



Climbing Mount Everest with the ICN Unilateral Conduct Working Group*

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Unilateral conduct has long been touted as the most difficult and controversial area of antitrust law. Some have described taking on convergence in unilateral conduct as attempting “the Mount Everest of antitrust.”¹ In 2006 the ICN was ready to start the climb, taking on its greatest challenge: the field of unilateral conduct. Under the leadership of the U.S. Federal Trade Commission and the German Bundeskartellamt, the ICN formed the Unilateral Conduct Working Group (UCWG) to promote convergence and sound enforcement of laws governing unilateral conduct.

In the years since, the Working Group has produced a significant volume of detailed work, including comparative reports on ICN member practices. Impressively, the Working Group has also developed international best practices – in ICN parlance “recommended practices” – on the assessment of dominance. These practices reflect a consensus among ICN’s 100-plus member agencies on a sound analytic approach to assessing dominance. The Working Group now is developing a practical manual for agency staff to investigate unilateral conduct and to analyze its competitive effects in accordance with international best practice.

This article describes in more detail the steps the ICN Unilateral Conduct Working Group has taken, both with respect to understanding practices in the area of unilateral conduct around the world, and compiling that learning in a way that can be shared broadly so as to promote convergence. The article then turns to steps that remain and directions in which the UCWG may go in pursuit of its principal goal.

Step 1 - Laying the Foundation

In the area of unilateral conduct, little work had been done by the mid-2000s to identify similarities and differences in laws and procedures. This dearth of comparative work stood in stark contrast to significant amounts of such work that had been done in the merger area, even before the ICN was formed.²

After formation in 2006, the UCWG began to lay the groundwork for future convergence by engaging in a dialogue with its 35 agency members and a diverse group of non-governmental advisors (NGAs) on objectives of unilateral conduct

¹ Randolph Tritell, Objectives of Unilateral Conduct Opening Remarks, available at www.internationalcompetitionnetwork.org/uploads/.../doc395.pdf

² See, e.g., Report of the International Competition Policy Advisory Committee (200), available at <http://www.justice.gov/atr/icpac/finalreport.html>. Unilateral conduct was not even within the scope of ICPAC’s agenda, which covered mergers, anti-cartel enforcement and cooperation.

laws and the definition of "dominance" and "substantial market power."³ The process began with the Working Group sending a questionnaire to its members, which was summarized in a report on the responses of 35 ICN members and NGAs.⁴

The survey responses revealed several important findings. First, almost all agencies said that ensuring a competitive process was at least one of their goals. A majority of respondents also listed both enhancing consumer welfare and maximizing efficiency. The group also learned that all respondents use a comprehensive set of criteria to assess dominance/substantial market power. Even if the relative importance of these criteria varies from case to case, jurisdictions generally consider market share and barriers to entry or expansion and durability of market power as the most important criteria.

The Working Group then studied how agencies assess specific types of unilateral conduct in practice by conducting surveys and preparing comparative reports on exclusive dealing (2008), predatory pricing (2008), tying and bundled discounting (2009), loyalty discounts and rebates (2009), and refusal to deal with a rival and margin squeeze (2010). ICN members have used these reports as a reference tool in case investigations, for training purposes, and to compare their practices against those described in the reports. These reports also created a baseline for discussion and next steps in the convergence process.

Step 2 - Building the Framework

After gaining a better understanding of international practices, the next stage was for the UCWG to seek agreement on common principles and approaches to particular practices. The Working Group began this process with the fundamental building blocks for analyzing unilateral conduct – dominance assessment, price-cost tests, and foreclosure analysis.

Determining whether a firm possesses dominance generally is the first step in the evaluation of potentially anti-competitive unilateral conduct. The Working Group distilled themes from the Objectives Report to develop a set of Recommended Practices (RPs) for the assessment of substantial market power and dominance

³ At the time, the Unilateral Conduct Working Group had 35 agencies as members, a number that has grown to over 50 today along with more than 100 NGAs.

⁴ ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (2007), *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> (“Objectives Report”).

under unilateral-conduct laws, adopted by ICN members at the 2008 Kyoto annual conference.⁵

The Recommended Practices contain several important practices regarding the use of a sound analytical framework firmly grounded in economic principles to determine whether dominance/substantial market power exists. The RPs therefore reflect significant convergence on several fundamental and critical principles of unilateral conduct analysis.

