

The International Competition Network: Its Past, Current and Future Role

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* Views expressed are the author's alone and do not necessarily represent the views of the Federal Trade Commission, any individual Commissioner, or the ICN.

Roadmap

- ICN origins, why was it created?
- ICN model, organization and achievements
- ICN's Second Decade - looking back to the future
- Past attempts at a Global Competition Law
- ICN's Future Role

Description of the ICN

- Formed in 2001 by fourteen competition agencies
- Today, 114 competition enforcement agencies in 110 jurisdictions are members
- Next year is the start of the network's second decade
- Appropriate juncture to look back at the ICN's achievements, consider why the ICN is successful and to ask the question: What's next?

ICN Origins

- Boeing/McDonnell Douglas Merger - 1997
- FTC Statement closing the investigation observed that “[t]here has been speculation in the press and elsewhere that the United States antitrust authorities might allow this transaction to go forward . . . as the United States . . . needs a single powerful firm to serve as its “national champion.”
- On July 30, 1997, the EC concluded that Boeing had a dominant position which would be strengthened by the merger but cleared merger on basis of significant commitments by Boeing.

ICN Origins

- Nov. 1997, International Competition Policy Advisory Committee (“ICPAC”) formed.
- Joel Klein, Assistant AG for Antitrust, asked the members of the Committee to “think boldly about multijurisdictional mergers, international enforcement cooperation, and trade and competition policy issues.”

ICN Origins

- ICPAC Report issued in Feb. 2000
- Recommended:
 - (1) developing a more broadly international perspective on competition policy, with the goals of reducing parochial actions by firms and governments;
 - (2) fostering soft harmonization of competition policy systems;
 - (3) developing improved ways of resolving conflicts;
 - and (4) developing a degree of consensus on what constitutes best practices in competition policy and its enforcement.

ICN Origins

- “. . . recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a new venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can exchange ideas and work toward common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."”

ICN Origins

- On 3rd July 2001, the European Commission made a decisive move in rejecting the proposed \$42 billion merger between General Electric (GE) and Honeywell.
- The significance of this decision lay in the fact that it was the first time that EC Competition regulators decided to block a merger between two US companies which had already been approved by the DOJ.

ICN Origins

- On October 25, 2001, top antitrust officials from 14 jurisdictions – Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia – launched the ICN.

The ICN's Operations

- The International Competition Network. . . “is a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.”
- Followed the direction suggested by ICPAC

ICN Model

- Purpose
 - Promote procedural and substantive convergence around sound competition principles
 - Forum for officials to have regular contacts
 - Improved cooperation and coordination in enforcement policy
 - Reduction of unnecessary or duplicative processes / requirements
 - Dialogue on emerging issues
 - Practical emphasis

ICN Model

- Flexibility
 - Voluntary participation
 - No formalities
 - Address all competition topics
- Aspirational approach – no rule-making authority; non-binding work product: convergence by persuasion, not requirement

Organization

- Membership
 - Open to competition authorities
 - Members work hand-in-hand with non-governmental advisors (NGAs)
 - ICN is guided by a Steering Group (15 members + 3 ex officio members)
 - Chair selected by Steering Group, chair selects vice chairs
 - Steering Group guides ICN's vision and strategy

Organization

- Structure – virtual network
 - Project-based: Working Groups/Special Projects
 - Members and NGAs volunteer to participate in Working Groups
 - Create discrete, project-oriented work plans
 - Recommendations and papers are presented for adoption at annual conference
 - Communicate by conference calls, e-mail
 - Specific-topic teleseminars, webinars, and workshops

ICN Achievements

- Membership

- Membership has increased from 16 agencies from 14 jurisdictions in 2001, to 114 agencies from 110 jurisdictions in 2010.

- “Treasure trove” of work product

- Work product produced in the areas of anti-cartel enforcement, mergers, unilateral conduct, advocacy, agency effectiveness, capacity building, and regulated sectors; including best practices, case-handling manuals, reports, templates on laws and rules in member jurisdictions, databases and toolkits.
- Work product directly influencing member activity, many used in day-to-day practice as well as agency training programs.

ICN Achievements

- Creation of common standards in merger review, analysis, and unilateral conduct
 - Common standards leading to change, for example, more than half of ICN members have made changes to their merger control procedures to bring them into greater conformity with the ICN's suggested best practice ("Recommended Practices").
- Greater cooperation
 - Increased interaction has led to better case cooperation, additional exchanges of good practices, and a greater understanding of each other's laws and policies.

