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**REPORT FROM CAPE TOWN – THE FIFTH ANNUAL ICN CONFERENCE**

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**CONFERENCE PANEL:  
ICN/OECD Major Recent Developments and Practical Implications**

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## **I. INTRODUCTION**

At the beginning of May, the International Competition Network (ICN) held its fifth annual conference in Cape Town, South Africa. This is an early report on some of the highlights of the conference.

For those unfamiliar with the ICN, it was formed in 2001 as a network of competition agencies from around the world to exchange ideas and experiences, with significant involvement by the legal, business and academic communities. In particular, the ICN was formed with the main goals of achieving better competition enforcement and advocacy through cooperation between competition agencies and convergence in competition laws and practices. In short, the ICN works to promote sound and principled procedural and substantive standards in order to help minimize economic costs and uncertainty so as to leave pro-competitive and efficiency-enhancing conduct free to flourish.

In light of these goals, ICN members, through their participation in working groups, produce a variety of valuable outputs. Such outputs include: case-handling and enforcement manuals, reports on multi-jurisdictional surveys, templates on legislation and rules in different jurisdictions, databases, toolkits, workshops and, of course, stimulating discussions at the annual conferences. Some working groups also identify non-binding recommended practices, which form a benchmark for individual competition authorities to consider and adopt, if appropriate in light of their own unique economic, legal and cultural characteristics.

The ICN's membership includes nearly all the world's competition agencies, having increased since the Bonn conference by seven members to stand currently at 97 members from 85 jurisdictions, of which almost 70 were represented in Cape Town. Non-governmental advisors, of which about 100 attended in Cape Town, provided invaluable input into the products and outputs of the working groups this year as well as discussions at the conference.

I will commence my overview of the 2006 annual ICN conference by starting with some highlights of the Mergers Working Group. From there I will highlight recent developments concerning the working groups on Cartels, Competition Policy Implementation, and Telecommunications Services. Finally, I will discuss the proposed Unilateral Conduct Working Group.

## **II. MERGERS WORKING GROUP**

Right from its inception, the ICN has engaged the subject of mergers while choosing to address other significant aspects of competition law enforcement (i.e., cartels and abuse of dominant position) only later. Accordingly, the most comprehensive of working group outputs is with respect to mergers. This year, both the Merger Notification and Procedures Subgroup and the Merger Investigation and Analysis Subgroup made contributions.

### **i) Merger Notification And Procedures Subgroup**

The Notification and Procedures Subgroup's main project, to date, has been to develop a set of non-binding Guiding Principles and Recommended Practices for Merger Notification and Review Procedures, and to promote their implementation. In essence, the Guiding Principles provide a "road map" for agencies developing and revising their merger regimes. The Recommended Practices address priority areas related to merger notification procedures, as identified by public and private sector representatives. The Recommended Practices are aimed at facilitating convergence toward best practices in the procedural aspects of merger review.

As conformity with the Recommended Practices must accommodate different legal and cultural traditions and stages of development, the Subgroup concluded that a compilation of conforming language examples would be useful. Accordingly, following the 2005 Annual Conference, Subgroup participants began assembling examples of conforming language from competition laws and regulations around the globe. As a result of these efforts, an Implementation Handbook was produced for Cape Town, providing examples of conforming language for eight of the Practices. While these examples are not "endorsed" by ICN members, they were nonetheless offered as a tool for those agencies interested in better understanding the Recommended Practices, and facilitating their implementation.

During the session on implementation, we learned that, by the latest measure, 34 ICN members had made conforming changes to their merger review regimes, up from 23 the year before and only 8 the year before that. I'm sure this number will continue to grow as we approach the next annual conference in Moscow as a reported 60% of members had made, or planned to make, such changes. As noted by Maria Coppola Tineo of the USFTC: this represents "extraordinary growth" in completed and proposed modifications to bring members' merger control regimes into greater conformity with the Recommended Practices within a short period of time. I also found it quite compelling to hear Randy Tritell indicate that the advice from his jurisdiction to the People's Republic of China has been based on ICN-established standards. There can be no better litmus test that the ICN, in its five short years of existence, has become the international standard-setting organization in this area. But I also agree with Randy's observation that, despite these impressive gains, we should not become complacent – 60 or 70% conformity is good but we can do better; we need to continue to be self-critical and welcome NGA and member input on where gaps remain. And the N&P Subgroup will continue to be available for consultation by member agencies wishing to move their jurisdictions into greater conformity with the Recommended Practices.

