
International Competition Network—Update

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In our May 2004 article, we provided background on an innovative organization, the International Competition Network ("ICN"), describing how this nascent "virtual network" was changing the face of international antitrust.¹ In this update, we aim to inform you of the ICN's recent activities, examine whether and how the initial considerations for future success (highlighted in our 2004 article) have been addressed, and note new challenges for the ICN.

* The views expressed are those of the authors and do not necessarily reflect the views of the Federal Trade Commission or any of its individual members. The authors wish to thank Randolph W. Tritell for his helpful comments on an earlier draft of this update.

¹ See E. Kraus & M. Coppola, "The International Competition Network: A Virtual Reality," *Mergers and Acquisitions Newsletter*, Vol. IV., No. 3, Summer 2004, available at <http://www.abanet.org/antitrust/committees/at-mergers/mergers-newsletter.html>. In this article, we noted that the ICN was meeting its objectives of facilitating procedural and substantive convergence and providing support for new antitrust agencies by promoting dialogue among enforcers, practitioners and interested academics, and addressing practical antitrust enforcement and policy issues of common concern. We described the ICN's formation, structure and development, highlighting key projects and work product realized to date, and focused on the Merger Notification and Procedures subgroup as an example of how the ICN's subgroups use the network's flexible working style to achieve results.

In the past year, the ICN has expanded in membership, participation and work product. Nearly all of the world's competition agencies are now members, with membership exceeding 90 agencies from over 80 jurisdictions, from Albania to Zambia. The fourth annual conference, held in Bonn, Germany on June 6–8th, 2005, was the best-attended ICN event to date, with over 400 participants, representing more than 80 competition authorities and non-governmental advisors ("NGAs") from the private sector and academia. Agency representatives and NGAs, working together, prepared materials in four substantive areas (mergers, cartels, competition policy implementation and antitrust enforcement in regulated sectors), primarily for presentation and discussion at the annual conference and in workshops presented over the course of the year. These materials, discussed below, are all available on the ICN's website.²

Recent ICN Activities and Work Product

In the mergers area, the ICN's membership adopted two additional Recommended Practices for Merger Notification and Review Procedures, presented by the Notification and

² Consult the ICN's website, at <http://www.internationalcompetitionnetwork.org>, for access to ICN materials, including documents prepared for the fourth annual conference.

Procedures subgroup, on remedies³ and competition agency powers.⁴ The full set of Recommended Practices, adopted by the ICN's membership over the past four years, addresses thirteen priority areas related to merger notification procedures.⁵ As discussed in the subgroup's Implementation Report, prepared for the conference, over 50% of ICN members with merger review laws have made or planned revisions to their merger regimes that bring these regimes into greater conformity with the Recommended Practices.⁶ In addition

³ The remedies practice addresses the object of a remedy, advocates a transparent framework for the proposal, discussion, and adoption of remedies, and recommends that: (i) procedures be established to ensure that remedies are effective and easily administrable and (ii) appropriate means are provided to ensure implementation, monitoring of compliance and enforcement of the remedy.

⁴ The agency powers practice recommends that agencies have the authority and tools necessary to enforce their merger laws as well as the necessary staffing and expertise, and advocates that agencies have sufficient independence to ensure the objective application and enforcement of merger review laws.

⁵ The Recommended Practices for Merger Notification and Review Procedures are available at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html> and cover: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) inter-agency coordination; (11) remedies; (12) competition agency powers; and (13) review of merger control provisions. The format consists of a short statement of the Recommended Practice followed by explanatory comments.

⁶ See Implementation of the Recommended Practices for Merger Notification and Review Procedures, April 2005 at 4, available at http://www.internationalcompetitionnetwork.org/050505Merger_NP_ImplementationRpt.pdf.

to the Implementation Report, which identifies and provides solutions to challenges agencies face in implementing the Practices, the subgroup developed a model waiver of confidentiality form and accompanying paper on the use of confidentiality waivers, and also completed a comparative study on merger notification filing fees. The Mergers Analytical Framework subgroup discussed a preliminary draft checklist on merger guidelines and, in an effort to provide practical guidance on the choice, design and implementation of merger remedies, presented a study on merger remedies that complements the remedies Recommended Practices. Following on its successful October 2004 workshop, in which agency staff lawyers and economists from 49 jurisdictions learned tools and techniques relevant to merger investigations with the help of 16 NGAs, the Investigative Techniques subgroup finalized and presented key concepts from its Investigative Techniques Handbook for Merger Review.

