



INTERNATIONAL COMPETITION NETWORK

Summary of ICN Work Product

Presented at the 8th Annual ICN Conference

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Dear ICN Annual Conference Participant,

Welcome to the 8th Annual ICN Conference.

The ICN is a truly remarkable institution. Over the past eight years, the network has established momentum that shows no sign of abating, as it continues to expand its membership, improve its existing participation, and broaden its agenda.

At this year's annual conference we will learn about ICN's substantial, concrete results to strengthen competition law enforcement and policy in the global marketplace. We will also engage in the type of robust debate that enables us to better understand our differences, allowing us to construct better practices out of a more thorough appreciation of these differences. These executive summaries have been prepared to assist in focusing the debate.

Reading the executive summary, you may be impressed with the sheer scale of the ICN's productivity. One of the real eye-openers in taking over the chair of the ICN was the realization that the ICN is engaged an extraordinary amount of activity. To share with you the breadth and scope of overall ICN activity, the executive summary includes a list of all 2008-2009 projects.

This past ICN year, members and NGAs continue to demonstrate considerable support for previous years' work product. For example, the chapter on leniency of the Anti-cartel Enforcement Manual proved particularly useful, as experience with these programs grows. More and more jurisdictions consult the Recommended Practices for Merger Notification and Procedures when they revise their merger procedures, and jurisdictions such as Germany and Korea articulated publicly the role these Practices played in their reforms. There were an unprecedented number of workshops last year, each utilizing existing work product. From around the globe, case handlers participated in workshops on cartels, mergers, and unilateral conduct, and agency heads in a workshop on agency effectiveness. As appropriate to a virtual organization, we have begun to use communications technology more effectively in conducting our work.

These achievements are all the more remarkable because they have been accomplished without the infrastructure normally associated with international institutions. The network's flexibility and inclusive participation can and should serve as a model for others. I hope that the ICN will stand as an example of a new form of global governance where networks of practitioners based on professional respect and trust promote greater understanding and appreciation of differing national needs and imperatives, and through this greater understanding, greater harmonization.

On behalf of the ICN Steering Group, I hope you enjoy the conference.

With best regards,

A handwritten signature in black ink, appearing to read "David Lewis", written over a horizontal line.

David Lewis

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Session I: Advocacy Working Group

Introduction

The current mission of the Advocacy Working Group (AWG) is to develop practical tools and guidance to improve the effectiveness of ICN members' competition advocacy. In 2008-2009, the Group was engaged in a review and update of existing ICN advocacy work, and examined in greater detail members' experiences conducting market studies, with the goal of developing procedures and evaluation criteria for conducting studies. The Working Group is co-chaired by the United Kingdom's Office of Fair Trading and the Russian Federal Antimonopoly Service.

2008-2009 Work Product

Report on Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy

The Advocacy Working Group's Review and Update Project Team, based on a survey of 32 ICN members, prepared a report to: (1) identify ICN members' experiences with competition advocacy; (2) assess the extent to which existing ICN advocacy work product is used by members; and (3) make recommendations for additional work in the area. This report was complemented by other activities, including three teleseminars on competition advocacy issues presented by the UK OFT, Russian FAS, and Polish OCCP.

The first part of the report presents an overview of the advocacy activities of survey respondents, and the political and legal environment in which they conduct advocacy, including the agency's independence and autonomy, and the legal provisions and general powers to conduct advocacy. Resources dedicated to advocacy activities are presented as a percentage of the agency budget, ranging from one to fifteen percent. This section of the report also summarizes the ways agencies measure the success of advocacy initiatives, from basic examinations of whether or not a recommendation was accepted to sophisticated calculations of the monetary value of the impact of a particular advocacy activity. Challenges to conducting advocacy ranged from resource constraints, to stakeholders' lack of an understanding of competition principles, to time limitations on opportunities to engage in advocacy.

The second part of the report examines competition agencies' relationships with other institutions in advocacy activities. While most of the agencies said that they are engaged in advocacy activities with judicial bodies, respondents listed the executive and legislative bodies as the government institutions they most frequently target. The possibility of influencing particular legislative initiatives that impact competition is seen as the most important reason for conducting advocacy with the executive and legislative branches of government. Advocacy with the judiciary usually involves training activities or seminars.

This section of the report also notes that ICN members conduct advocacy activities with groups such as consumer associations, the business community, media, and the general public. The means for conducting competition advocacy are identified in this

section and include formal and informal activities, such as non-binding opinions, guidelines, market studies, feedback from consultations, workshops, seminars, informal meetings, and educational materials, including DVDs, brochures and books, as well as agency websites, annual reports, and press releases.

The third section of the report describes the competition advocacy efforts by the responding agencies in a variety of sectors including energy, transportation, telecommunications, financial services, health services, pharmaceuticals, agricultural goods, real estate, professional services, postal services, and international trade, highlighting a number of successful initiatives. This review of the scope and goals of the respondents' advocacy efforts in relevant sectors helped to identify specific sectors for possible future work.