### **ii) Merger Investigation & Analysis Subgroup**

Prior to Cape Town, the Merger Investigation and Analysis Subgroup had produced three main analytical products:

- a comprehensive "issues" paper on the general substantive standards used for analysing mergers;
- a comprehensive study by outside experts on the merger control enforcement guidelines of a number of jurisdictions; and
- a merger remedies review project providing practical guidance in the use of merger remedies.

A Merger Guidelines Workbook was presented at the conference in Cape Town. It is designed for use by jurisdictions as a practical manual, discussing key issues in producing merger control guidelines, the application of a framework for merger assessment, and how different aspects should be taken into consideration.

It is expected that these documents will enhance the ability of competition agencies to focus their enforcement activities on intervening in relation to those mergers that are likely to give rise to competition concerns, and to identify the remedial measures that are most likely to prove effective in addressing any such concerns.

On the investigative techniques side of the subgroup, a virtual "how to" workshop, referred to as a "Workshop in a Can," has been prepared, along with a moderator's guide, for members to use to enhance their skills in planning merger investigations, developing reliable evidence from merging and third parties and conducting their subsequent analyses. The workshop can be tailored to the individual jurisdiction giving it and can also include NGA involvement, which has enriched past such workshops. And, speaking of workshops, the third workshop on investigative techniques is being planned on a regional basis for Latin America in the latter half of 2006.

### **iii) Going Forward**

Going forward, the Mergers Working Group will engage in the following activities:

- a project on implementation of the Guiding Principles and Recommended Practices;
- a workshop on a specific topic, possibly concerning a substantive merger analysis and; and finally,
- updating and creating various web links and templates.

This having been said, in his introductory remarks in Cape Town, Tom Barnett outlined a more ambitious agenda in which he indicated that future work (presumably following Moscow) could involve seeking convergence on substantive issues, such as analytical approaches; in the process, divergences would also be recognized, thereby identifying opportunities for longer-term convergence initiatives. I took from this that AAG Barnett was "throwing down the gauntlet" to both ICN members and the NGA community to explore the possibilities and suggest substantive issues that are ripe for convergence discussions.

### **III. CARTELS WORKING GROUP**

Moving on to the Cartels Working Group, virtually all competition agencies around the world consider the fight against cartels as their foremost enforcement priority. In particular, and in light of the ICN's growing importance to developing jurisdictions, ICN Steering Group Chair Ulf Böge noted that "combating cartels is all the more important for developing economies as they suffer significantly from cartel harm." The fight against cartels, however, is a technically demanding task and, to this end, the main focus of the ICN Cartels Working Group has been on assisting competition agencies in honing their operational and practical skills. Both the General Framework and Enforcement Techniques Subgroups made significant contributions in this regard over the past year.

#### **i) General Framework Subgroup**

The General Framework Subgroup has prepared a set of "building blocks for effective anti-cartel regimes" that are intended to help agencies, especially those new to anti-cartel enforcement, in basing their own anti-cartel strategy on a solid foundation. For the 2005 annual conference, the Subgroup prepared an initial batch of three such building blocks:

- a discussion of the appropriate scope of the term "hard core cartel;"
- a review of various agencies' experiences with setting up dedicated cartel units; and
- an analysis of effective sanctioning systems.

At 2006 conference, three more such building blocks were added:

- inter-agency co-operation in cartel investigations;
- private enforcement of cartel rules; and
- obstruction of cartel investigations.

