

A REPORT ON THE FOURTH ANNUAL CONFERENCE OF THE INTERNATIONAL COMPETITION NETWORK*

By Professors Josef Drexl and Dirk Schroeder

The Fourth Annual Conference of the International Competition Network (“ICN”) was held in Bonn, Germany, on June 6-8, 2005. With more than 400 participants the Fourth Conference was the largest competition experts’ gathering to date. Representatives of more than 80 antitrust agencies, non-governmental experts (so-called non-governmental advisors (“NGAs”)), observers and special guests had come together in Bonn to continue their valuable work on cartel enforcement, merger review, antitrust enforcement in regulated sectors and competition policy implementation; to discuss reports on effective anti-cartel regimes, preliminary work products on merger assessment and procedural aspects of international cooperation in merger cases, and the preliminary results of a study on successful technical assistance; to debate the expectations of and challenges for younger competition authorities within the ICN; to adopt two new ICN recommendations for merger notification and review procedures; and to discuss proposals for future work.¹ The conference took place in the former plenary chamber of the Bundestag, the lower house of Germany’s legislature.

I. Opening of the Conference

The ICN Conference was opened by **Dr. Ulf Böge**, President of the Bundeskartellamt, host of the Conference and Chairman of the ICN Steering Group.² Dr. Böge pointed out that, given that the ICN is a member-driven organization, it is a very special and important event when all members got together once a year. He referred to the ICN’s development: In 2001, competition agencies from 14 jurisdictions founded the ICN, which, today, comprises 91 competition authorities from 81 jurisdictions. He welcomed representatives of more than 80 of these 91 authorities from all over the world. Dr. Böge acknowledged the hard work invested by all participants since the last ICN Conference in Seoul, with the result that there was more numerous and extensive work product available than ever before. He emphasized that such result could not have been achieved without the ICN members’ commitment and input from external participants. He particularly thanked the NGAs, the OECD, the WTO, the World Bank, UNCTAD, and other organizations. The ICN Conference participants would assess and discuss the highly practical work results, implementation of ICN work product, and how to advance the ICN’s work and prepare the next Annual Conference to take place in Cape Town in 2006. Dr. Böge was particularly pleased that more than 30 “young” competition authorities from developing and emerging countries were participating. He pointed out that, for the first time, the 2005 conference would feature a panel exclusively dedicated to the needs of “young” competition authorities.

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¹ The Conference materials are available at:

http://www.internationalcompetitionnetwork.org/annualconferences_bonn.html.

² Available at: <http://www.internationalcompetitionnetwork.org/bonn/2005speeches/openingspeech.pdf>.

He then introduced the opening speaker, Dr. Axel A. Weber, President of Deutsche Bundesbank and Chairman of its Executive Board. Dr. Böge noted that both competition and monetary policy play key roles in a country's economic policy. Since the ICN had always been open to interdisciplinary comments, it was appropriate that the opening speech would be given by a specialist in monetary policy. Dr. Böge stressed the specific cooperation between the Deutsche Bundesbank and the Bundeskartellamt in Germany. Germany used to have exceptions from the scope of competition law for the banking sector. However, the upcoming 7th amendment to the Act Against Restraints of Competition would almost entirely eliminate these exceptions. The Deutsche Bundesbank has a supervisory role vis-à-vis German banks, and many Bundeskartellamt decisions concerning the banking sector are still subject to prior consultation with the Deutsche Bundesbank. However, the most important feature common to the Deutsche Bundesbank and the Bundeskartellamt is their independence, which ensures that both institutions are not subject to instructions from any other authority. Dr. Böge emphasized the important role such independence plays for the way the two institutions carry out their work and perceive themselves.

Dr. Weber gave a keynote speech about the interrelation between monetary policy and competition.³ Monetary policy benefits from competition in several ways: First, Dr. Weber explained, the more intense the competition, the better the allocation of scarce resources functions at the macro-economic level. A better allocation in turn accelerates economic growth. Higher growth facilitates the implementation of monetary policy. While, even in times of growth, monetary policy must be tailor-made, the risk of its malfunctioning is smaller. Wages and prices, with little flexibility for decreases, have less of an impact in times of growth, and structural change can take place more smoothly. Moreover, increasing growth reduces relative public debt and potential fiscal policy pressure on the central bank. Second, he elaborated that intense competition also leads to an accelerated elimination of existing distortions. Opportunity cost can exercise pressure on prices to adapt themselves to an acceptable level. Eliminating distortions at a faster pace can help to avoid abrupt shifts. Overall, shocks can be dealt with more quickly and easily, which is in the direct interest of a monetary policy charged to maintain stability. Third, intense competition directly limits pricing power, both of enterprises and of employee associations. Accordingly, competition creates a natural counterweight to a possible wage/price increase effect. Asymmetrical shocks, such as a significant increase in energy costs, can then be better compensated for and absorbed and have less impact on consumer prices. Finally, intense competition accelerates the monetary transmission process and can thereby reduce insecurity for monetary policy and reacting markets.

Dr. Weber continued by explaining that monetary policy that aims at ensuring stability in turn encourages competition. He pointed out that stable monetary value accentuates the significance of prices. At a stable price level, changes in price reflect changes in relative scarcity. Consumers' and investors' reactions to such price signals are thus justified and improve welfare. If in contrast, people or markets are unable to rely on stable monetary value, prices lose their signaling character. That would create costs because auxiliary tools would then have to be used to determine scarcity or because of poor investments. Dr. Weber added that a stable monetary policy supports the acceptance of the results of market competition, because it facilitates a policy of repartition. He noted that inflation affects recipients of nominally determined income (wages, pension) more than owners of capital, and that inflation ranks among the top three problems of modern societies. Accordingly, stable

³ The speech is available at <http://www.bundesbank.de/download/presse/reden/2005/20050606weber.pdf>.

monetary value builds people's confidence in prices, values and in the entire economic system. He considered price stability to be decisive for acceptance of our system of competition regulation.

Dr. Weber then considered the issue of central banks and sector-specific regulation. He found that since the 1970s, regulation has been increasingly based on the interaction of competitive forces. The old paradigms of prohibiting and limiting transactions have been modified on a step-by-step basis. Dr. Weber noted that, today, regulation primarily demanded sufficient transaction coverage, for instance through provision of sufficient equity and transparency. Generally, regulation facilitates product innovation, relies on responsible consumers and encourages competition. In this context, he referred to the Basel II Accord, which is based on competition in all three pillars, *i.e.*, in minimum capital requirements, in the supervisory review process, and in the enhanced disclosure of risk information.

Dr. Weber stated further that a stability-oriented monetary policy encourages competitiveness. He specified that this is particularly true with respect to the Euro monetary policy and Germany. He emphasized that the German macro economy benefits from the Euro and from the Euro system's success in maintaining stability. He referred to a recent discussion dealing with the perception that the European Monetary Union is responsible for Germany's weak economic growth. The argument put forward to support that view mainly focuses on the fact that the nominal interest rate level in the Euro zone is uniform, which, if inflation in Germany were to be below average, would lead to a disproportionate "real" interest rate in Germany, thereby stifling growth. Dr. Weber rejected this argument. He pointed to data showing that there is no increasing divergence of inflation or output in the Euro zone. He acknowledged that a lower inflation rate in Germany could hamper business activity through increased real interest rates in the short term. However, such an effect would be overcompensated for by increasing price competitiveness, at the latest in the medium-term. He noted further that the relevant real interest rate for investment decisions in Germany should be based on an *ex ante* assessment because of the future-oriented character of investment decisions. Based on an *ex ante* view, true interest rates in Germany are not higher than European average. Dr. Weber finally turned to the question of how to explain Germany's weak economic performance. His response was that more competition is required. He advocated tackling the structural problems of the labor market, making the tax system competitive, eliminating the negative incentives provided by the social security system, balancing state finances and creating a consistent concept in order to re-establish the public's trust.

II. Plenary Session of the Cartel Working Group

Philip Lowe, Director General at the European Commission's Directorate-General for Competition, opened the Cartel Working Group plenary session. He congratulated the ICN on the considerable progress it had made, which was evident from the working papers produced. Cartels lead to significant price increases, which harm consumers. Mr. Lowe gave an overview of the European Commission's recent anti-cartel enforcement activities. The majority of cartels were of long duration, *i.e.*, of more than five and of up to 30 years' duration. Since the modernization of EC competition law, the European Commission and the national competition authorities ("NCAs") have been applying one and the same law. Mr. Lowe also referred to the information exchange in the European Competition Network. While the Commission's enforcement activities are substantial, the record of the NCAs is also very important. The new procedural regulation (Regulation 1/2003) has strengthened the

Commission's investigatory powers. The Commission and the NCAs are aiming to simplify leniency procedure, perhaps even to create a "one stop shop". The Commission was finalizing the creation of a single unit (directorate) for cartel enforcement. There had been a record number of inspections, decisions, and fines. Since the introduction of its second leniency notice in 2002, there had been 50 on-site inspections, 30 decisions and fines totaling nearly €4 billion. Mr. Lowe noted that Vietnam and Egypt recently adopted anti-cartel laws. Japan and Switzerland were toughening sanctions, thereby increasing the effectiveness of enforcement. However, unilateral action is not sufficient; the competition authorities were already working bilaterally, but would now need to cooperate openly to demonstrate to potential cartelists what they were up against. At the multilateral level, the ICN had created the Working Group on Cartels in Seoul last year. Issues addressed by the working group were: (1) the institutional framework of anti-cartel programs, (2) the separation of investigative and prosecutorial functions, (3) sanctions (under- or over-punishing cartels; whether there is a need for criminal sanctions), (4) transparency in the imposition of sanctions, and (5) effective investigatory powers (how to conduct efficient searches; leniency programs).

A. Panel 1: Effective institutions, effective sanctions, legal privilege

Emil Paulis, a Director at the European Commission's Directorate-General for Competition, and **József Sárai**, head of the international department of the Hungarian competition authority (GVH), co-chaired the first panel. Other panelists were: *Geoff Parr*, Chief Economist of the Competition Commission of South Africa, *Scott Hammond*, Deputy Assistant Attorney General of the U.S. Department of Justice, *Dr. Felix Engelsing*, Head of the German and European Cartel Unit of the Bundeskartellamt, and *Denyse MacKenzie*, Senior Deputy Commissioner of the Canadian Competition Bureau. Mr. Paulis described the main objective with the question: "What can we do to fight the cardinal sin?" The panel discussed three topics: (1) the organization and set-up of an antitrust agency's anti-cartel enforcement efforts; (2) the optimal punishment and the transparency of sanctioning, and (3) practical problems in searches and raids involving legal privilege.

Overview of the Cartel Working Group's activities

Mr. Sárai first provided an overview of the first year's activities of the Cartel Working Group that had been created on April 22, 2004, during the ICN's Third Annual Conference in Seoul.⁴ Under the co-chairmanship of the European Commission and the Hungarian Office of Economic Competition, the Cartel Working Group aimed at addressing anti-cartel enforcement challenges, assisting ICN members with different levels of experience and focusing on the interests of agencies in developing and transition economies. The Working Group has two subgroups: the General Framework Subgroup and the Enforcement Techniques Subgroup. The General Framework Subgroup, with 18 members under the co-chairmanship of Brazil's Secretariat for Economic Law and the United States Department of Justice, Antitrust Division was intended to address legal and conceptual challenges of anti-cartel enforcement and had prepared a joint report⁵ identifying effective **Building Blocks for Effective Anti-Cartel Regimes**. The first building block addressed the issue of defining hard

⁴ His presentation is available at:
http://www.internationalcompetitionnetwork.org/bonn/2005speeches/Cartel_WG_report_Sarai_20050606slide.pdf.

⁵ Available at:
http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG1_General_Framework/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

core cartel conduct. The second building block addressed the issue of effective institutions, *i.e.*, the institutional set-up of enforcement agencies suited to the detection, investigation and punishment of cartels. The third building block concerned the question of effective penalties. The building blocks were based on responses from 20-30 agencies to questionnaires circulated by the subgroup.