The report concludes with a summary of the responding agencies' recommendations on the institutional and sectoral directions of further ICN work on competition advocacy, as well as on types and forms of this work. Specific recommendations, as provided for in the Review and Update Project Work Plan, include teleseminars on institutional and sectoral issues, and updating the Competition Advocacy Toolkit.

Market Studies Project Report

The ICN Advocacy Working Group's Market Studies Project aims to analyze ICN members' market studies experience, with a view to considering further work by the ICN in this field, possibly including a guidance document on market studies practice and process.

Building on existing work on market studies, the project team gathered data on ICN member market study practices relating to the definition and purpose, powers to conduct studies, their selection, processes, and outcomes, and measurement of the studies' impact. Thirty nine agencies from 37 jurisdictions responded to a questionnaire. The Market Studies Report provides a summary and analysis of these responses, and concludes with a number of suggested areas for further ICN work in this field.

The report identifies six key findings.

1. Members have various types of powers to conduct market studies and to gather information for studies, but do not seem to have need, or appetite, for greater convergence of legislative powers.
2. Most respondents indicated that market studies are useful for collecting information and developing thinking that informs their enforcement work.
3. There is scope for greater transparency regarding the process and findings of market studies; and such transparency may help authorities make the most of their studies and any advocacy efforts resulting from the studies.
4. Where the success of a study is dependent on follow-up advocacy activity, it is important for authorities to make informed decisions about

the topics they select for study and the manner in which they seek to influence decision-makers – a commitment by government to consider market study recommendations may be useful for some authorities.

5. Authorities may have additional opportunities to use studies to advocate voluntary changes in business practice where conduct falls short of infringement of competition law.
6. Although not common, responses indicate that advocacy may be more successful if authorities clearly identify the benefits ex ante, or estimate the likely costs and benefits of implementing their recommendations.

ICN members have a diverse wealth of experience in conducting market studies, and employ a wide range of practices to do so. It is hoped that the insights in this report will provide a useful tool for greater convergence, and informed divergence, in what appears to be an expanding field. There is clearly scope for cross-fertilization of policies and practices, including on: ideas for markets and topics to study, the approach to selecting and carrying out studies (and use of study powers), and ways to conduct studies efficiently and effectively.

Regarding specific suggestions for future work, responses suggest consensus for work in two areas: (1) Best practice. There appears to be scope for outlining best practice in relation to a number of aspects of the conduct of market studies, which the ICN may consider undertaking. The ICN might therefore consider producing a document setting out best practice on these aspects. (2) Estimating or measuring impact. Although few authorities have taken steps to estimate or measure the specific impact of their market studies, the experiences of those that have done so proved very beneficial. This may be an area in which those that have developed, or are developing, evaluation programs could share their experience.

Session II: Merger Working Group

Introduction

The mission of the Merger Working Group (MWG) is to promote best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews. The MWG has made great strides in advancing this mission with its work on notification and procedures, and the analytical framework and investigative techniques for merger review. The U.S. Department of Justice, Antitrust Division and the Irish Competition Authority co-chair the Merger Working Group (MWG).

The group completed three key projects this ICN year. The MWG developed three proposed **Recommended Practices for Merger Analysis** for adoption by members at the 2009 annual conference, covering: competitive effects analysis in horizontal merger review; unilateral effects; and coordinated effects. These follow three Recommended Practices for Merger Analysis adopted in 2008 on: 1) the legal framework for competition merger analysis; 2) the use of market shares, thresholds and presumptions; and 3) entry and expansion.

The MWG also prepared a report on **Information Requirements for Merger Notification** that examines member notification practices in an effort to promote greater understanding of and conformity with the Recommended Practices on Merger Notification and Review Procedures. The paper summarizes the type of information commonly sought in merger notification, and describes mechanisms for flexibility that agencies use to minimize unnecessary costs and burdens of notification, particularly for transactions that do not present competitive concerns.

During the past year, the MWG also held a successful enforcers' workshop in Taipei, covering practical issues and techniques for notification, investigation, and substantive merger analysis.

2009-2010 Proposed Recommended Practices for Merger Analysis

(MWG comments omitted; please see conference materials for a complete version)

IV. Competitive Effects Analysis in Horizontal Merger Review: Overview

A. The goal of competitive effects analysis in the review of horizontal mergers is to assess whether a merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power, either unilaterally or in coordination with rivals.

B. In conducting competitive effects analysis, agencies should consider whether a merger likely will result in anticompetitive unilateral or coordinated effects. These two theories of competitive

harm provide the analytical frameworks for determining whether a horizontal merger may be expected to harm competition significantly.

C. The analysis of competitive effects under either the unilateral or coordinated effects framework should be clearly grounded in both sound economics and the facts of the particular case.

V. Unilateral Effects

A. In analyzing the potential for a horizontal merger to result in anticompetitive unilateral effects, agencies should assess whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently.

B. In conducting unilateral effects analysis, agencies should apply the economic theory or model that best fits the characteristics of the market(s) at issue.

C. In conducting unilateral effects analysis, agencies should assess the competitive constraints and other factors relevant to the ability of the merged firm to exercise market power in the relevant market(s).