The Cartel Working Group has been extremely active during its first year. In Bonn, the General Framework subgroup presented its report, "Building Blocks for Effective Anti-cartel Regimes," covering the definition of "hard core cartel," effective institutions for cartel detection, investigation and prosecution, and effective penalties. The Enforcement Techniques subgroup, presented the first two chapters of its "Anti-cartel Enforcement Manual," addressing searches, raids and inspections and drafting and implementing an effective leniency program. This subgroup also presented an NGA-led role-playing exercise, which was developed for the subgroup's Leniency Workshop, one of two ICN cartel workshops held in Sydney, Australia, in November 2004. The subgroup also presented its anti-cartel enforcement template, which, once completed for each agency, will provide basic information about anti-cartel programs in all ICN member jurisdictions.

The Competition Policy Implementation ("CPI") Working Group addressed issues of particular importance to newer competition agencies. The technical assistance subgroup presented the first in-depth, quantitative examination of the effectiveness of technical assistance to competition agencies, based on the experience of 32 recipients of such aid.⁷ The report identified key elements of successful programs and activities, producing a number of results that run counter to many donors' conduct in the design and implementation of technical assistance programs. These preliminary results will serve as the basis for recommendations to technical assistance donors and providers.

The consumer relations subgroup, as part of a focus on building a competition culture through consumer outreach efforts, produced a video on outreach strategies. While the "competition cat" used in television commercials in Japan was particularly popular, the video contained a number of methods and messages that can easily be adapted by other agencies.⁸ The advocacy subgroup prepared detailed studies of advocacy initiatives in regulated sectors, highlighting process issues, to ensure that the

lessons learned can be replicated across sectors and jurisdictions.⁹

The Antitrust Enforcement in Regulated Sectors ("AERS") Working Group presented a report on the increasing role for competition in the regulation of banks, with a set of recommendations related to antitrust in the banking sector. Its second subgroup discussed its report on the interrelation between antitrust and regulatory authorities, focusing on institutional frameworks, competition principles as a foundation for regulation, costs of concurrent jurisdiction and the importance of informal relations between the authorities.

The ICN's leadership also presented a mission and achievements statement that examines the ICN, its role and accomplishments.¹⁰ This document marks an important transition for the ICN in that it demonstrates the network's commitment to focus efforts on implementation of its work product. This focus also was exemplified by the conference's implementation panel, which demonstrated how much of the ICN work product, e.g., the merger investigative techniques handbook, the technical assistance assessment tools, and the Recommended Practices, has been put to use by its membership. As the Chairman of the ICN's Steering Group noted in his closing remarks, "...the shift in focus towards implementation

⁷ The report on technical assistance is available at http://www.internationalcompetitionnetwork.org/assessing_technical_assistance.pdf.

⁸ The subgroup also prepared a report on lessons learned in outreach activities. Earlier in the year, in February 2005, the subgroup held a workshop for ICN members, observers and NGAs on consumer outreach, producing a conference report for Bonn. Finally, the subgroup also prepared a short paper on the effects of institutional structures on consumer relations. All of the subgroup's materials are available at http://www.internationalcompetitionnetwork.org/annual_conferences_bonn.html.

⁹ The Advocacy Report is available at http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf.

¹⁰ "A Statement of Mission and Achievements up until May – 2005," available at http://www.internationalcompetitionnetwork.org/bonn/Work_Plans/achievements/ICN_Mission_and_Achievements_Statement.pdf.

shows us that the ICN has reached a new level of maturity."¹¹

Stocktaking One Year Later

With the conclusion of the ICN's successful fourth annual conference, now is a good time to review the possible institutional challenges highlighted in our 2004 article to assess whether and how the ICN has addressed these concerns. The challenges identified concerned: (i) the ICN's ability to engage and ensure participation of all of its member agencies, particularly younger agencies, both in developing work product of interest and promoting participation in ICN activities; (ii) fostering additional avenues for NGA participation, and (iii) cautioning against overextension of the ICN and its resources.

Regarding increased participation by younger agencies, the ICN's leadership has recognized that to remain relevant the ICN must address issues of interest to this constituency. To better understand these concerns, Bonn conference attendees heard directly from young agencies in a plenary panel dedicated to "ICN Participation: Expectations and Challenges for Younger Competition Agencies." A number of suggestions were made, from greater opportunities for cooperation, *e.g.*, through information exchanges and/or mentoring programs, to calls for coverage of additional topics, *e.g.*, unilateral conduct, as well as more focused coverage of, *inter alia*, investigative techniques and economic analysis and additional workshops. Funding of various projects and conference attendance also was highlighted as a key concern.