The Cartel Enforcement Techniques Subgroup, with 23 members under the co-chairmanship of Australian Competition and Consumer Commission and the Canadian Competition Bureau, is practice-oriented and aimed at improving the effectiveness of anti-cartel enforcement through the identification and sharing of specific investigative techniques. The subgroup planned a Cartel Workshop and Leniency Workshop, both hosted by the Australian Competition and Consumer Commission in Sydney in November 2004. Further, it had prepared an **Anti-Cartel Enforcement Techniques Manual**, two chapters of which were presented to the Conference.⁶ The first chapter provided a concise summary of good practices in the carrying out of searches, raids and inspections. The second chapter dealt with the drafting and implementation of an effective leniency policy, based on the results of the Sydney workshop. Finally, the subgroup had produced an Anti-Cartel Enforcement Template⁷ to gather information about ICN members' anti-cartel enforcement.

Effective institutions

Mr. Parr addressed the topic of institutional set-up. He presented the two fundamental choices to be made: (1) whether to rely on a dedicated cartel unit or to use investigators with sector experience; and (2) whether investigative and prosecutorial functions should be separated or integrated.

With respect to the first issue, Mr. Parr discussed detection, investigatory skills, and resources. Leniency programs are very effective in detecting cartels, working on the “greed and fear” principle. A leniency program would benefit from a dedicated cartel unit, because people would then know to whom to address themselves. On the other hand, sector knowledge is important in knowing where to look and what to look for. Tight oligopolies might learn how to avoid detection. In terms of investigatory skills, he noted that lawyers and IT forensic specialists were better than economists, because it was more important to establish the infringement than to demonstrate its effects. The team of investigators should include leniency experts to promote trust. Investigators should possess interview skills and prevent evidence from being disqualified. If no leniency is forthcoming, there is then more room for sectoral expertise. The optimal use of resources depends on the nature and size of the authority. In a small authority, demand might be sporadic, so that a sectoral approach might be more appropriate.

Mr. Parr then elaborated on the issue of separation vs. integration of investigation and prosecution. While he considered an integrated system to be more efficient, the interests of impartiality and due process as well as the risk of bias spoke in favor of separation. Where there is no separation, it would be helpful to have checks and balances, for example, to have a

⁶ Available at:
http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG2_Enforcement_Techniques/Anti-Cartel_Enforcement_Manual.pdf.

⁷ Available at:
http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG2_Enforcement_Techniques/Anti-Cartel_Enforcement_Template.pdf.

fresh pair of eyes review a case. In South Africa, for instance, investigators might involve independent counsel or an economist.

In the subsequent **discussion**, a representative of the Danish competition authority underlined the need to balance efficiency, impartiality and legal certainty. The Danish experience was that, in a small cartel authority, it is useful to let the investigators have more than just cartel enforcement responsibilities. Nonetheless, there is a need for contact points for the outside world, and prosecutors should not be too involved at the outset of a case. A Canadian representative explained that they had set up sector teams whose members could be pulled into the cartel unit. The investigators cooperate with the prosecution service reporting to the Department of Justice, but the members involved would then not be the ones who decide whether to prosecute a case. According to a delegate from Brazil, it is desirable to have specialized investigators in dedicated units and to separate investigatory and prosecutorial functions. However, which should come first? An Indonesian representative expressed a preference for combining a dedicated unit and a sectoral approach. Mr. Lowe explained that the European Commission had a learning process: it had put a premium on market knowledge, but had lost a degree of focus in anti-cartel work. The sectoral approach had decreased detection. As far as the separation of investigation and prosecution was concerned, the availability of separate teams of lawyers was a resource issue, but there were other checks. However, he would not exclude anything in the next two to four years. A delegate from Luxembourg reported that there is a strict separation between investigation and prosecution. However, such a separation is less important in administrative proceedings with subsequent judicial review.

Optimal sanctioning

Mr. Hammond gave a presentation on optimal sanctions and optimal deterrence. His starting point was the question whether the current mix of multi-government enforcement and private damage action litigation aimed at international cartel activity was resulting in under-punishment, over-punishment or optimal sanctions. Mr. Hammond's response was that, while currently under-punishment still prevailed, agencies were collectively moving toward optimal sanctioning. He reported that the trend was towards individual criminal sanctions, and that global deterrence of international cartels was improving. Mr. Hammond emphasized the need for individual liability and accountability. He identified general rather than specific deterrence as the primary objective in penalizing hard-core cartels. Restitution was not the primary objective of sanctioning, rather that of private litigation. Mr. Hammond highlighted that hard-core offenses were premeditated offenses, often committed by highly-educated executives who weigh the risk of detection against the potential positive rewards before deciding whether to commit the offense.

Mr. Hammond discussed the possible risks associated with under-deterrence, based on the premise that executives would be deterred from cartel conduct if they perceived the potential costs of engaging in such conduct exceeded the anticipated rewards. While he acknowledged that economists find it impossible to measure the level of deterrence, he wanted to give his view as a prosecutor on how U.S. enforcement had impacted hard-core cartels. Mr. Hammond referred to the "lysine tapes" as a first milestone, which sent shockwaves through the business community when business people realized that the FBI could be watching them. The investigation seemed to deter some executives from engaging in cartel behavior, and compliance programs were put into place. On the other hand, cartel members became more sophisticated and concealed conduct from U.S. detection. For instance, they avoided meeting in the United States or having U.S. executives involved. The second milestone to which Mr.

Hammond referred was the first European executive agreeing to serve a prison term in the United States in May 1999. Since then, 16 foreign nationals from seven countries, as well as 53 U.S. citizens have served prison sentences for infringement of U.S. antitrust laws. Mr. Hammond elaborated on proof of actual deterrence as the third milestone. He reported that the Department of Justice recently detected cartels that did not extend their activities to the United States, even though the United States was amongst the largest and most lucrative markets, because they feared U.S. sanctions. Mr. Hammond concluded that the risk posed by under-punishment in a particular country was that the cartel would target that country's businesses and consumers.

Subsequently Mr. Hammond addressed the risk posed by over-punishment. He observed that over-punishment for early cooperators diminished incentives to cooperate. While many agencies had leniency programs with immunity for the first applicant, there was a need to also have the second and third applicant come through the door. Moreover, the cumulation of fines, restitution and damages should not result in companies being driven out of the market and competition being further reduced as a result. In Mr. Hammond's experience, levying a sufficiently high fine was often not possible because of the risk of insolvency.

Mr. Hammond referred to a recent study⁸ that determined the average cartel overcharges to be around 25%, and 32% in international cartel cases. Fines would need to be a multiple of that overcharge in order to deter cartel activities. The threat of imprisonment was the single greatest deterrent. Immunity against prosecution for individuals was the greatest incentive for seeking corporate leniency. Individual confessions are needed when no "hot" documents are found. Globally, deterrence is on the rise, moving in a positive direction towards optimal sanctions.

Transparency and effective penalties

Dr. Engelsing addressed the question whether transparency and/or predictability of fines would have a positive or negative impact on deterring cartels and encouraging leniency applications. Dr. Engelsing pointed out that in all systems, be they administrative, with the administration setting the fine, or judicial, with the court setting the fine, there is always a wide discretion in setting the fines up to the statutory limit. The European Commission, the Netherlands and the United Kingdom have fining guidelines. Germany had no such guidelines, because the relevant test is three times the extra proceeds generated by the infringement. If Germany were to switch to a general turnover threshold, as expected, it would also be appropriate to adopt fining guidelines. Transparency is positive if the predicted fine significantly exceeds the gains and the probability of detection. Otherwise, transparency is counterproductive. Since fines imposed in the EU, the U.S. and in Germany exceed gains, they should be transparent and predictable. Transparency also enhances leniency. The higher the expected fine, the more likely it is that companies will opt for leniency. An effective deterrent should take away the financial gain of a cartel, taking into account the probability of detection. German law comes close to that idea by fining up to three times the additional proceeds – this multiple takes into account the probability of detection. Nevertheless, a recent decision of a German court of appeal requires the Bundeskartellamt to prove the causality between the infringement and the additional proceeds "beyond reasonable doubt", which is difficult and which is a reason to opt for a turnover-based approach.

⁸ John Connor and Robert Lande, "How High Do Cartels Raise Prices?", *Implications for Reform of Sentencing Guidelines*, American Antitrust Institute Working Paper 04-01 (April 3, 2005), available at <http://www.antitrustinstitute.org/recent2/342.pdf>.

In the subsequent **discussion**, Mr. Hammond was asked how the DOJ had convinced Congress of the need for higher fines. He responded that the maximum amount of fines they could impose had increased tenfold from \$ 10 million to \$ 100 million and the maximum jail sentence had increased from 3 to 10 years, because they had won the battle to establish that cartel conduct is fraud committed by well-dressed thieves. Congress has approved the statutory maximum sentences. In response to a question from a member of the Australian ACCC as to the impact of this on smaller businesses, Mr. Hammond pointed out that fines are in large part determined by the volume of the business concerned. A delegate from Israel's antitrust authority pointed out that while transparency of sufficiently high fines would enhance leniency programs and thus enable authorities to detect and pursue cartels more effectively, courts might not want to impose sanctions that could drive companies into bankruptcy. To the question why high fines cannot deter cartel conduct, Mr. Hammond replied that in his experience individuals routinely offer to pay higher fines in exchange for fewer days in jail, but never the other way around.

A member of the French Conseil de la Concurrence, related the experience the Conseil had had with criminal sanctions. Every time the Conseil had sent a case to the judiciary, the courts had failed to punish the individuals; this seemed to be due to a cultural barrier. In his experience, the withdrawal of the right to hold public office or to become an officer of a company was a very efficient sanction. Had other authorities considered this possibility? A delegate from the UK's OFT briefly shared details of the UK experience with the recent introduction of criminal sanctions for individuals. While the introduction had been the right decision because it created a key deterrent, agencies should not underestimate the institutional effort involved in developing the ability to prosecute criminal cases. He also referred to the need to align corporate and individual leniency programs and to make them attractive. The OFT had initially noticed a chilling effect on leniency applications upon the introduction of criminal sanctions. A representative of the Irish Competition Authority felt that deterrence was linked to having a *per se* rule. In Ireland, criminal sanctions had long ago been introduced, but the authority had the burden of proving the economic harm to the court beyond all reasonable doubt. With respect to transparency, he recommended that if the fines do not cover possible cartel gains, the cartel authority should make a case that this was so, in order to have the system changed. An Indonesian delegate related that over-punishment could be a concern for "younger" competition authorities, because high fines could induce corporations to challenge decisions in court where they would be represented by good lawyers, a resource that might not be available to the agency. A delegate from Luxembourg expressed his opinion that ultimately, effective detection and financial penalties could have a more deterrent effect than criminal sanctions.

A European Commission delegate underlined the fact that leniency had the characteristic of being a risk difficult to control. He also introduced the idea of effective deterrence through reputational damage associated with fines. Prison is a real deterrent, while fines levied on individuals will be paid by the corporation. A Canadian representative took up the idea of a "third" way and suggested it should be explored whether there was a role for the Securities Commission to play. Cartel perpetrators could be precluded from serving as officers in companies. An NGA from Canada suggested that the cartel group might want to consider work on extradition. It should examine the similarities between penalties in countries where cartels are criminalized and countries where there are criminal offences for fraud. He also mentioned that Canada was considering changing to a *per se* approach. Finally, Dr. Engelsing spoke out in favor of taking into account a company's ability to pay a fine. Bankruptcy would not serve society.

Searches, raids and legal privilege

Ms. MacKenzie dealt with the topic of legal professional privilege in searches, raids and inspections. She made reference to the chapter of the Cartel Working Group's Enforcement Techniques Manual dedicated to searches and raids, which has been drafted on the basis of responses from 38 competition authorities. Ms. MacKenzie noted that most ICN members have enforcement tools to search, raid and inspect; however, always within certain limits because of the consideration of other rights. One of the limits concerns legal privilege, which is often (but not always) recognized as a fundamental right. As regards the fundamental importance of the solicitor-client privilege under Canadian law, she referred to the *Lavallée* judgment.⁹ Legal privilege can broadly be defined as protection from disclosure for communications between a client and its legal representative for the purpose of obtaining or providing professional legal advice or assistance. She pointed out that the scope of protection for legal privilege varies between jurisdictions, which obviously has a direct bearing on the safeguards in place and on how agencies carry out their search processes. For instance, not all jurisdictions recognize inhouse-counsel privilege, privilege for legal advice stored outside the lawyers' offices, or legal advice given by lawyers from other jurisdictions. Often there is no distinction between electronic documents and hard copies for the purposes of protection for legal privilege.