VI. Coordinated Effects

A. In analyzing the potential for a horizontal merger to result in coordinated effects, agencies should assess whether the merger increases the likelihood that firms in the market will successfully coordinate their behaviour or strengthen existing coordination in a manner that harms competition significantly.

B. In conducting coordinated effects analysis, agencies should assess whether the conditions that are generally necessary for successful coordination are present: (a) the ability to identify terms of coordination, (b) the ability to detect deviations from the terms of coordination, and (c) the ability to punish deviations that would undermine the coordinated interaction.

C. In conducting coordinated effects analysis, agencies should assess the extent to which existing competitive constraints and other factors would likely deter or disrupt effective coordination. In making this assessment, agencies should consider all available evidence, including the pre-merger market conditions that may constrain or facilitate successful coordination, and the impact of the merger on these conditions.

Paper on Merger Notification Information Requirements

The ICN Merger Working Group's Notification and Procedures Subgroup evaluated initial merger notification requirements and approaches for filing notification information in 28 ICN member jurisdictions.¹ The Subgroup prepared a paper that summarizes the various categories of information sought by ICN members in the initial notification of a merger. It also describes the approaches and mechanisms for flexibility that agencies use to obtain essential information for initial merger review while minimizing unnecessary costs and burdens of notification, particularly for transactions that do not present material competitive concerns. The Subgroup undertook this project to assist agencies in comparing their approaches to initial notification with those of other ICN members and to help agencies planning to introduce or revise their notification forms or requirements in conformity with the ICN Recommended Practices for Merger Notification and Review Procedures (Recommended Practices or RPs; available at: <http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>).

The Recommended Practices state that the initial notification should elicit the minimum amount of information necessary to initiate the merger review process. RP V on Requirements for Initial Notification identifies three categories of potentially relevant information: information needed by the agency (1) to verify that the transaction exceeds jurisdictional requirements and notification thresholds; (2) to determine whether the transaction raises competitive issues meriting further investigation; and (3) for a decision clearing or approving the transaction, or to prepare other documentation required to terminate the review of transactions that do not merit further investigation.

A review of members' notification forms and initial information requirements identified a "common core" of information that is reported to most agencies that includes certain information gathered for administrative purposes, information concerning the parties to the filing, a description of the transaction, and some information on competitive analysis, like the competitive overlaps. However, because transactions can have a wide range of possible competitive effects, the RPs recognize that no single set of initial notification requirements is optimal for all transactions. Therefore, the RPs advocate that jurisdictions adopt mechanisms that allow for flexibility in the content of the initial notification and with respect to additional information requirements during the initial phase of the review.

The paper highlights some of the different mechanisms agencies use to provide flexibility to reduce initial notification burdens, including: (1) alternative notification formats that vary with the likely complexity of the competitive analysis of the transaction, (2) procedures that provide agency staff with discretion to waive responses to information specifications that are not sufficiently relevant to the agency's disposition of the transaction, and (3) abbreviated initial notification requirements coupled with procedures that provide competition agency staff with

¹ With the assistance of non-government advisors (NGAs), the Subgroup reviewed notification forms and publicly available notification information to complete questionnaires that were sent to agencies in jurisdictions that have implemented one or more mechanisms for flexibility in the content of the initial notification. Agency staff worked with the NGAs to complete the questionnaire and to confirm the accuracy of the questionnaire responses.

discretion to seek additional information during the initial review period. Many agencies use one or more of these mechanisms, as well as other mechanisms described in the paper.

The paper describes additional measures identified in the Recommended Practices, to minimize the burden of translating documents submitted with initial notifications and of certifying the validity of notifications and supporting information. In addition, the paper notes that voluntary notification systems provide the additional flexibility to parties of choosing whether to file at all.

Merger Templates and Weblinks

To facilitate ready access to merger laws and key features of merger review systems worldwide, the MWG established links to national merger review laws and related materials, and to responses to a template of questions about the merger review system. This past year, the MWG updated the templates and weblinks, to reflect recent changes in agency practice and laws. These materials are available at: <http://www.internationalcompetitionnetwork.org/index.php/en/publication/293>.

Session IV: Cartel Working Group

Introduction

ICN's Cartel Working Group brings together antitrust enforcers who share a willingness to work together against hardcore cartels, enhancing the ability to shut down both domestic and international cartels. The Working Group aims to reduce obstacles that antitrust agencies face in cracking cartels through the examination of important legal and policy topics and the exchange of effective investigative techniques. The Hungarian Competition Authority and the European Commission co-chair the Cartel Working Group.

The Cartel Working Group has two subgroups: the Legal Framework Subgroup and the Enforcement Techniques Subgroup.

Subgroup 1: Legal Framework

The Legal Framework Subgroup addresses the legal and conceptual challenges of anti-cartel enforcement. The focus of the subgroup is examining policy-level issues of the institutional and investigative framework for the detection and punishment of hard-core cartel conduct.