The project on inter-agency cooperation includes a stocktaking of the various forms of co-operation between agencies in cartel investigations, and an identification of some of the barriers to deeper co-operation. The project on the private enforcement of cartel rules explores the interaction between the public and private enforcement by examining the basic role of private enforcement, the extent to which private enforcement currently exists, and the role of private enforcement in deterring cartel conduct. In particular, this project discussed the impacts of private enforcement on leniency programmes. The project on obstruction of cartel investigations addresses what anti-cartel enforcers can and are doing to prevent obstruction of justice.

#### **ii) Enforcement Techniques Subgroup**

The Enforcement Techniques Subgroup of the Cartels Working Group has been working on an Anti-Cartel Enforcement Techniques Manual. Before Cape Town, two chapters had been completed: one on the organisation of searches and raids to gather evidence and

another on effective leniency programs. In Cape Town, a chapter on digital evidence gathering and an expansion of the chapter on leniency were added.

The aim of the chapter on digital evidence gathering is to better understand the range of ICN member approaches to digital evidence gathering and to identify good practices and procedures for the use of digital evidence in the context of the investigation and adjudication or prosecution of cartels. The purpose of the expanded chapter on leniency is to draw together key practices concerning the drafting and implementation of an effective leniency policy.

Finally, the Subgroup has established a template on anti-cartel enforcement, that provides a standardized overview of the main features of the vast majority of the anti-cartel enforcement regimes existing in the world today. It provides agency representatives as well as companies and their advisors with ready access to such information, and should be particularly useful when these parties are confronted with questions on anti-cartel enforcement and policy. Almost 50 ICN members have provided cartel templates for their jurisdictions, and we are already starting to make these available via the ICN Web site.

During the implementation session, we learned from a representative of the Turkish agency that both the Sydney and Seoul Cartel Workshops had led directly to recommendations within Turkey to change the law to increase fines available against both corporations and individuals while, at the same time, affording a basis to establish a leniency program. In addition, the agency has published a notice on fining policy with a view to increasing transparency and has trained staff to enhance their IT skills. It is considering setting up a separate anti-cartel unit, establishing prison as a sentencing option and adding wire tap to its investigative tools. The agency has also translated the ICN's anti-cartel enforcement manual into Turkish.

It is hoped that all members -- particularly newer agencies -- will continue to benefit from, and deepen their engagement in, the work of the ICN concerning anti-cartel enforcement.

### **iii) Going Forward**

In terms of work to be completed by the Sixth Annual Conference in Moscow next year, the General Framework Subgroup will:

- extend its report on the Interaction of Public and Private Enforcement by factoring in the perspectives of the business community; and
- prepare an International Cooperation/Exchange of Information report, which will consider a number of potential ways to promote or enhance cooperation in anti-cartel enforcement.

The Enforcement Techniques Subgroup will:

- arrange the next Cartel Workshop in The Hague, Netherlands;
- adjust existing chapters of the Anti-Cartel Enforcement Manual, as well as draft new chapters on Case Initiation and Investigative Strategy; and
- update various information sources concerning cartel enforcement.

#### **IV. COMPETITION POLICY IMPLEMENTATION WORKING GROUP**

Another working group that has been very active in the last year through its subgroups is the Competition Policy Implementation Working Group. I am just going to highlight a couple of areas that, in my view, constituted the most invaluable deliverables addressed in Cape Town.

##### **i) The Effectiveness of Technical Assistance Subgroup**

As a network composed of both younger and established agencies, support for capacity building has been a major focus of the ICN since its inaugural annual conference in Naples. The ICN has avoided being a “developed country-centred” institution and has been integrating the interests of members from developing countries into all its activities.

As a result of input from newer competition agencies at the 2005 Bonn conference, the Effectiveness of Technical Assistance Subgroup undertook a pilot program intended to make it easier for newer competition agencies to tap into the experience and expertise of their colleagues in more experienced agencies. An early evaluation of this program was discussed in Cape Town, with the conclusion that the program should be extended for a year and better publicized to ensure potential users of the program use it.