First, the RPs provide that, while market shares can be a useful starting point for analyzing market power, a firm should not be found to possess substantial market power without comprehensive consideration of factors affecting competitive conditions in the market under investigation. Second, the Recommended Practices provide that agencies should use a sound analytical framework, firmly grounded in economic principles, in determining whether a firm has substantial market power, and that assessment of entry and expansion conditions should be an integral part of the analysis.

In 2010, the UCWG began creating a multi-chapter workbook on the analysis of unilateral conduct. The workbook is a manual for case handlers on conducting unilateral conduct investigations. The Working Group began with a chapter on assessing dominance, covering the methods used to define relevant markets and to assess the existence of dominance, as well as the data and other evidence that is useful for determining whether a firm can be considered dominant.

The workbook also includes chapters on specific types of unilateral conduct. The first type of conduct the group addressed is predatory pricing. The predatory pricing workbook chapter complements the predatory pricing report by providing practical guidance on conducting a predatory pricing investigation, and provides an in-depth analysis of price-cost tests, the economic terminology used and rationale for using one measure over another. Price-cost tests are employed in predatory pricing cases to determine whether an alleged predator is selling at a loss or sacrifice. One important aspect of using a price-cost test is deciding upon the appropriate cost benchmark, on which is also addressed the chapter on predatory pricing. Cost benchmarks are potentially used in a variety of other unilateral conduct cases, including margin squeeze and loyalty discounts cases, and thus this

⁵ The UCWG also issued RPs on the application of unilateral-conduct rules to state-created monopolies, addressing: the competition agency's enforcement role with respect to anticompetitive unilateral conduct by state-created monopolies, the authority's advocacy role before government entities that oversee the liberalization and privatization of such monopolies, and effective advocacy instruments.

chapter lays the groundwork for subsequent chapters covering the analysis of those types of conduct. This workbook chapter also supplemented the group's previous work in the area, including an on-line training module on predatory pricing for the ICN Curriculum Project,⁶ a July 2011 webinar⁷ on the role of price-cost tests in unilateral conduct analysis, and a workshop on loyalty discounts and margin squeeze in December 2010.⁸

Currently, the group is working on a chapter on exclusive dealing that will be submitted for adoption at the April 2013 ICN annual conference. To build towards convergence in this area in advance of the chapter's completion, earlier this year the group held a webinar on exclusive dealing, as well as and a regional workshop in Singapore based on an exclusive dealing hypothetical. One of the central analytic focal points in exclusive dealing cases is the degree of foreclosure of the relevant market, a topic addressed in detail in the draft workbook chapter. The analysis of foreclosure also will be instructive for the analytical aspects of future chapters on refusal to deal with a rival and tying arrangements.

Step 3 – Developing Guidance and other Recommendations

Feedback from ICN members and NGAs shows that there is a strong desire for the ICN to continue to pursue convergence, with ICN Recommended Practices being the work products cited most often by members when asked to describe the ICN's main achievements.⁹ Such recommended practices are not binding on ICN members. Rather, they represent a consensus view of best practices with respect to a particular mode of analysis or enforcement approach, and thus can provide support or impetus for agencies that take different approaches to move towards the common view of the better approach. RPs promote convergence by not only identifying the focal point upon which to converge but also by providing a tool to move in that direction.

To date, the Working Group has not attempted to create recommended practices in addition to those described above, instead focusing its efforts on expanding the unilateral conduct workbook and promoting its work product and implementation of existing recommended practices through regional and global workshops and at ICN annual conferences.

⁶ <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>

⁷ <http://www.icnblog.org/audio/210560.wav>

⁸ <http://internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars/2010.aspx>

⁹ The ICN's Vision For Its Second Decade, Presented at the 10th annual conference of the ICN, available at <http://internationalcompetitionnetwork.org/uploads/library/doc755.pdf>

The Working Group anticipates that the process of drafting the Workbook will lead to identifying further areas in which the group could productively develop additional recommended practices or other guidance, but considers that different views may make achieving consensus difficult. According to its work plan, the Group will discuss how and when it is realistic to begin work on additional recommended practices, and also discuss whether to start with a general analytical framework or specific types of conduct, and if the latter, which conduct.¹⁰

A recommendation on predatory pricing seems most promising. Predatory pricing is an area that already has a good degree of global consensus. Compared to other types of unilateral conduct, enforcers have identified a common framework for analysis that includes concrete reference points (for example, price-cost tests) upon which there is broad agreement. Moreover, the development of thinking in this area already is mature, a necessary precondition for developing recommended practices.