Ms. MacKenzie went on to observe that there are no uniform agency procedures in terms of dealing with legal privilege. Some jurisdictions allow the identification of certain areas, such as filing cabinets, as containing legally privileged material. Usually, agencies provide a reasonable amount of time for the identification of privileged documents and for claiming legal privilege. She stressed the importance of screening documents to check for qualification for legal privilege. With respect to contested claims for legal privilege, she noted that the evidence could be isolated and the validity of the claim then verified by independent persons or by a court. Agencies had a clear interest in ensuring that search processes were in place to avoid disputes or deal with them so as to avoid delaying the investigation. In this regard, a number of agencies reported a process to settle disputes. Based on the practices followed by those agencies sensitized to legal privilege, three practices appeared to be key features in respect of agency search and raid procedures: (1) an opportunity to claim legal privilege, (2) the existence of a document providing a screening mechanism, and (3) a specific procedure for handling disputed documents and for resolving disputes usually involving assessment by an independent party. The independent nature of the assessment was identified by one agency as preferable to review by the case officer and the risk that this might taint the search.

Turning to multi-jurisdictional enforcement, Ms. MacKenzie noted that when exchanging information pursuant to enforcement cooperation, agencies have a clear interest to protect against improper disclosure and use of privileged information and to avoid resulting legal challenges that might jeopardize or delay investigations. This argued for an appreciation of the nature of the legal privilege in other jurisdictions. This argued for an appreciation of the nature of the legal privilege in other jurisdictions and clear processes for information exchange. There is obvious merit to exchange practices that ensure the ability of the requested jurisdiction to apply its own privilege rules when obtaining information requested by another jurisdiction. Likewise, requesting jurisdictions should avoid requesting and using information protected by privilege in their jurisdictions. Ms MacKenzie noted that the OECD Competition Committee's Working Part No. 3 on Cooperation and Enforcement is addressing privilege concerns in the context of its broader effort to identify best practices for the formal

⁹ *Lavallée, et al. v. Canada*, [2002] 3 S.C.R. 209.

exchange of information among agencies in support of effective enforcement of hard core cartel investigations.

differences between agencies/countries need to be identified. It is important to have clear communications. An agency should apply its own rules as well as those of the foreign agency whose assistance it is requesting and should not use evidence that should not be used under either set of rules.

B. Panel 2: Hypothetical multi-jurisdictional leniency application

David Smith, Commissioner at the Australian Competition and Consumer Commission, chaired the second Cartel Working Group's panel. The panelists were *Dr. Frank Montag*, partner at Freshfields, Brussels; *Gary Spratling*, partner at Gibson, Dunn & Crutcher, San Francisco; and *Sai Ree Yun*, partner at Woo Yun Kang, Jeong & Han, Seoul. Mr. Smith briefly introduced the panelists who proceeded to present a hypothetical scenario in the form of a virtual videoconference. The hypothetical scenario, which had originally been developed for the workshop in Sydney, was aimed at demonstrating issues of a multi-jurisdictional leniency application/strategy faced by a potential applicant and its lawyers.

Dr. Montag opened the videoconference and gave his colleagues details as to the background of the case to be discussed. He had received a telephone call from a long-standing client, Ludwig Chemicals, a chemical company based in Bonn, Germany. The company's general counsel had received an anonymous letter that contained allegations that the company was involved in worldwide price fixing and market share allocation/market sharing. Currently, the internal investigation was at a very early stage, and employees were being interviewed to establish whether the allegations were well-founded. The product concerned was a gasoline additive ("Schumachtite"). Dr. Montag had set up the videoconference in order to receive input for a meeting with the CEO scheduled for immediately after the videoconference. Dr. Montag asked his colleagues: (1) about the likely exposure in their jurisdictions, (2) whether their jurisdictions offered leniency programs, and (3) which strategy they recommended.

Mr. Spratling addressed the question with respect to the United States and Canada. He pointed out that the conduct would lead to exposure in the United States because it would amount to a *per se* violation of U.S. antitrust laws. There would be criminal prosecution if executives had participated in the conduct. There would be no immunity from prosecution simply because the company was based in Germany. Mr. Spratling referred to the fact that three German companies, BASF, SGL and Infineon, had been subjected to the highest fines ever levied. Individuals were equally open to prosecution; the DOJ had brought criminal cases against foreign nationals in the past. Mr. Spratling described the DOJ as very aggressive with respect to fines and even more so with respect to imprisonment. The only way to avoid prosecution was to apply for leniency. If the DOJ had as yet no knowledge of the conduct, the company could obtain automatic leniency under type A of the leniency program, *i.e.*, immunity from fines and jail sentences. The preconditions were that the company (1) was the first to apply, (2) had ceased the infringement, (3) made the request with candor, (4) had made the application as a truly corporate act, and (5) had not been a ringleader. The only downside of a leniency application is exposure to civil damages: an amnesty applicant cannot deny having engaged in anti-competitive conduct and is therefore an easy target for plaintiffs. However, Mr. Spratling pointed out another recent change in U.S. law whereby amnesty applicants are only subject to simple (instead of treble) damages and are no longer jointly and severally liable for the actions of other cartel members.

In Canada, the conduct would equally infringe antitrust laws and lead to criminal exposure. Canada also has a leniency program, with roughly the same criteria as in the United States. The exposure would be criminal fines for the company of up to C\$ 10 million, as well as criminal sanctions for individuals of up to five years' imprisonment. Cartel members would be severally and jointly liable for single damages in civil litigation, and class actions are on the increase in Canada. He mentioned, however, that Canada does not have a *per se* approach to price fixing so that the enforcers would need to prove that the cartel has "undue" anticompetitive effects or unreasonably enhances prices, and proof of a violation requires showing more than the mere fact of an agreement. In addition, the prosecution of individuals is not as common in Canada as it is in the U.S. Moreover, there is uncertainty with respect to jurisdiction for conduct occurring outside Canada, as well as a problem with respect to jurisdiction over persons located outside Canada. In sum, the overall risk of exposure is less than in the United States.

Mr. Yun addressed the situation in Korea. He explained that Korea had started applying its cartel law to conduct occurring outside Korea that produced effects within the country. He described the Korea Fair Trade Commission as very active in antitrust enforcement. Fines for the company could exceed \$ 100 million. While Korean law provides for the possibility of criminal sanctions (in which case the matter would be referred to the prosecutor), such sanctions are rare, but cannot be entirely excluded. The company would also be exposed to civil damages, limited to single damages, but would be jointly and severally liable with the other cartel members. Recently, the Korean authority had actively promoted the leniency program, and the past nine cartel cases had been triggered by leniency applications. Mr. Yun described the requirements to qualify for leniency as being similar to those in the United States. The most recent amendment (in force as of April 1, 2005) made the program even more attractive, providing for automatic exemption from sanctions for the first applicant and a reduction of 30% for the second. The applicant would have up to 12 days to complete his leniency application after making contact with the authority (marker system).

Dr. Montag explained the situation in the EU: The company's alleged conduct would infringe the EC law prohibition of anticompetitive agreements and practices. The 25 Member States have similar prohibitions. He noted that EC law does not provide for criminal sanctions but for high fines, up to 10% of a corporation's worldwide turnover, and that recently, EC fines have increased and are now even higher than in the United States, presumably to compensate for the fact that there are no criminal sanctions under EC law. For instance, fines imposed on members of the vitamins cartel exceed €800 million in total. Dr. Montag pointed out, however, that certain Member States provide for criminal sanctions, including imprisonment for up to four years (France) or up to five years (United Kingdom). A leniency program is available at the EC level, granting full immunity if the applicant provides sufficient evidence to start an investigation or to find an infringement and (1) has terminated the cartel activity by the time of the leniency application, (2) fully cooperates throughout the investigation and (3) has not coerced other cartel members. At the national level, only 17 Member States currently have leniency programs, and the programs available are not identical.

Dr. Montag also asked Mr. Spratling about the situation in Australia. Given that the company had sales offices in Australia and assuming cartelized prices, Australia would have jurisdiction. Under Australian law, the company and executives would be exposed, but only to civil fines. A court could impose fines up to A\$ 10 million per count on the company and A\$ 500,000 on individuals. However, Mr. Spratling pointed out that there is currently

legislation pending to introduce criminal sanctions for certain conduct. Mr. Spratling assumed that if the Australian competition authority had jurisdiction, it would pursue the company. Australia has a leniency program. While the program is different from those in the United States and Canada, Mr. Spratling believed that if the company qualified for leniency in the United States and Canada, it would also qualify for leniency in Australia.

On the basis of the input provided, Dr. Montag came to the preliminary conclusion that it seemed best to advise to apply for leniency. His follow-up question was how to best go about applying for leniency in the different jurisdictions.

Mr. Spratling stated that there is a marker system in the United States to give an incentive to report a violation immediately. He described the procedure as a quick process: He would make one phone call, identify the product, the alleged conduct and as to whether amnesty was still available. If amnesty was available, he would identify the client and obtain an oral representation from the agency that, for a set period of time, the client would receive a marker as placeholder. Subsequently, the client (and the lawyers) would investigate the facts in more detail within a time frame to be negotiated between the agency and the client. Once the internal investigation was completed, Mr. Spratling would make an oral proffer and the client would then obtain a conditional leniency agreement with the agency. Mr. Spratling noted that there is also a possibility for withdrawal of the marker. In the current case, he would assume that the time frame for the internal investigation could be negotiated for around six weeks, given that it would be a difficult investigation to be carried out on three continents. Mr. Spratling reported that a marker system also exists in Canada, with a similar procedure. The client should ask for six weeks, but might only get four.

Dr. Montag explained that, contrary to marker systems, in the EC program an applicant's ranking depends on when he provided the evidence required. Some Member States, however, have a marker system. Dr. Montag concluded that in the EU, there are several layers of complexity, and that he needed to assess whether applying for leniency with the European Commission would be sufficient or whether applications should also be made with the Member States. He mentioned that despite the European Commission's guidelines on case allocation within the network of European competition authorities, he knew of one example where the Commission had not pursued a case triggered by leniency because of lack of resources. If applications in Member States were necessary, it would be a complicated process due to the fact that a high number of Member States could be involved, most of which have different leniency regimes and different language requirements. Mr. Spratling spoke out in favor of a marker system in Europe. Dr. Montag agreed. He referred to current reform discussions that focused on having a one-stop shop, but that would only become relevant in the future.

Mr. Yun explained the procedure in Korea where, first, an application should be submitted describing the client and the offense; there is no need to provide evidence at this time. The submission of evidence can be postponed by seven days initially, which postponement can be further extended by another five days. Without filing an application, he clarified, there is no marker, and the filing must be made in writing.

Mr. Spratling briefly mentioned that the Australian leniency program also has a marker system.

Dr. Montag pointed out that the client needs to cease the cartel activity in order to obtain the marker at a point in time when it might not have the requisite evidence for the EC available.

Termination, however, could alert other cartel members that have evidence more readily available and can apply themselves, thus obtaining a better ranking. Mr. Spratling argued that the client should not wait to obtain a marker, because from the moment the client starts its internal investigation, there is a risk that the investigation will become public. He mentioned that while in principle the client must cease the infringing activity, the United States and Canada might want an opportunity to actively monitor the conduct and might want the company to continue the activity. Dr. Montag replied that if the United States and Canada want the client to continue the conduct, there could be a conflict with the EC leniency program that requires cessation of the cartel activity.

Dr. Montag summarized that he would advise the CEO to apply for leniency in all areas, and to do that as quickly as possible, in particular in the United States and Canada because of criminal sanctions. The situation in the EU looked a bit different. Here, the priority should be to collect the information necessary for a leniency application. The company's board was concerned about treble damages and civil exposure, but he concluded that if the company were successful in its application, there might only be single damages and no joint and several liability. He thanked his colleagues for making themselves available on short notice and ended the videoconference.