Enforcers Calls

Over the past year, the Legal Framework Subgroup held a series of substantive, experience sharing anti-cartel enforcer calls addressing effective inter-agency coordination, both at the multijurisdictional and domestic levels. The series attracted unprecedented member participation. Member materials from these calls are included in the conference documents. The teleconference series devoted significant discussion to issues that arise in the transition from an administrative system to criminal sanctions for cartel conduct. These discussions included: aspects of criminal sanctions beyond deterrence; the availability of additional investigative tools; key issues to consider during the legislative process; building relationships with public prosecutors for enforcement cooperation; interaction with other stakeholders; and ensuring that the possibility of criminal sanctions acts as additional incentive to apply for leniency.

In one discussion, the United States Department of Justice and the United Kingdom's Office of Fair Trading used public information about recent convictions in the marine hose industry to discuss broader issues of international cooperation and the use of criminal sanctions. The discussion covered issues and considerations involved in effective international coordination and parallel enforcement across jurisdictions. The UK's first criminal proceedings for a cartel offense demonstrate the risks to individuals of cartel conduct when jurisdictions have and use criminal sanctions.

Brazil's Secretariat of Economic Law of the Ministry of Justice (SDE) and the Australian Competition and Consumer Commission (ACCC) each led calls focused on their interactions with their prosecutors and investigators to bolster cartel enforcement.

The prosecution of hard-core cartels has been a top priority in Brazil since 2003, when SDE started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct. SDE has made anti-cartel enforcement its number one priority and views criminal prosecution of such conduct as critical to ensuring effective deterrence. SDE significantly improved the interaction and cooperation with criminal prosecutors to strengthen anti-cartel enforcement in Brazil. SDE's efforts aimed at employing creative education, training and awareness initiatives aimed at building support throughout Brazil for its criminal cartel enforcement initiatives have yielded impressive results.

The ACCC described Australia's recent progress towards criminalization of hardcore cartel conduct. In Australia, the ACCC and the DPP will each have roles in anti-cartel enforcement. After careful review, Australia determined that the possibility of criminal sanctions for company executives will increase the deterrent effect for businesses, enhance incentives to apply for leniency and bolster the detection of cartel conduct and making additional investigative tools available. The ACCC, in its transition to expected criminal sanctions, has laid a solid foundation for successful cooperation with its prosecutors, having already concluded an MOU and conducted joint training with Australia's federal prosecutor, the Commonwealth Director of Public Prosecutions (DPP). The MOU outlines the roles each agency will play from investigation of the cartel conduct by the ACCC through to prosecution, as well as the principles that will guide dealings between the agencies in criminal cartel matters.

Subgroup 2: Enforcement Techniques

The Enforcement Techniques Subgroup aims to improve the effectiveness of anti-cartel enforcement by identifying and sharing specific investigative techniques and advancing the educative and information sharing agenda of the International Cartel Workshops.

Update to Anti-Cartel Enforcement Manual

Over the past year, the Enforcement Techniques Subgroup updated chapters 1 and 2 of the Anti-Cartel Enforcement Manual on Searches, Raids and Inspections and Drafting and Implementing an Effective Leniency Program.

Chapter 1 – Searches, Raids and Inspections: The Chapter was originally published based on information collected from ICN members in July 2004 by means of a questionnaire. A revised questionnaire, containing the original questions, as well as 22 new questions, was distributed to ICN members in February 2009. The Chapter has been updated to incorporate new information and changes since 2004. The focus of this exercise was to identify good practices and procedures with respect to pre-search intelligence and preparation, the development of search teams, entry onto the search premises, conducting the search and post-search activities.

Chapter 2 - Drafting and Implementing an Effective Leniency Program: This chapter was originally published in 2006 and updated in 2009. The updated chapter outlines a number of good practices relating to the drafting and implementation of leniency programs, practical aspects of administering leniency programs as well as raising awareness and educating the public about leniency programs.

Update to Anti-Cartel Enforcement Templates

Over the past year the Enforcement Techniques Subgroup updated the Anti-Cartel Enforcement Templates which provide public access to information about ICN members' anti-cartel enforcement regimes. The templates also cover a range of topics, including the process for filing a complaint, decision-making, sanctioning cartel conduct, investigative tools, leniency, rights of defendants and confidentiality.

Some ICN Members have also provided links to related materials on their websites, including relevant legislation, implementing rules and regulations, guidelines and information about cases.

Templates can be found on the ICN website at:

<http://www.internationalcompetitionnetwork.org/index.php/en/publication/277>

Cartel Workshop

The Portuguese Competition Authority hosted the 2008 Cartel Workshop in Lisbon on October 28-30, 2008. Through a series of plenary sessions, case presentations and discussion of a hypothetical case, participants examined all stages of the enforcement process. Day one focused on cartel detection. Participants looked at both proactive and reactive detection tools, including economics and cooperation with domestic and international agencies. On day two participants discussed the investigative process: the development of an investigation plan and the management of leniency programs. Day three was dedicated to the prosecution of cartel cases, including penalties, negotiated settlements and the interaction between public and private enforcement.

Session V: Unilateral Conduct Working Group

Introduction

The ICN Unilateral Conduct Working Group (UCWG) was established primarily to examine the challenges involved in addressing unilateral conduct of dominant firms / firms with substantial market power, and to promote greater convergence and sound enforcement of laws and policies governing unilateral conduct. The Working Group is co-chaired by the U.S. Federal Trade Commission and the German Bundeskartellamt.

