary of the event, will take place in 2013 in South Africa.

The European Commission has had the pleasure of hosting the 2011 ICN Cartel Workshop in Bruges, Belgium, which focussed on “Enhancing the effectiveness of

¹ For the entire list of products, please visit the ICN website:
<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

the fight against cartels”. It was a big success with high quality discussions, gathering participants from 70 jurisdictions.

The 2012 workshop was similarly successful. During the three-day workshop, more than 130 participants, including both ICN member agencies and Non-Governmental Advisors (NGAs), discussed and explored effective strategies to investigate cartel conduct. The workshop built on the foundations of global anti-cartel enforcement by highlighting previous Cartel Working Group work products, including the Anti-Cartel Enforcement Manual. In particular, participants explored how these work products have been used in practice. The work products were also used as the basis for discussions surrounding a hypothetical cartel investigation.

Four interesting plenary themes set the tone for the debates in the Mini-Plenary and Break-Out sessions. The first plenary theme focused on agency use of the Anti-Cartel Enforcement Manual -- in particular, officials from Mexico, Taiwan, and South Africa – and the ways they have relied on the manual as an important reference in building their leniency regimes. The second plenary theme focused on the strategies counsels use to advise companies before a leniency application is filed. The third theme presented an overview of the issues related to the marker procedure in both criminal and administrative regimes. Interestingly, despite the different enforcement regimes, there is currently a great convergence among agencies in their approaches towards markers. Finally, the fourth theme addressed a variety of case resolution mechanisms.

The second important work product of the Cartel Working Group is the Anti-Cartel Enforcement Manual. With a collection of best practices contained in each of its chapters, it is an excellent reference tool for competition authorities from all over the globe. Agencies have indicated that the chapter on 'Drafting and implementing an effective leniency program' is particularly useful. A well-functioning leniency policy is crucial for a successful anti-cartel enforcement regime. For the European Commission, three out of four cases originate from leniency applications, and ICN's leniency chapter has served as an inspiration and a training tool for new officials in the Commission, as it has elsewhere.

Precisely because of the importance of leniency as an enforcement tool, two further initiatives are worth mentioning.

First, the European Commission has, within the framework of the ICN Curriculum initiative, produced a video module illustrating the pillars of a successful leniency policy. The module, featuring presenters from administrative and criminal systems,

was presented at the 2012 ICN Annual Conference and is made available to all agencies through the ICN and the European Commission's Directorate-General for Competition websites.² Soon it will also be available with Spanish and French subtitles.

Second, in its capacity of co-chair of Subgroup 1, the European Commission, together with the Colombian Superintendent, is in charge of organising the 2012-2013 enforcer roundtable discussions on leniency. The project is being conducted through the framework of at least seven conference calls, covering topics such as the fundamentals of leniency, the interaction between leniency programmes and private enforcement, leniency and sanctions on individuals, etc.

In preparing and organising this year's enforcer roundtable discussions, the co-chairs of Subgroup 1 are building on the impetus and success generated by the previous enforcer roundtable discussions, originated by the US DoJ and by Brazil's CADE, on 'bid-rigging', and on 'cartel awareness' and outreach, carried out in in 2010-2012. The call series on cartel awareness and outreach resulted in compiling the largest collection on cartel awareness materials, accessible from the ICN webpage.³

The future challenges of the Cartel Working Group

The challenges faced by a decade old Cartel Working Group have evolved significantly. While initially, the focus was very much on the need to build solid foundations for cooperation in an international context and the need to create an array of materials which would help competition authorities around the world to establish their anti-cartel enforcement regime, the Working Group faces new challenges today. For instance, how can we cooperate more efficiently and faster in individual cases? How can we coordinate our deterrence work more successfully? How can we best assist the youngest competition agencies in tackling cartels? As the number of anti-cartel enforcement regimes has grown so quickly and continues to grow, the ICN needs to make sure that all agencies are equipped with the right investigative tools and are using them to their full potential.

² <http://ec.europa.eu/competition/cartels/leniency/leniency.html>

and

<http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>

³ <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness.aspx>.

Thus, in the coming years, one of the main issues will be for agencies to deploy the correct resources, enforcement tools, and investigative techniques. The growing sophistication of cartelists needs to be matched by an equally refined response from agencies throughout the world. Sessions, seminars, or workshops focusing on specific topics – such as the use of forensic information technology, which allows for better detection; the introduction of well-designed case resolution mechanisms, which allows for faster action with fewer resources; and the interaction between the leniency tools and other features in the system. Experience-sharing on all of these topics may be a useful way to further improve the functioning of anti-cartel regimes worldwide. And finally, a related challenge is the need to continue to update the Anti-Cartel Enforcement Manual to reflect our changing times.