¹¹ Closing Speech of Ulf Boge at 3, available at <http://www.internationalcompetitionnetwork.org/bonn/2005speeches/closingspeech.pdf>.

These issues were among the first items to be discussed in the Steering Group meeting immediately following the conference and efforts to address them have been and will continue to be the subject of much work. For example, an initial discussion of possible ICN mechanisms for increasing cooperation among member authorities is scheduled for July, with project proposals to follow.

With respect to the scope of ICN's projects, the comments of certain younger agency representatives highlighted the tension between wanting to push the ICN to achieve the most that it can and exhausting its resources and membership, many of whom do not have sufficient staffing to participate in and/or monitor ICN developments in an increasing number of working groups and subgroups. This tension was taken into account when developing the ICN's future work plans. For example, the Mergers Working Group (the first working group to be established) is beginning to refocus its activities on implementation of its work product. In doing so, the working group has streamlined its structure from three to two subgroups. Similarly, the AERS Working Group was concluded upon the expiration of its two-year mandate. Related work regarding the telecommunications sector will continue as a one-year project,¹² with a new working group on monopolization/dominance expected to be established at the next annual conference.

¹² This group expects to: review existing work on competition policy and the telecommunications sector, examine major antitrust cases in the sector, and survey the state of competition in the sector in selected developing countries. Based on this information, the group will identify lessons learned and, possibly, optimal approaches to addressing antitrust in the telecommunications sector. The proposed work plan for this group is available at http://www.internationalcompetitionnetwork.org/bonn/Work_Plans/Telecoms_2005-06_Work_Plan.pdf.

In this way, the ICN has attempted to focus its projects on topics of interest to its membership without overburdening the network, its members and interested NGAs, on which it increasingly relies.

Concerning funding, a separate not-for-profit, corporate entity has been established to receive and disperse member contributions in support of the ICN. In addition, the Steering Group has proposed a suggested minimum annual contribution for members exceeding a GDP threshold. Contributions from a handful of such members helped ICN members from less developed jurisdictions to attend the Bonn conference, though many also received stipends from German foundations supporting the conference. The ICN's new funding mechanisms are likely to be tested over the coming year, when the ICN produces two workshops (on Implementation of the Recommended Practices for Merger Notification Procedures and Cartels) as well as the annual conference.

Through these measures, the ICN hopes to increase participation and involvement of its members, particularly younger agency members, in its daily work, conferences and workshops. Similarly, the ICN is interested in promoting increased NGA participation in the network's activities. The ICN has benefited from increased NGA involvement over the past year, with NGAs active in a greater number of subgroups, participating as speakers in ICN conferences and workshops, and designated as key resource persons in annual conference breakout sessions. Of note, the ABA's Antitrust Section has provided the ICN with key NGA input, and members from this committee played a lead role in the development of the ICN's merger model waiver and accompanying report. The ICN should continue to involve NGAs in its activities, including by reaching out to a broader range of non-governmental advisors from additional jurisdictions (to date, the majority of NGA partici-

pants are from North American and European jurisdictions) and backgrounds, *e.g.*, in-house counsel and academic participants.

New Challenges

The ICN's flexible nature and working style continue to serve the organization well. This flexibility, however, can come at the cost of certain administrative and organizational inefficiencies, including, for example, uneven surges in demand for member participation (*e.g.*, survey responses) without a central coordination mechanism. A number of the inefficiencies can be remedied without the addition of a heavy bureaucratic overlay and consideration may be given to formalizing a limited number of responsibilities to complement the organization's flexibility. For example, within the existing structure, Steering Group members and vice chairs, and/or Working Group chairs can be tasked with additional responsibilities to ensure project target goals are identified and met in a timely manner.

An additional challenge for the network concerns outreach and how the ICN can publicize its work product beyond its current active participants as well as promote implementation of this work product within ICN member jurisdictions. The design of a more effective communications strategy, drawing on existing instruments such as the website and listserv, and development of new tools that reach a wider audience, appear warranted. In addition, efforts to increase the involvement of NGAs from a broader range of jurisdictions and backgrounds also can help to garner support for ICN work product within these jurisdictions, which, over time, can foster implementation of the ICN's work across its membership.

Such steps may further the success of the ICN in building consensus and convergence towards sound competition principles across the global antitrust community.