Over the past year, the UCWG continued its work on the analysis of unilateral conduct by examining tying and bundled discounting, and single-product loyalty discounts and rebates. For each practice, the group gathered information through a questionnaire.² The paper on loyalty discounts and rebates is based on the responses of competition agencies and non-governmental advisors (NGAs) covering 34 jurisdictions. The paper on tying and bundled discounting is based on the responses covering 35 jurisdictions.

During the past year, the UCWG also held a successful workshop in Washington D.C., on March 23-24, 2009. Nearly 130 delegates from nearly 35 jurisdictions attended the workshop and an even greater number participated through a live webcast. Using case studies, roundtable discussions, and small group breakout sessions, the workshop promoted greater understanding of the ICN's Recommended Practices on the analysis of dominance/substantial market power and explored in greater depth the issues raised by the group's work on exclusive dealing, predatory pricing, and state-created monopolies. On the first day of the workshop, delegates discussed how dominance/substantial market power differs from market power and the significance of market shares, presumptions, and safe harbors as well as practical issues raised in the analysis of the durability of market power and entry and expansion. On the second day, delegates discussed anticompetitive effects in exclusive dealing cases and the role of price-cost tests and recoupment in predatory pricing cases.

Reports on the Analysis of Loyalty Discounts and Rebates and Tying and Bundled Discounting Under Unilateral Conduct Laws

Loyalty Discounts & Rebates

Most responding agencies reported that their competition laws do not specifically define loyalty discounts and rebates. The agencies define the term as discounts or rebates on units purchased of a single product, conditioned on the level or share of purchases. Some agencies highlighted that loyalty discounts and rebates condition discounts on loyal purchasing behavior; in other words, customers receive the discount only if their purchases exceed a certain threshold. A few agencies define the term to cover only discounts or rebates that apply to *all* units of the customer's purchases of the product.

²The questionnaire and responses are available at <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/questionnaire>.

Many agencies indicated that single-product loyalty discounts and rebates are considered a legitimate form of price competition and are generally procompetitive. While loyalty discounts and rebates can create efficiencies and can benefit consumers through lower prices, there is also general agreement that when exercised by dominant firms or firms with substantial market power, they have the potential to cause competitive harm in certain circumstances. Given the potential benefits to consumers from loyalty discounts and rebates, several responses expressed a cautious approach to enforcement.

Many responses acknowledged a lack of experience in evaluating single-product loyalty discounts and rebates. During the past ten years, responding agencies brought approximately 45 cases in which a violation was established. Thus, while the responses and discussion of some agencies that contributed to this report are based on the experience and rulings in cases, a number of agencies' responses were based largely on their policy views and how they likely would assess such conduct. A summary of the key findings drawn from the responses is set out below.

Effects Analysis of Loyalty Discounts & Rebates

Many agencies indicated that they would use price-cost tests to evaluate the legality of loyalty discounts and rebates. Among the agencies that use price-cost tests, some use a predatory pricing analysis, while others use price-cost tests to assess whether the loyalty discount arrangement forecloses competitors by limiting their opportunities to compete for sales. Several of these latter jurisdictions stated that price-cost comparisons are one factor, among others, in their assessment of whether loyalty discounts and rebates have an anticompetitive effect.

Agencies stated that loyalty discounts and rebates can be anticompetitive in certain circumstances. Several agencies stated that the discounts can be anticompetitive if they effectively foreclose a large share of the relevant market such that they exclude rivals or act as a substantial impediment to entry and/or expansion.

Given the importance of price cutting to vigorous competition, almost all agencies stated that there are no circumstances under which a firm's use of loyalty discounts and rebates is presumed illegal. Rather, agencies analyze the impact of the conduct on competition. No agency reported having a safe harbor from a finding of liability. However, a few agencies explained that they would be less likely to take enforcement action if the price is above their relevant cost benchmark.

Tying and Bundled Discounting

Tying is commonly defined as a dominant firm selling one product only on the condition that the buyer also purchase a different product or agrees that it will not purchase the tied product from another supplier. It also includes the sale of products or services that could be viewed as separate but are only sold together as a bundle. To determine whether two products or services are separate many agencies focus on the analysis of the demand side and whether there is sufficient (consumer) demand for the allegedly tied product or service. In various jurisdictions supply side aspects are also of relevance, such as technological possibilities and industry practice.

Bundled discounting is commonly defined as offering discounts or rebates based on a buyer's purchase of two or more different products or services. Bundled discounting arrangements do not prevent buyers from purchasing individual products separately, although the aggregate price of the individual components is typically higher than the price of the bundle.

Many agencies stress that tying and bundled discounting are neither held to be *per se* pro- nor anticompetitive. Rather, agencies draw attention to the fact that they examine the effect tying and bundled discounting have on competition.

Effects of Tying and Bundled Discounting

The assessment of anticompetitive effects is an important element in the analysis of both types of conduct. More specifically, many replies show that jurisdictions are concerned that tying and bundled discounting may harm competition or lead to anticompetitive foreclosure and contribute to the maintenance or strengthening of market power.