A recommended practice on predatory pricing in which a consensus likely could be achieved, could include the following:

- Low prices should be condemned as predatory only if the alleged predator charges prices below some appropriate measure of its costs, and subsequently has the ability to raise and maintain prices above the competitive level to the detriment of customers.
- Enforcers should employ a safe harbor that precludes a finding of predation for pricing above average total cost.
- No single measure is appropriate in all cases; the choice of cost measure should reflect the theory of harm.
- Prices that appear to be below the firm's short run marginal cost, or average short run variable costs, provide reason for continued investigation. These measures, however, can be particularly difficult to apply and enforcers

¹⁰ UCWG 2012-13 workplan, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc843.pdf>.

should consider whether they are properly measuring price and cost before concluding that prices are predatory.

- Where the dominant firm's increased output is the mechanism that may exclude rivals, an average avoidable cost measure, which weighs the costs incurred to generate that increased output against the incremental revenues received, is the most appropriate measure.¹¹
- Agencies should develop a framework for evaluating predatory pricing allegations that enables quick resolution of investigations without needing to apply a price-cost test, by making an initial determination of whether the alleged predator's prices are likely to cause competitive harm. Accordingly, at an early stage of an investigation:
 - Agencies should consider the pro-competitive reasons offered by the alleged predator for temporarily setting low prices.
 - Agencies should assess whether the firm is dominant, including an assessment of entry and expansion conditions, because predatory pricing is a form of unilateral conduct that generally has the potential to cause anticompetitive harm only when it is undertaken by a dominant firm.
 - Agencies should consider whether market conditions have the potential to allow for recoupment, for example because there are high barriers to entry or expansion.

Following this year's work on exclusive dealing, the Working Group also should be poised to develop additional recommendations, including advocating a market share safe harbor for foreclosure and eschewing the use of market share presumptions in exclusive dealing cases.

Step 4 – Bridging Remaining Differences

¹¹ As RPs are developed, further discussion and debate should take place within the working group on whether special treatment, e.g., the use of a different measure of cost, is appropriate when the allegedly predatory conduct involves the sale products for which the incremental cost of producing additional output is slight in comparison to the initial costs of product development.

Three elements will improve prospects for convergence.

1. *Facilitating cooperation in unilateral conduct cases.* ICN members may need to have a greater degree of convergence before attempting additional recommended practices, and as part of the convergence process, ICN members will benefit from more frequent case cooperation. In the merger area, close and frequent cooperation has unequivocally been an important catalyst for convergence. However, there have been far fewer instances of cooperation in unilateral conduct cases. Participants in a recent UCWG webinar on cooperation suggested that this could be because there are fewer conduct cases generally and even fewer with cross-border implications. Another explanation is that different timetables for review also make cooperation both less likely and less fruitful. The ICN is exploring ways to deepen cooperation, both through actual case cooperation, simulated cases, and additional policy work on cooperation.¹² In the immediate term, the ICN can best promote cooperation and convergence through its case handler workshops, which provide opportunities for staff to work together on hypothetical cases.

2. *Engaging more economists.* Engaging more economists in ICN discussion and debate is a critical step that will help bridge differences and drive convergence. Additional economists would allow for a better understanding of the role of economists and economic evidence in unilateral conduct cases. Additional economist input also could enhance existing work product by developing more practical guidance on dominance assessment and conducting economic analysis of competitive effects and efficiencies. For example, the assessing dominance chapter could be supplemented with a section or annex on economic techniques for assessing dominance. It could be much more detailed about how one performs the analysis of relevant markets. Providing a forum for economists from ICN member agencies and economist nongovernmental advisors to share experience and learn from one another also could help bring more rigorous economic analysis to agency decision-making in this area, and in the longer term, promote convergence.

3. *Willingness to engage in real debate.* The Working Group's achievements demonstrate an impressive ability to achieve a broad consensus on principles and

¹² See ICN Steering Group International Enforcement Cooperation Project, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>. The UCWG work plan also contemplates work on cooperation in unilateral conduct enforcement, which may include: the objectives of cooperation; the types of cases that may benefit from cooperation; cooperation tools; impediments to cooperation; confidentiality and privilege considerations; cooperation on remedies; how parties can facilitate cooperation; and what makes for effective cooperation.

approaches even in the complex area of unilateral conduct. Continued convergence will require further willingness to engage in real debate and exchange, as well an openness to hearing alternative ways of approaching unilateral conduct analysis, and in the longer term, a commitment to introduce change as appropriate.