The panelists pointed out that a leniency strategy is based on a very complex analysis, much more complex than they could show in the hypothetical's timeframe. Other typical issues to be considered included, *inter alia*, discoverability, oral or written statements, legal privilege, dealing with employees and the fact that, in the United States, fact-finding is based more on interviewing witnesses whereas, at the EC level, it is still a more document-based process. Dr. Montag stated that, for a defense team, it is very difficult to consider and combine all the different amnesty conditions. Mr. Spratling underlined the fact that the introduction of criminal sanctions in the United Kingdom and Australia added complexity – it is no longer clear where the first application must be filed. Mr. Yun stressed the need for harmonization of leniency conditions in order to minimize the risks and costs of leniency. Harmonization would encourage leniency applications and make leniency programs more successful.

The subsequent **discussion** focused on a question from a delegate from Brazil as to whether lawyers discussed the question of waiving the privilege of documents so that agencies could cooperate. Mr. Spratling responded that it was comparable to the chicken and the egg question. He explained that it would likely require there to be an enforcement record before parties would assume that they need to apply for leniency in a given country. If parties believed that they do not need to apply in a certain country, they will not give waivers concerning that jurisdiction.

Invitation to the ICN Cartel Workshop in Seoul/Korea

Chul-kyu Kang, Chairman of the Korea Fair Trade Commission, invited all ICN members to the ICN Cartel Workshop scheduled for November 8-10, 2005 in Seoul. He explained that the new Working Group on Cartels plays a leading role in institutionalizing annual ICN Cartel Workshops. Cartel workshops already had a long tradition; cartel enforcers first having held a workshop in 1999, in Washington, D.C. That workshop was followed by subsequent annual workshops in Brighton, United Kingdom; Ottawa, Canada; Rio de Janeiro, Brazil; and Brussels, Belgium. The first institutionalized ICN Cartel Workshop took place in Sydney, Australia, in 2004, in which 100 representatives of more than 30 enforcement authorities worldwide participated. Mr. Kang acknowledged that the Sydney workshop had been a landmark in terms of quality. He informed the audience that the Seoul workshop's agenda

would be finalized after the Fourth Annual ICN Conference. Possible topics chosen by the enforcement subgroup included: (1) electronic evidence-gathering and (2) obstruction of investigation. Mr. Kang expressed his hopes of seeing many representatives in Seoul in November.

III. Plenary Session of the Merger Working Group

Introductory speech

Makan Delrahim, Deputy Assistant Attorney General at the U.S. Department of Justice, made the introductory speech to the plenary session prepared by the ICN's Merger Working Group. Mr. Delrahim explained that the mission of the Merger Working Group is to facilitate global convergence around sound merger practice and procedure, with the aim of improving the effectiveness of merger review across the globe and reducing the costs of multi-jurisdictional merger reviews. He briefly described the organization of the Merger Working Group into three subgroups: (1) Notification and Procedures (chaired by the FTC); (2) Analytical Framework (chaired by the United Kingdom Office of Fair Trading and the Competition Authority of Ireland); and (3) Investigative Techniques (chaired by Israel's Antitrust Authority).

Mr. Delrahim noted that the ICN's strengths lie in its partnership with the legal and business communities and with academia, and that ICN can serve as a role model for how antitrust agencies and the private sector can work together to achieve goals of mutual interest. The force of this partnership was evidenced by the participation in the Merger Working Group of more than fifty NGAs over the past four years. Even more NGAs should be encouraged to participate in the ICN's work. In particular, the involvement of the business community, notably of executives and in-house counsel (who have direct access to business plans and decision-makers), should be increased. This could be achieved by inviting NGAs to the ICN's annual conferences, recruiting them to work within working groups, and asking them to comment on draft ICN work product. He mentioned that, in the United States, there is a concerted effort to achieve more participation from the business community in ICN activities. According to Mr. Delrahim, participation by the private sector improves the overall quality, and facilitates implementation, of ICN recommendations. Mr. Delrahim noted that it is important that the ICN's recommendations are implemented in practice. As an example of such implementation, he cited the Policy Guide to Merger Remedies issued by the Antitrust Division of the U.S. Department of Justice. He added that competition authorities around the world should aspire to act in accordance with sound principles and practices, as found in the ICN's recommendations. This is of particular importance since, due to the increasing number of jurisdictions that enforce antitrust rules, the risk of conflict over procedural and substantive issues had risen considerably.

To this effect, the Merger Notification and Procedures subgroup developed eight guiding principles: (1) sovereignty; (2) transparency; (3) non-discrimination on the basis of nationality; (4) procedural fairness; (5) efficient, timely, and effective review; (6) coordination; (7) convergence; and (8) the protection of confidential information. In addition, the subgroup developed and the ICN adopted eleven recommended practices, with respect to (1) the requirement of a nexus to the reviewing jurisdiction; (2) notification thresholds; (3) the timing of the notification; (4) review periods; (5) the requirements for initial notification; (6) the conduct of merger investigations; (7) procedural fairness, (8) transparency; (9) confidentiality; (10) inter-agency coordination; and (11) the review of merger control

provisions. Two further recommended practices, on remedies and competition agency powers, were to be adopted the following day. Mr. Delrahim expressed his contentedness at the fact that the recommended practices are used as a benchmark for merger control regimes and that many agencies have used them to implement changes.

Mr. Delrahim then briefly summarized the accomplishments of the various subgroups of the Merger Working Group.

The Notification and Procedures Subgroup had completed the following work product:

- Proposed Recommended Practices on Remedies and Competition Agency Powers;
- Model Waiver of Confidentiality and Accompanying Report;
- Report on the Implementation of the Recommended Practices for Merger Notification and Review Procedures; and
- Report on Merger Filing Fees.

The Analytical Framework Subgroup had prepared the following documents:

- Merger Remedies Study; and
- Preliminary Draft of Merger Guidelines Workbook.

Finally, the Investigative Technique Subgroup had achieved the following results:

- Organization of a workshop on investigative techniques; and
- Investigative Techniques Handbook for Merger Review.

The above-mentioned documents formed the basis of the ensuing five presentations. The documents were distributed at the conference, and are available on the ICN's website at www.internationalcompetitionnetwork.org. Also available are some of the slides underlying the presentations.

A. Presentation 1: Draft Merger Guidelines Workbook

The first two presentations discussed the draft Merger Guidelines Workbook and the Investigative Techniques Handbook. The panel was composed of *Sir John Vickers*, Chairman of the UK Office of Fair Trading; *John Fingleton*, Chairman of the Irish Competition Authority; *Ernesto Estrada*, General Director of International Regulation at the Mexican Federal Competition Commission; *Ilene Knable Gotts*, partner at the law firm of Wachtell, Lipton, Rosen & Katz, New York; and *Avi Weiss*, Chief Economist at the Israel Antitrust Authority.

Sir John Vickers, Co-Chair of the Analytical Framework Subgroup, briefly summarized the contents of the **draft Merger Guidelines Workbook**.¹⁰ The draft workbook was based on a comparative study of merger guidelines that had been coordinated by the OFT and

¹⁰ Available at: http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG2_Analytical_Framework/Discussion_Draft_Merger_Guidelines_Workbook.pdf.

predominantly carried out by private practitioners. The study had revealed that the available merger guidelines have a great deal in common. The Analytical Framework Subgroup had decided that a recommendation of merger guidelines would be excessive, and that a workbook, as a practical guide, would be an appropriate format. Sir John explained that the draft workbook was aimed at providing a user-friendly, practical manual for preparing new, or reviewing existing, competition-focused merger guidelines. However, it was also meant as a useful guide for competition agencies' everyday casework. The draft workbook was divided into four main sections. After a short introduction, the workbook explained the concepts and core principles of merger control and then examined categories of mergers. It then presents worksheets on important issues: (1) market definition; (2) market structure and concentration; (3) unilateral effects; (4) coordinated effects; and (5) market entry and expansion. Worksheets on (6) efficiencies; (7) failing firm; and (8) vertical mergers were still pending. The worksheets formed the core of the workbook. Each of the worksheets contained five topics: (1) the purpose of the task; (2) key steps; (3) key evidence; (4) pitfalls to avoid; and (5) illustrative case studies. Sir John encouraged the agencies to provide their views on whether the draft worksheets were useful and clear and made sense in the context of their respective merger laws; whether the economic principles were practicable and the illustrative case studies were helpful; and how best to finalize the workbook.

Mr. Estrada briefly explained the framework of the Mexican merger control regime. He touched upon some difficult issues, such as market definition and the inclusion of close substitutes, market concentration; how to identify entry barriers; and the assessment of efficiencies. Mr. Estrada noted that the draft workbook represented a comprehensive and coherent set of guidelines at the forefront of antitrust practice prepared by experienced agencies. Mr. Estrada stressed the importance of coherence and convergence of merger review around the world. He added the need for transparency so that the likely outcome of a merger review would be predictable. He concluded that the draft workbook helped in accomplishing these tasks.

Mr. Estrada explained that, one year ago, the Mexican Competition Commission had published draft merger guidelines. These reflected the Mexican Competition Commission's practice and were not binding. The analytical concept of the guidelines was based on the work of the ICN, and Mr. Estrada noted that this work would be very helpful in further developing the Mexican guidelines. For instance, while the Mexican guidelines provided input for the assessment of unilateral effects of concentrations, they did not address coordinated effects. The ICN's worksheet on coordinated effects would thus be very useful in this regard. In conclusion, Mr. Estrada predicted that the draft workbook would lead to more effective and transparent enforcement of merger control law.

Ms. Gotts described the draft Merger Guidelines Workbook as the result of a two-fold process between the government and private practice. She welcomed the fact that the draft workbook would increase transparency for the business community and improve competition advocacy. It would also benefit the agencies through capacity building and contribute to a uniform treatment of mergers on an international level. She noted that the draft workbook was very successful in providing state-of-the-art guidelines. In the future, the Merger Working Group might even go beyond this and take the work "to the next level". Ms. Gotts stressed the importance of integrating the Merger Guidelines Workbook with the Investigative Techniques Handbook, in order to coordinate how best to develop the facts of a case and to assess them in light of the conceptual framework. Ms. Gotts encouraged the drafters of the workbook to follow a simple approach, and to provide more practical

examples. She warned against adhering too rigorously to a step-by-step approach. Such an approach could lead to the wrong results and be overly burdensome if it is not properly coordinated. Rather, the analysis should be dynamic and holistic, and target the important issues. In order to achieve this, for instance, the interaction between competitive effects/market definition and third-party responses should be explained. Ms. Gotts also suggested adding the workbook's section on uncommitted entry to the entry analysis.

Ms. Gotts stated that it is important to achieve the right balance between innovation and competition. She warned against taking false comfort from market share and concentration analysis. The workbook should further emphasize that market shares are just a starting point, in particular in dynamic markets. Ms. Gotts submitted that market share thresholds might perhaps be better used as a presumption of safety rather than as an indicator of potential anti-competitive effects. Ms. Gotts considered that it is incorrect to believe that coordination among market players is possible without transparency in the market, and that it is problematic to apply a unilateral effects theory without proper market definition. Finally, Ms. Gotts suggested that the mitigating factors disruptive of market power should be further worked on and stressed in the workbook, in particular (i) repositioning; (ii) entry; (iii) countervailing buyer power; (iv) general market dynamics; and (v) non-price effects (Schumpeter). In particular, Ms. Gotts pointed out that price is important, but might not always reflect where the competition in a market really occurs.

Mr. Fingleton, Co-Chair of the Analytical Framework Subgroup, explained that he considered the workbook to be in a "beta testing" stage. It should be tested whether the workbook is sufficiently clear and covers all the relevant issues. He specifically mentioned that the Analytical Framework Subgroup had sought the ICN members' feedback during the year. Mr. Fingleton enquired as to whether a workshop on investigative techniques should include a discussion of the workbook.

