The International Competition Network (ICN) two years on: concrete results of a virtual network

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National and regional competition regimes have been proliferating around the world during the past 15 years or so. Estimates put the number of competition regimes of some sort or another at around 100. However, in the absence of internationally accepted competition standards, these regimes show a marked variety of features. This diversity presents a double challenge: on the one hand, it complicates the task of enforcement agencies that wish to co-operate in the investigation of potentially anti-competitive behaviour, given the often divergent procedural and substantive rules. On the other hand, the mushrooming of enforcement regimes has added to the financial and legal burden for businesses whose activities affect more than one jurisdiction.

Only the emergence of a broad global consensus on the right approaches to international competition problems is liable to remedy this situation. The desire to foster such a consensus through ‘soft’ convergence – i.e. without requiring jurisdictions to accept binding international rules - was at the heart of the decision by 14 competition authorities (1) in October 2001 in New York to launch the International Competition Network (ICN) (2). After the ICN’s highly successful inaugural conference in Naples in 2002, the leaders of many competition agencies, as well as a multiplicity of non-governmental representatives, convened in June 2003 in Mérida, Mexico, for the 2nd annual conference. This article seeks to explain where the ICN stands at the present time, and to summarise what has been achieved so far.

The ICN at a glance

One of the clearest testimonies to the ICN’s rapid development is the breadth of its membership. In less than two years, membership has risen from the 14 founding agencies to 79 member agencies, representing 70 jurisdictions (3), and more may yet join. The ICN thus represents the vast majority of the world’s existing anti-trust enforcers. This geographic spread puts the ICN in a pre-eminent position to address global antitrust issues generally, and more specifically to tackle issues of international co-operation in competition matters.

Membership in the ICN is open to national or multinational competition agencies entrusted with the enforcement of antitrust laws. About half of the existing members represent countries whose economies would generally be considered as being in the process of development or transition. In this sense, the ICN provides an appropriate forum for sharing experiences and expertise between well-established and more recent competition authorities. This is also echoed in the mission statement of the ICN which describes it as 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.’

One of the ICN’s salient features is that it involves the stakeholders of the various relevant anti-trust constituencies in its projects, namely experts from, in particular, the business community, consumer organisations, the ‘private bar’ and academia. The ICN also maintains close links with other international bodies working in the same field, such as UNCTAD and the OECD, which pursue complementary activities.

As befits an informal and virtual network such as the ICN, participation is voluntary and based on goodwill. In this spirit, the ‘Operational Framework’ (4) of the ICN only sets out a minimalist framework for co-operation. The day-to-day management of the Network is entrusted to a 15-member Steering Group which on the average...

(1) These were the anti-trust agencies from the following jurisdictions: Australia, Canada, EU, France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, the United Kingdom, the United States and Zambia.

(2) All relevant information on the ICN is publicly available at its web site: www.internationalcompetitionnetwork.org.

(3) Jurisdictions where two agencies have joined include Belgium, France, Malta, Romania, the United Kingdom and the United States. There are three agencies from Brazil and South Africa.

meets once per month, usually via conference call. After two successful years at the helm of the Steering Group, the Canadian Competition Bureau recently passed on this role to the Mexican Federal Competition Commission, thus underlining the important role that emerging economies play in the ICN.

The ICN’s work projects

But what has the ICN achieved during its first two years of existence, and what will be the main focus of its activities in the run-up to its third annual conference, scheduled for 21-22 April 2004 in Seoul?

Control of multi-jurisdictional mergers

One of the most prominent of the ICN’s efforts to date has been the achievements of the ICN Working Group on Merger Control, which consists of three sub-groups dedicated to: 1) notification & procedures in merger control, 2) the analytical framework for merger control, and 3) investigative techniques in merger investigations.

The mission of the Notification & Procedures sub-group includes a number of projects, including the creation of a compendium of web links to facilitate ready access to merger laws worldwide, the preparation of templates to facilitate comparison of key features of worldwide merger systems, and the compiling of available information on the costs and burdens of multi-jurisdictional merger review. The results of each of these projects can be found on the ICN website (1), and are frequently accessed by interested parties.