With respect to the assessment of bundled discounting, many agencies use or may use a price-cost comparison, while some agencies also indicate that such a test is not required to show that bundled discounting may be illegal.

Most agencies indicate that their unilateral conduct law and policy does not provide for a presumption of illegality. Most agencies state that their unilateral conduct laws and policies do not provide for safe harbors.

Intent in Tying, Bundled Discounting and Loyalty Discounts and Rebates Cases

The majority of responses indicated that anticompetitive intent is not required, but is often considered a relevant factor, particularly in assessing competitive effects. Agencies in a few jurisdictions may consider intent when establishing fines.

Justifications and Defenses

The responses indicate that justifications and defenses are generally available to dominant firms. Several agencies mention efficiencies to both suppliers and consumers. Some agencies stressed that justifications and defenses must have an objective basis. Benefits that are purely speculative or that would arise only in the distant future are disregarded. Most agencies agree that, while it is up to the agency to show anticompetitive effects, the firm has the burden of proving efficiencies.

Session VI: Competition Policy Implementation Working Group

Introduction

The mission of the Competition Policy Implementation (CPI) working group is to identify key elements that contribute to successful capacity building and competition policy implementation in developing and transition economies. For the year 2008-2009, the group consists of two subgroups focused on 1) agency effectiveness and compliance and 2) experience sharing among ICN members. The co-chairs of CPI are Brazil's Council for Economic Defense and the Turkish Competition Authority.

Report on the Agency Effectiveness Project, Second Phase – Effectiveness of Decisions

The Working Group carried out the second phase of its agency effectiveness work in 2008-2009, analyzing (1) the relation between agency priorities and resource allocation; and (2) agency effectiveness as measured by compliance with agency decisions. The work examined, *inter alia*, authorities' institutional powers to obtain compliance with decisions imposing remedies and sanctions as well as long term effects of compliance. In addition, the project studied ways agencies engage in self-assessment to review the effectiveness of their decisions. To collect this information, the group prepared a questionnaire, which was sent to all ICN members. The questionnaire focused on decision-making procedures and on the monitoring and implementation stages of agency decisions.

The increase in the number of ICN members that responded to the questionnaire, from 20 agencies in 2007-2008 to 37 agencies from 36 jurisdictions in 2008-2009, may reflect a growing recognition of the importance of this subject. While survey responses diverged considerably on many questions, responses to some questions showed considerable agreement. Key areas are summarized below.

Prioritization was considered the key factor in agency effectiveness, given that human and financial resources are limited. Second, respondents suggested that staffing has a large impact on effectiveness. In determining staff arrangements for case handling, expertise (competency area, such as mergers, cartels) often dictates group selection, although a sectoral approach was also used by some respondents. In addition to the use of general internal procedures in case handling, nearly all responding agencies use formal or informal internal procedures to assess the quality of reports or files before decisions are taken. The quality of reports is assessed by expert teams, management councils, directors, department heads, and/or senior experts. Institutional structure and the nature of decisions were other areas that respondents reported as influencing effectiveness. Interestingly, while most agencies reported that they have sufficient professional staff, none indicated any method of evaluating whether staffing was sufficient. Also interestingly, the majority of the agencies said that their organizational structure is favorable to effectiveness, regardless of the differences in their structure.

As expected, compliance with agency decisions is considered to be very important for an agency to be effective. Compliance is directly associated with agency credibility, and their effect on the markets, and many agencies take into account compliance and enforceability issues when considering remedy requirements. The expected result of a particular decision on the antitrust market in question was also cited as important, although views about the difficulty in implementing structural and behavioral remedies differ. In general, behavioral remedies are found to be more difficult to implement than structural remedies. Most respondents indicated that compliance monitoring is carried out by the investigation divisions or followed by reports or market studies. Few agencies cited recurring issues or difficulties in monitoring compliance. While imposition of fines is the most common tool to enforce compliance, the possibility of criminal sanctions exists in some jurisdictions.

Slightly more than half of the respondents indicated that they conduct ex post analysis of decisions. Agencies conducting ex post analysis employ their own personnel, outside experts, or both. Some of these agencies considered that these analyses led to improvements either in evaluation of internal processes, or compliance with or to the impact of enforcement activities, or both.

The report also indicated that the effectiveness of the agency decisions depends on the quality, proper implementation, and monitoring of decisions. The adequacy of a decision's deterrent effect and the independence of the decision-making body are also important. The compliance level of the market players, the adequacy of powers to ensure compliance with the decisions, and the quality of professional staff are other important factors. Among other things, the report highlighted the necessity of an agency's managerial processes to ensure that priorities and resource allocation are aligned with its strategic planning in order to achieve good outcomes in cases.

Report on the Seminar on Competition Agency Effectiveness

This paper reports on the discussions that took place in the January 2009 seminar in Brussels devoted to competition agency effectiveness, highlighting the main points that were made and raising ideas for future ICN work in this area. The report is structured along the four main themes discussed during the workshop: (1) strategic planning and prioritization, (2) project delivery, (3) evaluation and accountability, and (4) communication.