B. Presentation 2: Investigative Techniques Handbook

Mr. Weiss gave a brief presentation on the ICN's Investigative Techniques Handbook for Merger Review¹¹ and the work of the Investigative Techniques Subgroup over the past three years. The Investigative Techniques Subgroup was chaired by Mr. Dror Strum, General Director at the Israel Antitrust Authority. The handbook had been updated from the ICN's previous Annual Conference. It contains five chapters, beginning with an overview of the investigative tools that are typically used by the ICN's agencies. It then provides suggestions on how to plan a merger investigation, how to develop reliable evidence, the role of economists and economic evidence in merger analysis, and the private sector perspective on tools and techniques used in merger investigations.

Mr. Weiss demonstrated how one could use the Handbook with the help of the "soymilk hypothetical". The same hypothetical scenario had already been successfully used in the Washington and Brussels workshops. In the hypothetical, Fantasy Dairy, the largest dairy company in the market, intends to purchase Just Soy Inc. for \$ 300 million. Just Soy controls 70% of soymilk sales. Fantasy, which entered the market just over a year ago, controls 15%. Soymilk constitutes about one third of all milk substitute sales, and about 2% of milk sales. The merging parties claim efficiencies of \$ 40 million per year. Two other firms managed to

¹¹ Available at: http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG3_Investigative_Techniques/Investigative_Techniques_Handbook.pdf.

enter the market, but both of these firms already had national marketing structures for similar products. The costs of entry are therefore not very large and entry is not a lengthy process, provided that the firm entering the market already has extended shelf-life milk products. The competitive situation is further characterized by indications that there are numerous geographic markets.

Of the many questions raised by the hypothetical scenario, Mr. Weiss chose to discuss the issue of product market definition. According to Mr. Weiss, potential product market definitions were: (1) soymilk only; (2) milk substitutes; (3) milk and milk substitutes; and (4) all beverages.

Mr. Weiss explained that the Handbook chapter on investigation planning suggested developing various theories of harm. With respect to this task, the Merger Guidelines Workbook that had just been presented could be of great use. One should then identify sources of evidence and pertinent facts to evaluate and investigate the theories. Finally, administrative tasks and assignments should be specified, and the time factor should be carefully scrutinized.

In the hypothetical, with respect to theories of harm, unilateral concerns appeared to be most troubling if the product market was narrow (*i.e.*, soymilk only). Coordinated effects theories of harm were more pertinent if the product market was broader (*i.e.*, comprising milk alternatives). With an even broader product market, encompassing milk and milk substitutes, probably no concerns would arise.

As regards the types of evidence to be included in defining the relevant market, Mr. Weiss referred to the draft Merger Guidelines Workbook, Chapter 4, Worksheet A, and suggested that it may be helpful to request business plans, commercial strategies, surveys and other internal documents; to conduct interviews with customers and competitors (considering, in particular, consumers' willingness to switch products); to assess price correlations; and to take into account the switching behavior on the demand and supply side.

Mr. Weiss stressed that it was important to watch out for biased evidence, which is discussed in chapter 3 of the Handbook. In particular, there was a big difference in evidentiary value between, on the one hand, pre-existing documents prepared in the ordinary course of business and, on the other hand, uncorroborated, self-serving documents prepared for the competition agency with the transaction in mind. As regards interviews, more weight should be placed on customer reactions to the merger than on competitors' reactions. With respect to econometric data, Mr. Weiss noted that data on prices of products in the same geographic markets would be useful to carry out analyses of price correlations. The price data then needs to be controlled for exogenous changes that affect prices in a similar manner, such as inflation, exchange rate changes and tax changes. Finally, as regards switching behavior, Mr. Weiss suggested that agencies seek data on prices and quantities over time with sufficient variance to enable valid conclusions to be drawn from this "natural experiment".

In the **discussion** following Mr. Weiss' presentation, a comment was made that the economic analysis of mergers should not be limited to cost/price analysis. In developed economies, in particular, the agencies should also look at quality aspects, for instance, whether quality increased if costs increased. In addition, the aspect of dynamic efficiency should be duly considered in the workbook. A delegate from Jordan added that the Jordanian Competition Directorate generally encouraged mergers, since Jordan was a very small economy and only merged entities could be successful in a wider competitive environment. The workbook

should include a discussion of how to deal with this issue. A representative of the Jamaica Fair Trading Commission stated that the Handbook was very helpful for the Jamaican competition agency, the Fair Trading Commission, since in Jamaica a merger control regime would soon be introduced.

C. Presentation 3: Merger Remedies Review

The following contributions concerned the Merger Remedies Review project. The panel was composed of *Edward Henneberry*, Director at the Irish Competition Authority; *Surd Kováts* from the Hungarian Competition Authority (GVH); *Peter Freeman*, Deputy Chairman at the UK Competition Commission; and *Jonas Koponen*, Managing Associate at the law firm of Linklaters in Brussels. The work of the Merger Remedies Review Project had been summarized in a report for the conference.¹²

Mr. Henneberry provided an outline of the topics covered by the project. He explained that a survey of ICN members had served as a basis for the project. The survey had shown that, over the past three years, two thirds of the mergers that had raised competitive issues had been cleared subject to some kind of remedy. The survey had also shown that there was a high level of commonality in merger remedies used. He noted that the choice of remedy depended to a great extent on the local framework and that IP issues proved to be among the most challenging in structuring merger remedies. He explained that it was planned to publish the results of the survey.

Mr. Kováts reported experience that the Hungarian Competition Authority had gained in the review of a concentration affecting the Hungarian sugar industry. The Belgian company Tirlémontoise, a subsidiary of Germany's Südzucker AG, notified its intention to acquire sole control of Financière Franklin Roosevelt SAS ("Roosevelt"). Roosevelt held 50% of the shares in Eastern Sugar, which operated one out of seven sugar factories in Hungary and had a share of around 26% of the Hungarian sugar market. Südzucker already controlled Agrana, which operated three sugar factories and held a market share of approximately 37%. The efficiencies claimed by the parties were, at least on the Hungarian market, very limited. Other jurisdictions, such as the EU and Slovakia, had also examined the case, and the European Commission was expected to clear the concentration.

The Hungarian Competition Authority was concerned with Südzucker's high post-merger share of the Hungarian sugar market. Given that it was an international merger, the legal consequences if the European Commission cleared the concentration, and the Hungarian Competition Authority prohibited it, were unclear. It was unlikely that the parties would abandon the transaction. In order to be able to proceed with the transaction, the parties were willing to offer various possible remedies, which were modified several times. The parties proposed, *inter alia*, to re-allocate voting rights in the Hungarian Sugar Product Council (an association of all Hungarian sugar producers), or to agree on price caps, both of which proposals the Hungarian Competition Authority rejected. In a first decision, the Hungarian Competition Council, the decision-making body of the Hungarian Competition Authority, cleared the concentration subject to the condition that Südzucker divested its 50% shareholding in Eastern Sugar to Tate & Lyle, the other shareholder in Eastern Sugar. After the negotiations between Südzucker and Tate & Lyle failed, the Competition Council altered

¹² Available at: http://www.internationalcompetitionnetwork.org/bonn/Mergers_WG/SG2_Analytical_Framework/Remedies_Study.pdf.

the remedy, obliging Südzucker to eliminate its control rights in Eastern Sugar in favor of a buyer independent of Südzucker. Südzucker then sold its share in Eastern Sugar to Zuckerfabrik Jülich AG, which the Competition Council considered to be sufficient.

Mr. Kováts drew the following conclusions from the case: First, the initial remedy may not work, due to changes in the market and other factors. Therefore, one should always remain flexible, and leave room for altering the remedy. Second, decisions and remedies of competing competition agencies may have a negative effect on each other, in particular from the perspective of a small competition agency. Conflicting decisions should therefore be avoided, by way of increased international cooperation in the field of decision-making. Third, the ability of an agency to enforce a decision may be questionable in a transaction that involves large multinational companies and is completed in a foreign jurisdiction. One should therefore make sure that international cooperation allows for the enforcement of the decision.

Mr. Koponen noted that the structuring of remedies is the art of finding simple solutions to sometimes very complex issues. He stressed three points: First, he underlined the importance of identifying and addressing the root causes of a merger's negative effects on competition. Remedies should not be structured and assessed in isolation; they depend on the competitive environment. The ICN work product provides useful tools for accomplishing that task. Agencies should look beyond market shares in analyzing competitive issues and structuring remedies. The situation that agencies are facing when structuring remedies is comparable to that faced by surgeons: If you want to cure the problem, you must get the diagnosis right.

Second, cooperation in transnational cases is imperative. Cooperation should take place among agencies, counsels, and parties. From the client's perspective, conflicting remedies are a "nightmare". Cooperation must begin early on in the process. Mr. Koponen distinguished between "frontloaded" merger review systems, which require considerable analysis and advocacy in the initial merger notification, and "backloaded" merger review systems, where the focus is on providing information in response to information requests. Due to these differences, cooperation does not necessarily mean that the notification must be filed at the same time. Rather, cooperation should take place in meaningful phases of the merger review process. He referred to his experience of notifying parties being asked to accelerate or delay notifications in order to allow for the necessary cooperation between agencies to take place.

Third, Mr. Koponen pointed out that remedies should not be carved in stone. Effectiveness and certainty are important features of remedies, but in some cases a review clause allowing for a re-examination of the remedy, has a function. For instance, an agency may need to decide on a matter before the review is completed in all jurisdictions, and the review clause can then serve the purpose of avoiding a conflicting "end-game". In some cases, relevant circumstances change after the decision has been taken, and a review clause can also facilitate adoption of the remedy in those situations.

Mr. Freeman concluded the presentation on the Merger Remedies Review project by summarizing five issues and questions to be addressed when structuring remedies: (1) there should be a presumption in favor of structural remedies; (2) the risk of unsuccessful remedies should be minimized; (3) when might behavioral remedies be appropriate?; (4) how to take account of merger benefits; and (5) how to ensure effective implementation.

Mr. Freeman noted that the Hungarian case study demonstrated that there might be no point in prohibiting a merger if its center of gravity was outside the agency's jurisdiction. He further mentioned an example of an IP remedy that had not been effective because of a failure

to anticipate complex problems that arose from the remedy. He summarized that the lessons to be learned were to keep a remedy specific to the competitive concern, and to keep it simple, and that generally remedies were preferable to prohibiting a merger.

D. Presentation 4: Waivers of Confidentiality

The following contributions concerned the use of waivers of confidentiality in merger investigations, a project of the ICN's Notification and Procedures Subgroup. The Subgroup is chaired by *Randolph W. Tritell*, Assistant Director for International Antitrust at the U.S. Federal Trade Commission. The panel was composed of *Dan Sjöblom*, Head of Unit at the Directorate General for Competition of the European Commission, *Joseph Krauss*, partner at the law firm of Hogan & Hartson LLP, Washington, D.C., and *John Parisi*, Counsel for EU Affairs at the U.S. Federal Trade Commission. The panel presented the ICN Model Waiver Form and discussed concepts raised in the accompanying paper on waivers of confidentiality.¹³

In his introduction, **Mr. Sjöblom** noted that waivers of confidentiality were important in particular in problematic multi-jurisdictional merger cases. He explained that the form of cooperation between agencies could range from informal phone calls to intense cooperation. Officials would often discuss the relevant markets, the agencies' experience in the markets concerned, and timing. A typical case for intense cooperation would be where conflicting remedies need to be avoided, and where two agencies are considering a remedy in the same area of commercial activity. Usually, one agency would learn about notifications in other countries and unless the case was entirely unproblematic, would consider asking for a waiver.