From my perspective, as the head of a division that periodically receives requests for technical assistance, I have found the program to be quite useful in focussing our modest efforts in this regard. The greater the transparency in identifying those subjects on which more experienced members are prepared to assist newer agencies, the better in ensuring efficient and timely responses to our sister agencies’ benchmarking and advisory needs.

##### **ii) The Business Outreach Subgroup**

A new area of ICN activity, launched at the 2004 Seoul annual conference, was the interface between competition enforcement and consumer/citizen outreach. Following the conclusion of this work, the ICN launched a subgroup on business outreach in 2005 tasked with helping ICN members reach out to businesses to promote a better understanding of the benefits of competition and build support for the role of competition authorities.

The work of the Business Outreach Subgroup has involved exploring the messages and mechanisms used by competition authorities around the world for business outreach, sharing successes and challenges, and compiling practical tools and examples for ICN members to use. Outputs included:

- a written report that draws together and analyses case studies of successful business outreach experiences;
- an electronic toolkit compiling business outreach practices from around the world;
- an interactive trivia game on competition policy; and finally
- a report focussing specifically on comparing the experiences of young competition agencies in their enforcement efforts.

I will now briefly highlight recent developments concerning the short-lived Telecommunications Services Sector Working Group and the newly-established Unilateral Conduct Working Group.

## **V. TELECOMMUNICATIONS SERVICES SECTOR WORKING GROUP**

Following its previous work on regulated sectors, the ICN decided to look at the telecommunications sector through the creation of a Telecommunications Services Sector Working Group with a one-year mandate. The overall purpose of this group was to provide insight into the role of competition authorities with respect to their enforcement and advocacy efforts in this rapidly evolving sector. In particular, the Working Group sought to examine how technology is affecting competition in this sector and the challenges that such technological innovation presents for competition authorities. To this end, the Working Group produced both a Report and suggested Best Practices.

The Report surveys existing literature concerning competition policy in the telecommunications sector, including such topics as technological advances, impediments to competition, and the interface between the competition authority and the sector-specific regulator. The Report also contains examples of recent jurisprudence concerning anticompetitive activities in the telecommunications sector, as well as a selection of developing country case studies. The suggested Best Practices, which were endorsed by members in Cape Town, are a set of valuable lessons learned with respect to promoting and maintaining competition in the telecommunications sector. They will enhance the ability of competition authorities in both developed and developing countries to promote and maintain competition in this sector through their enforcement and advocacy efforts.

Before I leave this subject, permit me to observe that this Working Group, struck barely a year ago, shows how efficient the ICN can be in producing work of real value to those interested in competition policy within quite a short time-frame. Indeed, one observer with long experience involving multilateral *fora* has expressed the view that the ICN should be likened to “The SWAT Team” of international cooperation.

## **VI. NEW UNILATERAL CONDUCT WORKING GROUP**

Finally, Cape Town saw the creation of a Working Group on Unilateral Conduct. Moving into the last major area of competition law which has not so far been examined by the ICN, the mandate of this new Working Group is to examine the challenges involved in addressing anti-competitive unilateral conduct of market dominant firms,



both domestically and internationally. In the first phase of its work, the Group will generate a report on general principles and methodological issues regarding dominance/market power and abusive practices for the next annual conference in Moscow. In its second phase, the Working Group will initiate a dialogue, share experiences, and exchange views on how to deal with certain abusive practices. Based on the feedback provided in Cape Town, members are interested in focussing on challenges arising from government-created monopolies as well.

We hope the legal, business and academic communities become actively involved in the work of this new Group and its Subgroups.

## **VII. CONCLUSION**

In conclusion, the ICN's fifth year has proved to be an impressive success with both the continuation of previous outputs and the introduction of new ones. It is notable that within such a relatively short time-span, both established and newer competition authorities have benefited from ICN work and, in a number of instances, ICN recommendations have led to conforming legislative and policy changes in jurisdictions of member agencies. The next three annual conference hosts have been confirmed and another jurisdiction has offered to host in 2010.

I look forward to discussing any questions the panel or audience may have on the recent ICN conference.

Thank you very much.