However, the most visible and important projects undertaken by the subgroup consist in the development of Best practices for investigating mergers, including (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. Its focus, so far, has been on exchanging practical information and experience between agencies, rather than working on recommendations to be agreed by the ICN member agencies. An example of this was the 2-day international merger investigation workshop for staff lawyers and economists which was held on 21/22 November 2002 in Washington. The workshop consisted of several panels on the investigative tools used in the different jurisdictions, the agencies’ experience with these tools, as well as on the role of economists in merger investigations and possibilities to enhance international co-operation in merger case investigations. Also the private sector perspectives on merger review processes was represented at the conference.

The sub-group’s work plan up until the next Conference in Seoul foresees, inter alia, additional work on further Recommended Practices, as well as an examination of appropriate ways to promote conformity with Guiding Principles and Recommended Practices. The latter may take the form of speeches and articles, contacts with other competition agencies, promotion of the practices through training programmes, through “leading by example”, and so on. The sub-group will also consider whether to pursue the development of separate recommended practices for merging parties, third parties and their legal advisors.

The Subgroup on Investigative Techniques is active in the field of development of best practices for investigating mergers, including (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. Its focus, so far, has been on exchanging practical information and experience between agencies, rather than working on recommendations to be agreed by the ICN member agencies. An example of this was the 2-day international merger investigation workshop for staff lawyers and economists which was held on 21/22 November 2002 in Washington. The workshop consisted of several panels on the investigative tools used in the different jurisdictions, the agencies’ experience with these tools, as well as on the role of economists in merger investigations and possibilities to enhance international co-operation in merger case investigations. Also the private sector perspectives on merger review processes was represented at the conference.

(1) www.internationalcompetitionnetwork.org.
(2) Adopted at the plenary session in Naples on 29 September 2002, see ICN homepage.
(3) All seven Recommended practices can be found at the ICN homepage.
At the Mérida Conference, the group presented a **Summary report on investigative techniques** used in 35 ICN jurisdictions, as well as an overview of methods for developing **reliable evidence**, and a report regarding the **role of the economists** and econometric data (1).

The subgroup may proceed with further papers on other subjects discussed at the 2002 workshop. There would appear to be scope for developing best practice recommendations for merger investigations and this option is also being considered. Another workshop will be held in autumn 2004, probably hosted by the EU in Brussels, at which it is expected that there will be more emphasis on the use of hypotheticals, and sessions in smaller groups.

Finally, the **Analytical Framework Subgroup** is focusing on the general analytical framework for merger review, including the substantive standards for analysing mergers and the criteria for applying those standards. Information has been compiled on the substantive standard applied in each member jurisdiction, including information on enforcement guidelines or other interpretative material.

At the Mérida Conference, the sub-group presented a series of **research papers** produced by non-governmental experts, who were commissioned to study the merger guidelines of 12 jurisdictions (including the EU’s draft guidelines on horizontal mergers) (2). Five papers have been produced, on: (i) market definition, (ii) unilateral effects, (iii) coordinated effects, (iv) barriers to entry and expansion, and (v) efficiencies. While the papers are still in draft form, the intention is to finalise them in the coming months with a view to publishing a final authoritative report in the autumn of 2003. Although it is not currently envisaged to produce an actual set of recommended merger guidelines, the sub-group intends to work towards framing proposals for the topics that “model merger guidelines” should cover and, perhaps, to prepare a list of questions they should address.

**Capacity building in developing and transition economies**

As membership in the ICN is quite comprehensive, it groups together agencies with varying degrees of experience with competition law and policy: whilst a few jurisdictions pride themselves on having a national competition legislation dating back more than a 100 years, a significant proportion of ICN member agencies has only had a couple of years to gradually acquire the know-how and standing that are so crucial to the effective implementation of competition policy. One of the key purposes of the ICN is thus to share the expertise of the well-established agencies with those that are still building up their capacity to implement a credible competition policy.

Gaining stature on the domestic scene through credible and consistent enforcement work is a tall order for any competition agency. In the particular context of an emerging market economy, it is likely to be an even more difficult task. Many young competition agencies in developing and transition economies find the economic, administrative and political environment in which they are operating particularly challenging.

Under the joint leadership of the European Commission and the South African Competition Tribunal, ICN members in Mérida presented a comprehensive **Report on Capacity Building** that sets out how these challenges could be successfully addressed. (3) In particular, the report discusses how the efficiency of the programming and delivery of technical assistance – as external support to the national/regional capacity building process – can be further enhanced.