Mr. Sjöblom, **Mr. Parisi** and **Mr. Krauss** then presented a hypothetical scenario, composed of telephone conversations concerning waivers of confidentiality in an international merger scenario. Mr. Sjöblom in his role as an EC official called Mr. Parisi, an official of the U.S. Federal Trade Commission. To date, the two agencies had discussed a merger case without referring to documents filed by the parties, but Mr. Sjöblom was now asking for a waiver. Mr. Parisi then called Mr. Krauss, a private attorney advising a party to the merger. Mr. Parisi asked Mr. Krauss whether his client would be willing to grant a waiver of confidentiality. Mr. Krauss noted that the call came rather late in the proceedings, but that he thought that he could convince the parties to grant waivers. Mr. Krauss suggested discussing the form and contents of the waivers on the basis of the ICN Model Waiver Form. Mr. Krauss enquired as to whether the agencies were flexible in discussing the waiver, and Mr. Parisi confirmed that this was the case. Mr. Parisi noted that most parties granted broad waivers at the outset of the investigation as to any documents, statements, data and information they submitted to the agency in the merger investigation. However, it was also possible to grant waivers more limited in scope, *i.e.*, limited to evidentiary materials pertaining to specific issues such as product market definition or barriers to entry or, where the parties and agencies were in settlement negotiations, limited to potential remedies including the parties' settlement proposals. Mr. Parisi and Mr. Krauss agreed that the confidentiality rules of all jurisdictions participating in the merger review would have to be checked. Mr. Parisi noted that the European Commission should not share in-house counsel material with the U.S. agencies, since such documents would generally be considered privileged under U.S. law and the U.S. agencies would therefore not be authorized to use them. As regards the duration of the waivers, Mr. Parisi explained that they should be granted for as long as they were needed, and at least for as long as it took for the reviewing agencies to reach an enforcement decision.

¹³ Available at: <http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf>.

At the end of the presentation, the participants referred to positive experiences with waivers in the merger cases of *Guinness/Grand Metropolitan*, *Exxon/Mobil*, the cruise liner cases and mergers in the chemicals industry. Mr. Sjøblom remarked that, historically, the use of waivers had begun in remedies discussions, but that today they tended to be used earlier in the process.

E. Presentation 5: Remedies and Agency Powers Recommended Practices

In the last presentation of the Mergers Working Group plenary session, **Randolph W. Tritell**, Assistant Director for International Antitrust at the U.S. Federal Trade Commission and Chair of the ICN's Merger Notification and Procedures Subgroup, reported on the work of this subgroup. The projects of the subgroup included proposed Recommended Practices for Merger Notification and Review Procedures on Remedies and Competition Agency Powers;¹⁴ Model Waivers of Confidentiality in Merger Investigations and an accompanying report;¹⁵ a Report on the Implementation of the ICN Recommended Practices;¹⁶ and a study on Merger Notification Filing Fees.¹⁷

As regards recommended practices on remedies, the subgroup developed four main recommendations:

- (1) Remedies should address the competitive harm arising from the proposed concentration;
- (2) The merger review system should provide a transparent framework for the proposal, discussion and adoption of remedies;
- (3) Procedures and practices should be established to ensure that remedies are effective and easily administrable; and
- (4) Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.

With respect to recommended practices on competition agency powers, Mr. Tritell noted that agencies should have:

- (1) The authority and tools necessary for effective enforcement of applicable merger review laws;
- (2) Sufficient staffing and expertise to discharge their enforcement responsibilities effectively; and
- (3) Sufficient independence to ensure the objective application and enforcement of merger review laws.

In the **discussion** following the presentations, a representative from Israel asked whether the subgroup had discussed how to convince governments to give an agency the recommended

¹⁴ Available at: <http://www.internationalcompetitionnetwork.org/mnprepractices.pdf>.

¹⁵ Discussed under IV. above.

¹⁶ Available at:

http://www.internationalcompetitionnetwork.org/050505Merger_NP_ImplementationRpt.pdf.

¹⁷ Available at: http://www.internationalcompetitionnetwork.org/filing_fees_rpt.pdf.

powers. A delegate commented that the Subgroup should further work on suggestions as to how to avoid conflicting remedies. Mr. Henneberry responded that waivers of confidentiality are one step in avoiding conflicting remedies, but that efforts with respect to this issue must indeed continue. A Tunisian delegate asked how confidentiality could be assured if there are no agreements between the countries concerned dealing with the issue. Mr. Sjöblom responded that, in his view, it is better to start with informal contacts, which should be possible if the parties agree to waive whatever national protection they have, and possibly consider entering into more formal arrangements later on. Mr. Tritell pointed out that, in the United States, it is for the parties to propose remedies. Mr. Tritell then questioned others on how they proceed if a remedy needs to be improved upon. Mr. Henneberry suggested that the agency would point out that the remedy was not working and would then rely on the parties to find a solution. Mr. Freeman added that there is a dilemma in that prohibiting a merger might not be an option if the center of a transaction is abroad.

IV. Plenary Session of the Antitrust Enforcement in Regulated Sectors Working Group

A. Panel 1: An increasing role for competition in the regulation of banks

Alberto Heimler, Director Research Department of the Italian Antitrust Authority AGCM, and **Frédéric Jenny**, Chairman of the OECD's Competition Committee, co-chaired the first panel. The panelists included *Helcio Tokeshi*, Secretary at the Secretariat for Economic Monitoring ("SEAE"), Brazil, *Surd Kováts*, Hungarian Competition Authority GVH, *Dongkyu Lee*, Korea Fair Trade Commission, *Pascual Garcia Alba*, Commissioner at the Mexican Federal Competition Commission, *Norman Manoim*, Competition Tribunal South Africa, and *Soy M. Pardede*, KPPU Indonesia.

Mr. Heimler introduced the session. He mentioned that, in the previous year in Seoul, it had been decided that the AERS Working Group's subgroups on "Limits and constraints facing antitrust authorities intervening in regulated sectors" and "Enforcement experience in regulated sectors" would merge and present a joint **Report on the Increasing Role for Competition in the Regulation of Banks**. The report was being presented to the ICN at this Annual Conference.¹⁸ Mr. Heimler remarked that many competition authorities had not been involved in reviewing antitrust in the banking sector, *inter alia*, because of wide-ranging exceptions and sector-specific regulation. The capital requirement framework Basel committee 1998 report recognized that competition had a role to play. Mr. Heimler stressed that competition authorities could play a bigger role in antitrust scrutiny of the banking sector. He informed the audience that the AERS banking report identified a few market failures, such as depositors' switching costs leading to increased market power of banks, but that, in general, market mechanisms were found to work. The report included ten proposed **ICN Recommended Best Practices in the Regulation of Banks**¹⁹ to enhance the role of competition in banking, which were submitted for approval at this Conference. Mr. Heimler introduced the panelists and briefly explained the panel's set-up: He would present the ten Recommendations, and the six competition agencies that had provided input for the report,

¹⁸ Available at http://www.internationalcompetitionnetwork.org/bonn/AERS_WG/SG1_Banking/Banking%20-%20An%20Increasing%20Role%20for%20Competition.pdf.

¹⁹ Available at http://www.internationalcompetitionnetwork.org/BANKS_Bonn_best_practice_suggestions.pdf.

the agencies of Brazil, Hungary, Indonesia, Mexico, South Africa and South Korea, would comment on these.

Recommendation 1: *“Jurisdictions should promote an open, competitive banking environment without unjustified restrictions on entry, ownership or exit, resulting either from the rules to be applied or from enforcement practice.”*

Mr. Heimler turned to Mr. Tokeshi and enquired whether, in Brazil, regulation went beyond prudential rules. **Mr. Tokeshi** explained that a banking reform was on the agenda, because of the extremely high interest rates and high banking fees. He said that competition is seen as a means of achieving low interest rates and fees in the banking sector. Banking regulation had been established in 1964, while competition regulation had only been introduced in 1984. Because there had been bank failures, prudential rules were important. Between 1994 and 2004, the number of banks in the country had decreased by one third. Mr. Tokeshi pointed out that barriers to entry were less restrictive and regulation was more liberal than indicated in legislation. Three of the top six banks were foreign-owned. Since the application of the law was flexible, there was no issue for foreign banks.

Recommendation 2: *“Jurisdictions should ensure that there is a proper separation between the enforcement of prudential regulation and of the general competition rules.”*

Mr. Heimler suggested to Mr. Kováts that the banking market in Hungary was a liberal one, a high percentage of banks being foreign-owned. **Mr. Kovats** addressed the topic of interaction between the financial regulator and the competition authority in Hungary. The de-regulation of the banking sector had been an important element in transforming Hungary into a market economy. Competition law had been introduced across the sectors and also applied to banking, apart from merger rules providing an exception for short-term acquisitions by banks. He said that generic supervision is preferable to sector-specific regulation because it is considered to be less susceptible to lobbying activities. Mr. Kovats explained that the financial supervisory authority was responsible for the functioning of financial markets on the basis of fair competition. He considered the experience gained by the financial authority to be vital for the competition authority. The cooperation between the authorities was institutionalized: the competition authority is assigned a contact person at the financial supervisory authority. If the competition authority initiates proceedings, the contact person can help in identifying the relevant information and will also indicate whether there are signs of anti-competitive conduct. Further, the regulatory authority participates in the competition authority’s surveys and studies. One of the most recent surveys concerned housing credit and was carried out by a joint investigative team. Mr. Kovats mentioned that it was particularly helpful that the regulatory authority could provide the necessary investigative tools for the financial market. The cooperation between the two authorities is voluntary.

Recommendation 3: *“In addition, agencies should whatever the institutional setting, build good working relationships with the regulatory agencies and coordinate their efforts in reviewing particular matters.”*

Mr. Heimler wondered why there is no cooperation between the two institutions in South Korea. **Mr. Lee** explained that in South Korea, the competition authority applies competition law to the banking sector, as to any other industry. An exception for banking was removed in 1996. Banking is an important industry and enhancing competition there plays a significant role for the entire industry. As far as cooperation between agencies is concerned, the relationship between the competition authority and the sector-specific authority has

improved. Mr. Lee explained that, in merger cases, the financial regulator, the Financial Supervisory Commission (FSC) would review a number of issues, while the KFTC would perform a regular competition analysis. Only the KFTC would review issues such as interlocking directorates.

Recommendation 4: *“In addition, agencies should apply in enforcement the usual tools of antitrust analysis, including market definition, market power/dominance, remedies.”*

Mr. Heimler turned to Mr. Garcia. While he recognized that the competition authority was fully responsible for competition law in banking, Mr. Heimler wanted to know whether, in merger review, market definition was state of the art. **Mr. Garcia** first observed that Mexico had had bank failures and problems with prudential regulation. Regulation is necessary and it is important to get it right. Mr. Garcia then turned to merger analysis and referred to the merger review in Citigroup’s acquisition of Banamex, Mexico’s largest bank. The decision did not refer to regional markets because in the competition authority’s view most markets in banking were national, except for large corporate loans that were considered part of an international market, and banking services provided at the level of local branches that were considered part of local markets. The transaction was cleared. However, when in 2002 the country’s two largest banks (Banamex and Bancomer) attempted to merge, the competition authority prohibited the concentration because of issues in the consumer credit market and the national market of small business credits. The law allowed the authority to take into account previous conduct, and there had been a precedent of collusion among banks in the auction of public debts and in credit cards. As a consequence of that failed transaction, both banks were acquired by foreign banks.

Recommendations 5 and 6: *“Finally, agencies in their competitive advocacy functions should consider, as appropriate when competition concerns are raised, to advocate for: 5. The elimination of exclusions from competition law for financial institutions; 6. An environment where banks are informed in a timely and complete manner on the debt exposure of potential borrowers (in integrated financial markets also on an international basis), making sure to identify ways and precautions such that information sharing does not lead to restrictions of competition.”*

Mr. Manoim reported that in South Africa the finance minister, by issuing a notice, could remove jurisdiction of the competition authorities in banking cases. In practice, this had become a rule rather than an exception. In a recent banking merger involving Barcays Bank, the minister had immediately issued such a notice. The other regulator was thus excluded from negotiating remedies. Mr. Manoim did not recommend this model.

As regards consumer credit, consumers often received credit from retail stores. In practice, they are then tied to the store in terms of credit, because the lack of generally available credit records makes it difficult for them to obtain credit elsewhere – the cost of switching is too high. A system of generally available credit information would improve the situation.

Recommendation 7: *“Finally, agencies in their competitive advocacy functions should consider, as appropriate when competition concerns are raised, to advocate for: A legal environment where taking possession of collateral is possible without delay.”*

Mr. Pardede explained that, in Indonesia, collateral cannot be confiscated by a bank without a specific court order, and confiscation is frequently challenged by third parties to whom the collateral has also been pledged. He gave an example of a loan given by Deutsche Bank in

1998. When the loan became non-performing, the collateral was put to auction in 2001. A third party claimed that the collateral belonged to it. The case is still pending before the Indonesian Supreme Court.