The first part of the report deals with the process of strategic planning and prioritization in competition agencies. Three aspects are distinguished, *i.e.* definition of strategy/strategic objectives, concrete planning to implement the strategy defined, and prioritization of tasks. Prioritization requires a balance between potential impact and importance of different projects in terms of achieving the objectives of the agency on the one hand, and their resource implications on the other hand. The degree of autonomy of agencies in setting objectives and priorities varies. In many cases, statutory obligations reduce the freedom of agencies to set priorities.

The second part of the report focuses on the issue of effective project delivery. Three issues are highlighted: case and project management, agency structure, and human resources management. Regarding case / project management, the report stresses the need to set clear prioritization criteria. For agency structure, different models exist

(sector-based organization, instrument-based structure or a hybrid structure). Whatever structure is used, it is essential that there is flexibility in re-allocation of resources among different parts of the organization to respond quickly to changing enforcement needs. With respect to human resources, recruitment and retention of high quality staff was identified as an issue of particular concern to many agencies.

Many agencies reported that evaluation presented a significant challenge. There is general recognition that it is essential that agencies invest in evaluation (including evaluation of the efficiency of procedures, the impact of specific enforcement actions, and advocacy and communication activity), but at the same time concerns about, *inter alia*, resources involved, methodology, internal vs. external evaluators. Another concern was how the results of evaluation activities would be used.

The issues of accountability and communication are dealt with in the fourth part of the report. The report explores the relation between accountability to outside stakeholders, independence of agencies, and agency credibility. The report emphasizes communication as a requirement for effective advocacy and deterrence.

Experience Sharing Among Competition Agencies

The Working Group continues to identify ways to facilitate the sharing of practical experience among competition agency staff. The Working Group continued with the implementation of two of its previous initiatives: the partnership program, which pairs less experienced and more experienced agencies; and the conference calls, which allows ICN members to discuss ways of addressing practical problems in a particular subject area, such as unilateral conduct. More recently, the Working Group began a pilot project testing the same concept through an online discussion forum.

Some of the partnerships previously organized are still functioning, others are not. The Working Group conducted a survey of what characteristics had affected the success or failures of the various partnership programs, in order to improve the program going forward.

The telephonic conference calls, a sample of which was the subject of a video presentation at the annual meeting in Kyoto, continue to have high participation and positive feedback. The Working Group organized calls focusing on competition advocacy, single firm conduct, and building a competition culture in government processes. While the calls were quite well received, two significant limitations emerged: they are difficult to follow for those who are not fluent in the language of the call, and the timing is inconvenient for many agencies, especially in the Asia/Pacific and Latin American regions. To address these limitations, the Working Group held a Spanish-language call primarily for the Latin American region and a regional call primarily directed at East Asian competition agencies.

To address the language and timing issues across ICN membership, the Working Group, in consultation with the Steering Group, undertook to replicate the success of the telephone conference calls through an online discussion forum. The Working Group held its online discussion forum, jointly with a teleseminar, on the subject of agency effectiveness, on May 19. The Working Group will report on the results of the pilot program at the annual conference, making recommendations as to whether and how the online discussions should continue.

Sessions VII: Vice Chair for Advocacy and Implementation

Mandate: The Vice Chair for Advocacy and Implementation (VC A&I) is responsible for developing and, with Steering Group approval, implementing a work plan to promote and advocate for the adoption of ICN benchmarks and use of ICN work product by competition authorities throughout the world.

2008-2009 Projects and Activities

1. Establishment of the Support System: VC A&I established the Support System in August 2008, a team including the Vice Chair, liaison officers for each ICN Working Group (AIN), and additional active ICN member volunteers (VC A&I liaison agencies). The support system assists interested member agencies in identifying relevant ICN work product for their consideration in the context of any proposed changes to their competition laws or policies. Vietnamese Competition Authority (VCA) and Zambian Competition Commission (ZCC) are the first candidates to utilize the Support System.
2. Active Engagement of Advocacy and Implementation Network (AIN): In 2007, an Advocacy and Implementation Network (AIN) was formed, comprised of liaison officers for each of the ICN Working Groups and the VC A&I. *AIN members participated in the support system* and discussed how to provide the best form of support under the system. Also, AIN has identified ICN experts from relevant working groups to provide assistance to Support System recipients.
3. Communications: The 2009 version of the “ICN Key Messages” were finalized and will be posted on the ICN website after the annual conference, available for all to use. This version of the Key Messages provides both summary and detailed information about the ICN and its membership, activities, and work product.
4. Joint Vice Chair Project: Together with the Vice Chair for Outreach, the Office of Fair Trading (OFT) led a number of focus groups discussions with ICN members to generate ideas on how the ICN can further assist and support member agencies. The OFT prepared a report of the key findings of the focus group discussions, which will inform a panel discussion at the 2009 annual conference.
5. Other Activity: VC A&I is working to promote ICN work product at various international fora. This past year, VC A&I arranged for a one-day ICN training course for a technical assistance program on competition sponsored by the Japanese International Coordination Agency, and also OFT Chairman Philip Collins’ gave a presentation on ICN at an ASEAN Experts Group on Competition. VC A&I also began a joint project, “Competition Policy in Southeast Asia: A Stock Take of Recent Development and Performance” with the Asian Development Bank, the Japan Fair Trade Commission, and the ICN. The Vice Chair plans to disseminate and promote various ICN work product in a conference of this project in January 2010.