Adopting a long-term horizon, there are good reasons to argue that it is not only the recipient country that will benefit from such technical assistance in terms of know how and finances. Those who wish to create functioning governance mechanisms in a globalising world, will inevitably have to rely on effective enforcement structures in many parts of it. In this sense, support for individual elements of the emerging network of enforcement structures will over time also contribute to the development of an overarching, international global framework for co-operation.

With the many issues that the Report on Capacity Building has identified, the relevant working group has its work cut out until the ICN’s Seoul conference, now under the joint chairmanship of the European Commission, and of Mexico’s Federal Competition Commission. First of all, the working group is currently developing an on-line ‘**loose-leaf manual**’ comprising practical tools that should facilitate the design of effective assistance projects. Moreover, DG Competition envis-

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1. All these documents may be found at the ICN homepage.
2. The 12 jurisdictions are: Australia, Brazil, Canada, the EU, Finland, Germany, Ireland, Japan, New Zealand, Romania, the US and the UK.
ages organising, in February 2004, a Workshop to foster the dialogue between aid granting bodies (as the providers of assistance funds) and enforcement agencies with their special expertise in competition policy. Finally, the regional competition frameworks that are currently emerging in various continents – often, it should be noted, with financial support from the European Commission budget (1) – will receive particular attention. Time permitting, the results of these efforts may also be condensed into a recommendation, or ‘checklist’, of issues that ought to be considered when elaborating new assistance projects.

**Competition Advocacy**

The ICN has already largely completed its work in the field of competition advocacy. To avoid a frequent misconception, it should be noted that this term does not allude to the role that lawyers play in the implementation of competition policy. ‘Advocacy’ rather refers to the non-enforcement activities of competition agencies that seek to prevent or redress distortions of competition created by state intervention. In Naples, this academically rather neglected subject had already been the object of a Report ‘Advocacy and Competition Policy’ (2).

In Mérida, the advocacy working group presented the results of two follow-up studies. (3) First of all, ICN members had carried out a survey of the legal provisions that govern their advocacy efforts. This survey gives an impressive overview of the varying legal and institutional frameworks in which agencies carry out their advocacy missions. The survey concluded with the observation that no clear connection could be drawn between the effectiveness of an agency’s advocacy work, and the wording of the legal provisions underpinning its work. Secondly, the working group examined how certain competition agencies have used their advocacy powers in relation to the following four regulated sectors: (i) telecommunications, (ii) energy, (iii) airlines, and (iv) the legal professions.

In addition, the working group has begun to set up an on-line data base, or ‘Information Centre’ which is intended to give ready access to interesting cases and other initiatives of the many competition agencies that have joined the ICN. This project is expected to gain in momentum over the coming months, as a growing amount of information is made available. Finally, the former advocacy working group presented in Mérida a tool kit for agencies’ advocacy work, covering for example media relations. As part of this tool kit, DG Competition had prepared a CD-ROM that gives an overview of its own advocacy initiatives.

**Conclusion**

After less than two years of the ICN’s existence, few would dispute that it has produced some very concrete results. More is set to come as the ICN launches new work projects over time. For example, in Mérida, ICN members decided to start discussing the challenges and peculiarities of anti-trust enforcement in the so-called ‘regulated sectors’, such as utilities and the professions.

It may be argued in some quarters that the ICN recommendations are entirely non-binding and that they will therefore make little difference in practice. But in our view, the very strength of the ICN lies in this ‘soft-law’ approach, enabling it to make such swift progress. The resulting flexibility has already facilitated the drawing up, unanimous endorsement and promulgation of an impressive and growing body of accepted principles and best practices, and this despite the diversity in the Network’s membership. The organisation is built upon the understanding that each jurisdiction, as a voluntary participant in the process of convergence, is itself best placed to decide how and to what extent domestic reforms of its competition regime might be desirable, drawing inspiration from this multi-lateral project.

While much remains to be done, the achievements of the ICN in just two short years are undeniable. It is only a question of time until the tangible benefits of this virtual enterprise will be felt quite concretely in the ‘real’ world of anti-trust enforcement across the globe.

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(1) Such as the Common Market for Eastern and Southern Africa (COMESA), or the Andean Community.