Mr. Heimler briefly presented **Recommendations 8 and 9**: “*Finally, agencies in their competition advocacy functions should consider, as appropriate when competition concerns are raised, to advocate for: 8. A reduction of switching costs by depositors, for example by asking for disclosure rules, for example on the costs associated with the closing of an account or paying off a mortgage; 9. In countries with a common currency, a reduction of transaction costs on cross border payments, including the creation of larger than national payment systems, so as to favor the development of larger markets and greater choices for consumers.*”

Recommendation 10: “*Finally, agencies in their competition advocacy functions should consider, as appropriate when competition concerns are raised, to advocate for: Especially in developing countries and consistent with maintaining a competitive market, the creation of a legal environment where financial institutions can reduce their risk by joint liability lending.*”

With regard to recommendation 10, **Mr. Jenny** addressed market failures in developing countries. Traditional banking is based on individual liability. The ability to provide collateral to the bank is an important tool for the segregation of high-risk from low-risk transactions. However, poor people do not have any collateral to offer. As a result, banks refuse to lend them money or do so only at high interests rates. The consequences of these failures can be seen in the example of Ethiopia with its recurrent famines. Even if the harvests are good, farmers are forced to sell their goods immediately and locally, since they cannot afford to buy trucks or warehouses. If they need money, they must turn to moneylenders who demand high interest rates. Governmental aid to the banking sector, in the form of rural banks, as a response to this situation had failed, because it is difficult for these banks to separate good and bad risks, and there is often corruption. One answer lies in micro-finance establishments with joint liability, in which all members of a group are responsible in the event that one of them defaults. In Mr. Jenny’s view, this model should be promoted, and also needs to be regulated, albeit according to different standards than those applied to traditional banks (taking into account the large number of very small loans and the low degree of diversification of the portfolios).

B. Panel 2: Interrelations between antitrust and regulatory authorities

The work of the Subgroup on Interrelations between Antitrust and Regulatory Authorities was presented by a panel chaired by **Guillaume Cerutti**, Director General of the French Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes. The other panelists were *George Lipimile*, Executive Director at the Zambia Competition Commission, *Christian Hocepied*, Head of Unit at the Directorate General for Competition of the European Commission, *James F. Rill*, partner at the law firm of Howrey LLP, Washington, DC, and *Laurence Idot*, professor at the University of Paris I – Panthéon

Sorbonne. The Subgroup on Interrelations between Antitrust and Regulatory Authorities had also prepared a report for the ICN conference.²⁰

Mr. Cerutti briefly introduced the topic to be discussed by the panel. The key question to be addressed by the panelists, on the basis of two hypotheticals in the area of telecommunications regulation, was: “Who should regulate, and how should they regulate?”

In the hypothetical **scenario number one**, two companies A and B approached the government of a country with the intention to start providing wireless telecommunications services. No wireless telecommunications services were available in the country, and only minimal wire-line services. There was a competition authority as well as a telecommunications regulatory authority in that country. First, the government was faced with the question of timing, *i.e.*, whether it could simultaneously achieve the objectives of build-out of telecommunications infrastructure and competition, or whether it would have to move gradually from a state-run or regulated monopoly to a competition regime. Second, the government had to consider how it could ensure (and weigh) infrastructure build-out and competition in prices, services, etc. Third, there was the question of who should regulate, how should they should regulate, and how the two authorities should interrelate, taking into account universal service obligations, pricing regulation and interconnection/network access rules.

Scenario number two involved the same facts as scenario number one, only five years later. The two wireless providers A and B respectively had 60% and 30% of the country’s wireless customers. The wireline company C had obtained a license to offer wireless services a year ago, and now accounted for the remaining 10% of wireless customers. 70% of the country had wireless coverage. Two of the three companies (A and C) now proposed to merge. The questions to be addressed in the second scenario were the following: Who should review the merger, and how should it be reviewed? What roles should the antitrust authority and the telecommunications regulator play during the process? How should the role that the agencies played in scenario number one (in view of infrastructure build-out or pricing regulation) affect the review of the merger, if at all?

Mr. Cerutti noted that the hypothetical scenarios were scenarios that younger competition agencies were typically facing. He submitted that telecommunications is one of the most typical and interesting sectors in which to study the interface between antitrust and sectoral regulation. On the one hand, it was considered to be one of the best examples of how competition can bring great benefits to consumers. On the other hand, the provision of telecommunications services was typically subject to sector-specific regulation.

Professor Idot addressed the first scenario in her presentation. First, she discussed whether the objectives of build-out of infrastructure and competition can be achieved simultaneously, or whether there must be a state-run or regulated monopoly first, which can be transformed to a competition regime only in a second step. Professor Idot explained that the answer depended on several factors, including the amount of investment required for the build-out and the potential for technological development. If investments were very high (such as for fixed-line telecommunications networks), it could be necessary to allow companies to recoup their investment through a monopoly, and it might therefore not be possible to introduce

²⁰ Available at: http://www.internationalcompetitionnetwork.org/bonn/AERS_WG/SG2_Interrelations/Interrelations_Between_Antitrust_and_Regulation.pdf.

competition immediately. In mobile telecommunications, however, investment should not be overly high. Moreover, there is great potential for technological development. Professor Idot therefore concluded that it would probably be possible to introduce competition immediately and simultaneously achieve build-out of the network.

Professor Idot then explained that in order to regulate the new services, it is necessary to adopt a system of telecommunications licenses, and she addressed the issues that were relevant in this regard. In particular, the obligations of the operators must be defined in the licenses, with respect to the geographical coverage, the content, the quality, and the price of the services to be provided. If the country in question is a large country, it might be advisable to provide for a gradual build-out obligation, *i.e.*, 25% of the country in the first step, 50% in the next, *etc.* The quality and prices of the services would presumably be best regulated through competition. If there is competition from the outset, then the best services will be provided at the best price. However, care should be taken that there is no collusion between the mobile operators in their narrow oligopoly, otherwise the competition authority should intervene.

With respect to the allocation of responsibilities between the competition authority and the telecommunications regulator, Professor Idot noted that, in principle the sector-specific regulator is better suited to *ex ante* regulation, and *ex post* regulation should be carried out by the competition authority. She favored parallel competences, with a different focus for each of the two authorities. In Professor Idot's opinion, *ex ante* regulation is appropriate for universal service obligations. Price regulation could be implemented both *ex ante* and *ex post*. *Ex ante* price regulation should be carried out by the sector-specific regulator, and *ex post* by the competition authority. Professor Idot considered the role of the two agencies to be complementary. As regards the question of interconnection and network access, Professor Idot proposed that the general principles of interconnection and network access should be laid down *ex ante* and applied by the regulator, but that there is still room, and a need, for intervention *ex post* by the competition authority.

With respect to institutional cooperation between competition and regulatory authorities, Professor Idot noted that this depends on the legal culture of the jurisdiction in question but that, generally, it is better to have a clear allocation of roles according to a legal or written framework. Cooperation between the two agencies should be reciprocal. Appeals against the decisions of both authorities should be centralized before one court, as is the case in France, with the Court of Appeal in Paris.

Mr. Hocepiéd also referred to the hypothetical scenario number one. He stated that one should ask the question why the provision of mobile telecommunications services should be regulated at all. In contrast to fixed networks, where, in light of the huge investments required, a monopoly might be warranted, the case for regulation was not obvious. Competition is the best regulator, and a mobile telecommunications network could at least potentially be duplicated. However, Mr. Hocepiéd then noted that there are areas in which the regulators should intervene. The main task of regulatory intervention is to establish a level playing field among market participants. In almost all European countries, later market entrants have not been able to catch up with the incumbent fixed-line operator in terms of market share, except in Greece and the United Kingdom. In Greece, two independent operators had initially been authorized to offer mobile telecommunication services, and the incumbent fixed-line telecommunications operator had been allowed to enter that market only three years later. In the United Kingdom, competition is "perfect", at least structurally. Each of the mobile operators has a market share of approximately 25%. Mr. Hocepiéd also referred

to the example of Germany, where Mannesmann (now Vodafone) and T-Mobile had been licensed at the same time, and their market shares are not substantially different. In Mr. Hocepiéd's view, the competitive advantage of the incumbent operators is due to the stable relations that they have formed with their customers (in particular business customers), the advantages that they enjoy with respect to access to sites and building permits for telecommunications antennas, and the economies of scale from which primarily the incumbent operators can benefit.

Given these difficulties, it is important that governments provide a clear framework for issues such as building permits for antennas (there is a risk that local authorities would delay the process), mast sharing, frequency allocation, universal service obligations and number portability. When choosing from the candidates for the provision of mobile telecommunication services, the agencies should take account of the commitments made by the candidates with respect to coverage, pricing, service, and innovation. The regulator should leave room for network sharing, because duplicating network infrastructure could represent a waste of resources. The government should confer the task of assessing and controlling anti-competitive agreements between mobile operators to the competition authorities. In this regard, Mr. Hocepiéd pointed to the example of sharing of mobile telecommunications networks in Germany by O2 Germany and T-Mobile (Case COMP 37.369).

However, Mr. Hocepiéd acknowledged that in some areas intervention through *ex ante* regulation can be justified. As justifying factors, he named: (1) high and non-transitory entry barriers; (2) market structures that make it unlikely that the market will move towards effective competition; and (3) situations where competition law instruments are not sufficient to tackle such market failure. By contrast, regulation could be problematic where it leads to *ex ante* regulation of non-dominant operators. Moreover, regulatory non-discrimination obligations could delay efficiency and innovation. Mr. Hocepiéd concluded that good governance implies minimizing the burden of regulation as well as the provision of certainty in the longer term with respect to the applicable rules.

Finally, Mr. Hocepiéd addressed three specific examples of regulatory activities in the telecommunication sector in the European Union. With respect to wholesale access and call origination on mobile networks, regulation was generally not required. A dominant position had been identified only in Ireland to date. As regards wholesale mobile termination, mobile operators would generally have to be considered to hold dominant positions. With respect to wholesale international roaming services (*i.e.*, the service that one mobile operator provides to another to allow the latter's customers to use ("roam in") a foreign mobile network when traveling abroad), Mr. Hocepiéd noted that operators and regulators faced a kind of "prisoners' dilemma". No operator would be willing to lower its prices unilaterally, but it is improbable that all operators would lower their prices simultaneously, so that prices would remain high. Mr. Hocepiéd added that now, with the emergence of increased international cooperation among mobile network operators in the field of international roaming, the situation was slowly changing. This development might lead to the emergence of one market for wholesale international roaming.

Mr. Rill commented on the hypothetical scenario number two. He noted that, in the United States, it had been decided that there should be two agencies, one responsible for competition and one for sector-specific regulation. The reason for this was what Mr. Rill called the "Reese's Cup" dilemma. There was a fear that the different objectives of competition and sector-specific regulation might negatively affect each other if they were enforced by one

agency, just as the chocolate part of Reese's might contaminate the peanut butter part, and *vice versa*.

Mr. Rill pointed out that from the parties' perspective it is imperative that regulatory decisions be predictable and timely. Mr. Rill suggested that issues such as market definition, entry factors, actual and potential competition, and efficiencies should be dealt with by the competition agency. The regulatory agency should address issues such as universal service obligation, pricing, permissible content, and national security. It is desirable for the regulatory agency to take due account of competition aspects in its decisions, but this is not always the case in practice.

Mr. Rill mentioned an example of a case in the United States, where the telecommunications regulator, the Federal Communication Commission, had imposed regulatory, competition-based conditions in the case of a merger in the telecommunications area, which had been cleared by the competition agency (the FTC) nine months earlier. Given that parties are subject to parallel proceedings, it would be helpful for some harmonization to take place between the agencies' activities in terms of timing. Moreover, the information-gathering activities of the agencies should be coordinated. He acknowledged the technical expertise that the regulatory authority could provide to the competition authority. He concluded that cooperation between agencies is necessary both at a high level and at the working level. These issues should be considered by applicable legislation.