Vice Chair for International Coordination

Mandate: The Vice Chair for International Coordination (VC IC) was created with the goal of strengthening ties between the ICN and international and regional organizations in order to promote greater competition advocacy. Increasingly, international organizations that are actively involved in promoting economic development throughout the world have developed specific programs and divisions dedicated to competition issues.

2008-2009 Projects and Activities

1. Meetings with key organizations to promote IC mandate: In 2008, The VC IC met with key organizations such as the World Bank (WB), the Inter American Development Bank (IDB), and the United Nations Conference on Trade and Development (UNCTAD) in order to promote international coordination and identify ways to strengthen ties between our organizations.
2. Development of Compatibility Matrix: In 2008, a list of 17 “target” organizations was developed for the identification of areas where these organizations and the ICN have common objectives and may undertake common projects.
3. Development/Implementation of a formal schedule of competition courses for smaller agencies: UNCTAD was identified as one of the most important organizations to approach. In February 2009 a working level meeting took place in which it was agreed that a joint program on technical assistance and training courses dedicated to young competition authorities could take place in July 2009.
4. Development of a sectoral report (pilot project) funded and conducted by an IO: The WB was identified as a key organization. In September 2008, the VC IC contacted this organization to convey ICN’s interest in cooperating, especially in the agribusiness sector, focusing on input markets from a competition perspective. In October 2008 the WB’s International Finance Corporation responded positively and sent a proposal outlining the main areas that a study on the agribusiness sector in sub-Saharan Africa could analyze. This outline was circulated to the Steering Group, but little feedback has been received so far. In April 2009, the WB hired a competition policy expert who will serve as the main contact for the joint project in the agribusiness sector. In June 2009, meetings with the WB will take place at the margins of the Annual Conference in Zurich to review the project.

Vice Chair for Outreach

Mandate: The Vice Chair for Outreach is responsible for developing and, with Steering Group approval, implementing a work plan to engage ICN member agencies and nongovernmental advisors from ICN member jurisdictions in the activities of the ICN (*e.g.*, workshops, working groups, annual conferences), to encourage use of ICN work products and adoption of ICN best practices, and to ensure that the diversity of views and interests of ICN members are represented.

2008-2009 Projects and Activities

1. Member Focus Groups: Together with the Vice Chair for Advocacy and Implementation, the Vice Chair for Outreach led a number of focus groups discussions with ICN members to generate ideas on how the ICN can further assist and support member agencies.
2. NGA Focus Groups: The Vice Chair for Outreach organized a focus group with NGAs from diverse professional backgrounds, similar to the member focus groups, to explore ways to expand NGA participation and seek input about the effectiveness of the ICN. The results will be presented at the 2009 annual conference.
3. Concept Paper for Evaluation: Building on the work of the focus groups, the Vice Chair developed a self-assessment concept paper to be presented at the 2009 annual conference.
4. ICN-wide Teleseminar and On-line Discussion Forum: The Vice Chair for Outreach, jointly with the Competition Policy Implementation Working Group, held the first ICN-wide teleseminar and on-line discussion forum in May 2009, on agency effectiveness.
5. Executive Summary of ICN Work Product and Vice Chair Activity: Together with Working Group chairs and other vice chairs, the Vice Chair for Outreach prepared this executive summary to facilitate preparation for the 2009 annual conference.

2008-2009 ICN Projects

Advocacy Working Group

Review & Update Project
Market Studies Project
Teleseminar Series

Cartel Working Group

Review & Update of Searches Chapter
Review & Update of Leniency Chapter
Substantive Call Series on Cooperation
Lisbon Workshop
Cartel Templates

Competition Policy Implementation Working Group

Effectiveness Project
Brussels Agency Effectiveness Seminar in Brussels
Experience Sharing call series
Online Discussion Group
Partnership / consultation program

Merger Working Group

Recommended Practices for Merger Analysis
N&P Forms Project
N&P Templates
N&P Monitoring and Implementation
Taipei Workshop

Unilateral Conduct Working Group

Loyalty Discounts Project
Tying/Bundled Discounting Project
Washington DC Workshop

Special Project: Small Economies

Report on Small Economies

Operational Framework Working Group

Revisions to Operational Framework
Website Project

Annual Conference Planning Committee

Vice Chair A&I

Creation of Support System
Advocacy and Implementation Network
Member Support Plans
Focus Groups
Key Messages

Vice Chair International Coordination

Compatibility Matrix
World Bank Agribusiness Proposal

Vice Chair Outreach

Executive Summary of ICN Work Product
NGA Focus Group
Evaluation Concept Paper
Agency Effectiveness ICN-wide Call

Other working groups

Funding
Membership