ICN's Second Decade

- Will convergence alone be sufficient to reduce transnational conflicts?
- The fact that two or more states have similar competition law systems does not necessarily reduce the probability that each will seek to apply its own laws to conduct that may violate the laws of both.
- Will soft law evolve into hard law?

ICN's Second Decade

- An agreement could reduce risk of jurisdictional conflict and resolve conflicts that arise.
- But the concept of an international agreement is not new.

Past Attempts at a Global Competition Law

- World Economic Conference in 1927
 - Objective of conference was to identify and remove obstacles to international trade, e.g., tariffs.
 - But recent wave of cartelization meant that discussions over cartels were most contentious.
 - Official Report described the establishment of an international judicial regime for cartels as impossible due to divergences in enforcement between countries.

Past Attempts at a Global Competition Law

- 27th Conference of the Inter-Parliamentary Union in 1930
 - called for a set of competition law principles to be developed by states and enforced internationally
- Great Depression and Second World War

Past Attempts at a Global Competition Law

- Bretton Woods program, included discussions to create an international institution to improve commercial relations and reconstruct global trade following WWII.
- International Trade Organization (“ITO”)
- Meeting in Havana in 1948 where final agreement negotiated.
- 57 countries attended and 53 signed the Havana Charter.
- Waited on US to ratify, but too late, international climate had changed (cold war) and US opted not to subject itself to jurisdiction of international organization without benefits of wide membership.

Past Attempts at a Global Competition Law

- WTO established in 1994, and appeared to be perfect for a multinational competition law regime.
- Karel van Miert, European Commissioner, appointed group to draft recommendations on the subject.
- 1995 report encouraging bilateral cooperation but thought that convergence was insufficient, favoring a worldwide competition code to be applied under the auspices of the WTO.
- Led to EC proposing working group at WTO's 1996 Singapore meeting.
- WTO Doha conference in 2001, declaration supporting efforts.
- WTO ministerial conference in Cancun, steady opposition from US and developing countries led it to be dropped from the agenda in 2004.

Past Attempts at a Global Competition Law

- Work by Commissioner Kovacic suggests these attempts were premature.
- wide acceptance of competition policy substantive standards, procedures and institutions seems to occur in three stages:
 - first, decentralized experimentation within individual jurisdictions;
 - second, identification of best practices or techniques;
 - finally, individual jurisdictions voluntarily opting in to superior norms.

Future Role

- Only now with continuing acceptance of ICN's best practices, along with efforts by OECD, UNCTAD and WTO that countries are beginning to consider the transition from second to third stage: opting in to superior norms.
- Developing world's suspicion that competition policies and practices were a disguise for globalization efforts is dissipating.
- Acceptance that superior competition norms can be identified, adopted and applied to promote economic development.

Future Role

- Are we at the stage where countries may opt into a multilateral agreement to achieve the additional benefits associated with a global agreement on principles that all nations now accept?
- Perhaps, not yet clear that there is a set of competition norms and best principles that are globally accepted, herein lies the challenge for the ICN for its second decade.

Future Role

- ICN's Second Decade should continue to build on its past successes and encourage best practices.
- Take one step further and start to objectively evaluate whether there is convergence around a set of identified competition law norms.
- Currently, countries do not have to adopt any of the ICN's recommended best practices, and unclear whether being followed.

Future Role

- Possibly, group or rank nations depending on which norms they apply and their success in actually putting them into effect.
- Goal is to establish an objective means to evaluate competition agencies.
- Only through objective evaluation will it become clear the extent to which jurisdictions are converging around a set of competition norms and process
- Will also assist in identifying exactly which norms and processes are considered best practices and those that are being applied.
- If convergence is evident, then the next attempt at a multilateral agreement in accordance with those principles and processes will face greater prospects for success than in the past.

Looking Back at the Future

“The Advisory Committee recommends that the U.S. government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles to govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere.”

Looking Back at the Future

“The members of the mediation panel would be drawn from a roster of internationally respected antitrust and competition experts. An examination of a competition policy conflict by an expert panel will face many challenges. However, in some circumstances it could prove useful to clarify the competition policy characteristics of the problem at hand.”

ICN Website



www.internationalcompetitionnetwork.org