

INTERNATIONAL COMPETITION NETWORK

UNILATERAL CONDUCT WG

MANDATE

The approach to anti-competitive unilateral conduct by market dominant firms under competition rules is an area of competition policy where there exists a wide variety of views and practices by competition authorities. Most competition agencies will consider it their mission to ensure that all companies, including dominant ones, compete on the merits. But jurisdictions interpret differently how to fulfil this mission.

In an increasing number of instances the same anti-competitive unilateral conduct of multilaterally-operating market dominant companies is investigated by two or more national competition authorities under their own respective legislation. Moreover, remedies imposed by a competition authority with respect to anti-competitive unilateral conduct by market dominant firms in its own jurisdiction may also have effects in other jurisdictions, or conflict with remedies adopted in other jurisdictions.

The exchange of views and experiences on issues relating to anti-competitive unilateral conduct by market dominant firms can serve to promote greater convergence and better enforcement of remedies.

With a view to this, the ICN Steering Group of 9 June in Bonn decided that a mandate for an ICN working group on anti-competitive unilateral conduct should be prepared in anticipation of the creation of a working group on that issue.

The mandate of the Unilateral Conduct Working Group is to examine the challenges involved in addressing anti-competitive unilateral conduct of market dominant firms, both domestically and internationally.

The Working Group attaches particular importance to responding to the interests and needs of agencies from developing and transition economies. To this end, the Working Group will study ways to facilitate the active participation by these agencies in its proceedings.

During the last three years, the OECD has addressed directly or indirectly issues concerning unilateral conduct at round tables on competition policy on a number of occasions. Whereas the Working Group can certainly draw on the work undertaken by that forum, it is felt that it would be preferable if the work of the Working Group starts at a more fundamental level.

The preparatory discussions showed consensus among ICN members that the Unilateral Conduct Working Group should have two objectives, which should correspond to two phases of activity, the second phase starting after completion of the first. The present Mandate defines the scope of the Unilateral Conduct Working Group. The Mandate is intended to provide guidance to the Working Group, while allowing flexibility for refinement.

Objective/Phase 1:

In the first phase, the Working Group will launch a dialogue, share experience and exchange views on general principles and methodological issues regarding dominance/market power and abusive practices. The Working Group aims to submit a report to the annual conference at the end of its first year of activity, covering some or all of the topics below.

- Stocktaking with a view to reflecting objectives of competition laws controlling unilateral conduct of market dominant firms.
 - Consumer welfare objectives or other objectives?
- What is dominance/ market power?
- Level of intervention: acquisition of market power or only once dominance/ market power is acquired?
- Assessment criteria for dominance/ market power:
 - Market position of firm in question;
 - Market position of actual competitors
 - Buying power;
 - Potential competition/ entry barriers;
 - Durability factor (does the dominance/ market power exist on a lasting basis or do market shares fluctuate significantly over time?);
 - Relationship between IPR rights and dominance/market power;
 - Other factors.

Objective/Phase II

In the second phase, the Working Group will initiate a dialogue, share experience and exchange views on how to deal with certain individual practices.

- Abusive conduct:
 - Test(s) for distinguishing pro-competitive from anti-competitive unilateral conduct;
 - For instance: competition on the merits, per se rules/ effects based approach burden of proof/ presumptions;
 - Types of abuses;
 - For instance: exclusionary/ exploitative abuse/ discrimination;
 - Defenses;
 - For instance, efficiency defense/ meeting competition defense/ other defenses;
 - Specific abuses;
 - For instance: predation, rebates, refusal to supply, etc.
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