The launch of the new ICN Cartel Working Group

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Following its successful events in Naples (2002) and Merida (2003), the recent Seoul Annual Conference of the International Competition Network (ICN) brought together for a third time more than 100 senior anti-trust officials to promote cooperation and convergence in international competition policy. The conference, one of the largest competition conferences ever organised on the Asian continent, was also attended by a significant number of advisors from the private sector, the consumer movement, and academia.

The conference was marked by two major highlights: the adoption by all ICN Members of a set of **four new Recommended Practices for the review of multi-jurisdictional mergers** (2), and the creation of a new key project, the **Cartel Working Group**.

In Seoul, ICN Members invited DG Competition of the European Commission and the Hungarian Office of Economic Competition to assume the overall responsibility for the new Cartel Working Group. At the same time, after two intensive years at the helm of the ICN’s Working Group on Capacity Building and Competition Policy Implementation (CBCPI WG), the Commission was able to pass on this task into new hands. The Korean Fair Trade Commission and the Secretariat for Economic Monitoring of Brazil’s Ministry of Finance were nominated as new joint chairs for the (renamed) Competition Policy Implementation Working Group.

**New Cartel Working Group**

Until the Seoul conference, the ICN had focused on mergers and on advocacy/capacity building, complementing its extensive work in those areas only with discussions on the rather specific subject of anti-trust enforcement in the regulated sectors. Yet there has always been universal agreement that for a body like the ICN, comprising almost all of the world’s existing anti-trust authorities, it could only be a matter of time until the issue of cartels would come onto its agenda.

Against this backdrop, ICN member agencies in Seoul decided that the time had come to remedy this gap, and to begin discussions on how to better cooperate in the fight against cartels, and to gauge the scope for convergence across jurisdictions.

For many anti-trust agencies, the fight against cartels, and in particular against hardcore cartels (i.e. cartels directed at price fixing, bid rigging, market sharing and market allocations) is at the heart of their enforcement activity. The fight against international cartels is also a key element in the creation of well-functioning governance mechanisms in a globalising world.

As is noted in the mandate creating the Cartel Working Group, globalisation has created worldwide markets for many products and services, but it also presents certain challenges to competition authorities. They are faced with cartel activity that is increasingly cross-border. For competition agencies that remain national or regional, the pursuit of international cartels is, for both legal and practical reasons, particularly demanding.

At the same time, the mandate of the Cartel Working Group recognises the need to address the challenges of anti-cartel enforcement also at the domestic level by sharing agencies’ experiences.

In all its works, the new Working Group will exercise care to respond to the interests and needs of younger competition agencies, which typically represent developing and transition economies.

The new Cartel Working Group will be able to build on the important work already undertaken in other *fora*, such as the OECD and the WTO. Moreover, the success of the Merger Working Group is already providing some useful inspiration as to how this project could make a real impact on agencies’ daily enforcement and advocacy work in the cartel area.

However, one must also be aware of the constraints that any attempt at international convergence in the fight against cartels has to contend with. One of the key challenges for the

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(1) Complete information on the ICN, including all relevant conference material discussed at the Seoul conference, is available www.internationalcompetitionnetwork.org.

(2) For a presentation of these Recommended Practices, as well as of other issues on the agenda in Seoul see *Roebling, Ryan* and *Sjöblom, The International Competition Network (ICN) two years on*, 3 Competition Policy Newsletter (2003), page 37.
Cartel Working Group will be to do justice to the diversity of legal systems which govern the anti-cartel work of ICN member agencies. By way of illustration, suffice it to recall that some jurisdictions prosecute cartels as a criminal offence, whilst others have opted for a civil administrative prosecution system. These differences between the legal systems inevitably have repercussions on, for example, agencies' competencies, on the tools that they can use to detect cartels, on the entity that can be prosecuted (companies and/or individuals), and on the sanctions that can ultimately be imposed on offenders (e.g. fines and/or imprisonment). This diversity will make the elaboration of such non-binding yet aspirational global standards in the form of ‘Recommended Practices’ a task that will be at least as challenging as it has been in the merger area.

The Structure of the Cartel Working Group

The Cartel Working Group has organised its substantive discussions in two subgroups:

A first Subgroup, led by the US Department of Justice and its Brazilian counterpart, the Secretariat of Economic Law at the Ministry of Justice, will work on the basic concepts related to the necessity and benefits of the fight against cartels. The mandate envisages that this Subgroup would define categories of hard core cartels, their harmful economic impact on the market and their negative effects on consumers.

It remains to be seen in which format the Subgroup will present its first conclusions to the ICN’s 4th Annual Conference, scheduled for June 2005 in Bonn. Apart from a comprehensive stock-taking exercise, it would however, and despite the aforementioned challenges, not be unrealistic to expect that a number of Guiding Principles, or similar recommendations, could be put forward.

A second Subgroup, jointly chaired by the Canadian Competition Bureau and the Australian Competition and Consumer Commission, seeks to support competition agencies in the development and refinement of their practical enforcement techniques. To this end, agencies will share with their peers their experiences on a range of investigation techniques. The list of suitable issues for discussion is long but likely to include, at some stage or another, such key tasks as how to detect cartels with or without leniency applications, how to conduct productive inspections, how to collect evidence that will withstand scrutiny in court, and how to operate an effective leniency program.

Also this group is still reflecting on how to present the results of its work to the Bonn conference. There is however an idea emerging of building up, over the next few years, a manual which would summarise successful investigation techniques. In addition, this group will also be responsible for the preparation of the International Cartel Workshop (ICWS), a training event directed at the staff of agencies involved in cartel investigations. The next ICWS will take place in Sydney in November 2004.