Mr. Lipimile also reported on the hypothetical scenario number two, referring to the situation in Zambia. Zambia has both a sector-specific regulator and a competition authority. Mr. Lipimile stressed the importance of the law clarifying the scope of powers of different authorities. Both authorities have concurrent powers with respect to competition issues, but only the competition authority is competent to review mergers. The parties in the second hypothetical would therefore need to notify the Zambian competition authority of the merger. As regards the timing of the merger review process, Mr. Lipimile noted that Zambia had adopted the ICN recommendations. A merger must be cleared within two to three weeks if there are no substantial issues, an additional five to eight weeks are available if the case is problematic. There is a consultation process with the sector regulator. Mr. Lipimile mentioned, however, that the sector-specific regulators rarely have the necessary know-how in competition analysis. They tend to be technically-educated people with little or no training in competition analysis.

Mr. Lipimile explained that the standard for merger review is a substantial lessening of competition, combined with a public interest test, which would allow for the taking account of public benefits of the transaction. He discussed the various factors that would need to be taken into account when assessing the merger in hypothetical scenario number two, including the concentration of the market, barriers to entry, the competitive role played by the target, efficiencies, etc. If, having taken account of the above factors, the merger is cleared, the competition authority might consider making its decision conditional upon undertakings of the parties (1) not to engage in anti-competitive behavior; (2) to grant access to bottleneck facilities at competitive rates; (3) to commit themselves to developing infrastructure; and (4) not to take any action that would frustrate potential market entry.

Mr. Rill commented that there should be no condition not to engage in anti-competitive conduct, since such a condition is too general. Anti-competitive conduct could be regulated at a later stage. Moreover, as regards regulatory access, care should be taken not to create disincentives for the build-out of infrastructure and investments. Regulatory access should

only be applied in very narrow circumstances. A refusal to grant access could, again, be remedied at a later stage.

In the **discussion** following the presentations, **Sheridan Scott**, Canada's Commissioner of Competition, noted that the solution to scenario number one is not necessarily to involve only the competition authority; it rather depends on the policy objectives of the government. If the primary policy objective is to achieve network roll-out, which might be the case, in particular, in a country where no comprehensive telecommunications network is available, the sector-specific regulator might be required to play a leading role. Mr. Hocepied responded by referring to the French example, where structural funds are used to finance infrastructure investment. Shared infrastructure could obviate the need for regulation. In response to a question of a Tunisian delegate, Mr. Hocepied said that, generally, the network as a whole cannot be considered an essential facility. One must distinguish between different services provided over the network. As regards mobile termination services, Mr. Hocepied noted that these services might well be considered to be essential facilities. Professor Idot underlined the fact that in the long term competition regulation could be sufficient. Mr. Rill added that he was concerned about the innovation chill implied by the essential facilities approach.

Breakout sessions

Questions raised by the Mergers Working Group and the AERS Working Group were discussed in breakout sessions.

V. Plenary Session of the Competition Policy Implementation Working Group

In her introductory speech, **Deborah P. Majoras**, Chairman of the U.S. Federal Trade Commission, emphasized that competition rules benefit consumers, and that agencies have a special charter to champion competition. The creation of a competition culture around the world will ensure that individual ICN members are not isolated in their fight against restrictions of competition. She went on to say that well-established competition agencies as much as young authorities are facing new challenges. These are, among others, IP-related issues, questions of regulation, and generally, protectionist instincts on the part of companies and governments. Public measures that protect individual firms from competition are harder to eradicate than private restrictions of competition. Competition agencies have to stand up and defend competition against pressure for political privileges. In this context, she referred to a U.S. FTC/DOJ advocacy campaign against protectionist measures proposed in several U.S. states barring non-lawyers from certain services in the transfer of real estate. She urged the delegates to lead the fight to make markets work for the world's consumers. "We all face challenges from those who want to restrain the dynamic force that is competition. Our agencies are responsible for the broader public interest in protecting competition. We must keep that focus, despite pressure from those who seek exceptional treatment", Majoras said. She pointed out that it was more difficult to eliminate distortions of competition once exceptions had been created. Ms. Majoras referred to three basic steps that the Competition Policy Implementation Working Group has been supporting on the way to reach the goal of a worldwide competition culture: (1) delivery of technical assistance, (2) sharing experiences worldwide with consumers and showing consumers why competition is so important; and (3) finding ways to help developing agencies to become more efficient advocates for competition in their own jurisdictions. She ended her speech by clarifying that each agency is at a

different development stage and faces different challenges. The common goal can only be achieved by listening to each other.

Chul-kyu Kang, Chair of the Korea Fair Trade Commission, introduced the work of the Competition Policy Working Group, chaired jointly by Korea Fair Trade Commission and Brazil's Secretariat for Economic Monitoring, and its three subgroups. The first of these three dealt with technical assistance (TA). Since 1996, Korea has actively participated in TA programs. Mr. Kang underlined the high demand for TA in developing and transition countries that have to develop their economy and introduce competition at the same time. Mr. Kang suggested that TA should be recipient-tailored, not just donor-oriented. The second subgroup, dealing with consumer relations, delivered two reports, one on consumer outreach, the other on "The Effect of Institutional Structures on Enhancing Consumer Perspectives of a Competition Agency". Chairman Kang called competition policy and consumer policy the two sides of the same coin. Reaching out to consumers was essential for a successful competition policy. Forcing businesses to compete will benefit consumers most. Therefore, consumer and competition policies need to be implemented harmoniously. The Consumer Relations Subgroup had produced a video identifying successful practices of consumer outreach. Lastly, Mr. Kang introduced the report of the Getúlio Vargas Foundation drawn up on behalf of the subgroup on "Competition Advocacy in Regulated Sectors". He highlighted how important it was for competition agencies to be independent of regulators in order to advocate competition effectively. He concluded his speech by pointing out that the CPI Working Group has had remarkable success at encouraging participation by members from new agencies.

A. Presentation on Successful Technical Assistance (TA)

The co-chair of the TA Subgroup, **Aini Proos** of the Estonian Competition Board, chaired the presentation on "Successful Technical Assistance". At the outset of her introduction to the session, Ms. Proos read an appeal for cooperation with the World Bank, which intends to launch, with the support of the Italian government, a database on competition laws worldwide and on the agencies responsible for their implementation.

Turning to the work of the subgroup, she summarized that the subgroup's 2003 Report indicated a major need for capacity building. There was also a consensus that new agencies needed TA. This need gave rise to the question as to the best form of TA. This question was all the more difficult as there was little systematic data on evaluating technical assistance projects, and the needs of competition agencies varied according to maturity, size, scope of authority, *etc.* In order to find information and answers, the subgroup, in 2003 and 2004, compiled an inventory of TA projects, and developed a methodology and instruments for an evaluation survey. The survey was carried out in 2004 and 2005, to gather more detailed and systematic information from recipient agencies. Ancillary projects related to a donor contact list and a bulletin board of technical assistance projects.

The report and the preliminary results of the project were then presented by *Georges Korsun*, Deloitte, Washington, DC, and *Professor William Kovacic*, George Washington University.

Dr. Korsun gave an overview of the methodology of the survey on technical assistance measures. The survey covered specifically identified TA projects. Information-gathering relied on the actual memory of agency staff and avoided open-ended questions. For ease of communication and in the interest of the accuracy of the information gathering, interviews were conducted in English, French, Spanish, and Russian. Officials were interviewed at two

different levels: heads of agencies or senior officials, and staff who were actually involved in the TA program that was being evaluated. The survey consisted of nine modules; two modules dedicated to the structure of agencies and seven modules dedicated to specific projects. There was also an Agency Data Sheet asking for information about the structure of the agency, its budget and powers and other details. The seven modules used different instruments for examining a TA project (“general project”) and six specific activities (seminars, study missions, long term advisors, short term interventions, legal drafting and academic studies). In all, 37 agencies participated in the survey; 34 specific projects and approximately 60 activities were evaluated, yielding 900 sets of data.

Professor Kovacic summarized the “Preliminary Findings” of the 2004-5 survey:

- (1) Satisfaction is higher when the recipient agency is involved in the design of the TA project. This requires careful definition of the recipients’ needs. Likewise, a project can benefit from the recipients’ comments as much as from their local knowledge. As an example, he cited Mongolia as a land-locked country in whose language the metaphor of a “safe harbour” was meaningless and was instead replaced by the term “peaceful pasture”.
- (2) Advisor quality, specifically regarding technical know-how and teaching skills, is essential for the success of the project. Kovacic also emphasised another finding of the survey: local knowledge on the part of the advisor is not indispensable provided the recipient is sufficiently involved in the design of the project.
- (3) Advisors from mature agencies are well-suited to provide assistance, as recipients can learn from their experience.
- (4) Satisfaction with a specific project does not necessarily depend on the project’s impact on the performance of the agency. The Report found that seminars are highly valued, and that a continuous relationship with the providing agency can improve the success of a project.

Dr. Korsun then set out goals for future work on the survey because, at present, the survey posed more questions than it answers and many of its answers were preliminary. Regarding future methodology, more analytical work was required to correlate the inputs with specific outputs; to trace causalities; and to integrate the impact of outside influences such as budgetary considerations, academic work and others. Also, more data was needed. There may have been a bias in the survey in that projects were selected for evaluation, and there was insufficient variance in the results. Dr. Korsun called on ICN members for contributions in this respect. Ultimately, he explained, assessment is a dynamic process, since the needs of newer agencies change over time, as do the preferences of donors.

As to future work, Dr. Korsun suggested three areas: the taxonomy of competition agencies to facilitate the benchmarking of performance; performance measures (such as, in varying combinations: appeals record, turnover of staff, fines, budget); and the influence of project characteristics on the quality and effectiveness of the assistance given.

Ms. Proos then invited **questions and comments** from the floor. A representative of the Andean Community suggested that TA projects and surveys should also take into account the regional level and raised the question whether regional structures such as the Andean Community could more efficiently benefit from TA projects. The panel responded that it is important to take the regions into consideration, and to benefit from their experience. A

Kenyan representative reiterated this point with regard to COMESA and wanted to know whether there are contacts with other TA providers like OECD, UNCTAD and the EU. He also questioned the influence donors exert on TA programs, and stressed the need for co-operation between recipients and providers of TA. Dr. Korsun replied that plans initially were very ambitious. For instance, it was envisaged to include local businesses and local institutions, which turned out to be too difficult. Professor Kovacic expressed his view that regional organizations should be included in TA programs. A participant for Israel suggested that for measuring efficiency of TA projects, a distinction should be made between agency members who have participated merely in the design of a project and those who have participated in the project. Professor Kovacic confirmed that one receives biased answers from those who participated in the program. Perception of staff and heads are not necessarily identical. A delegate from Tunisia concurred: project objectives should be defined jointly with the recipient agency, taking into account the level of expertise of the agency, its environment, and the logistics for the transfer of the information. Ms. Proos concluded that the very purpose of the survey was to tell donors about the best approaches to a successful TA program.

B. Panel on Aspects of Independence of Regulatory Authorities

This panel was chaired by **Eduardo Pérez Motta**, President of the Mexican Federal Competition Commission. He began by explaining the challenges regulated sectors pose for competition policy, namely a typical market structure of few operators with strong incumbents, among them former monopolists, and high barriers to entry. These sectors of the economy (telecommunication, utilities) were of specific importance for developing countries and transition economies. Whereas in the past the public treasure had strong influence on state-owned incumbents, today competition agencies had to make sure that regulation and competition policy went hand in hand in the interest of consumers. He noticed that often, sector regulators had played a role in privatization and even today sector regulators might still protect incumbents or act as the operators' spokesperson. Therefore, competition authorities should become active in favor of protecting competition by getting involved in sector specific legislation, and should develop competition advocacy in these sectors.

Mr. Perez Motta proceeded to present the work of the subgroup "Competition Advocacy in Regulated Sectors": (1) The "Competition Advocacy Review" comprises "Case Studies on Regulated Sectors". It examines the interaction between competition agencies, advocacy policies and regulated sectors on the basis of case studies. (2) The Getúlio Vargas Foundation of Brazil contributed a study on "Aspects of Independence of Regulatory Agencies and Competition Advocacy".

Mr. Perez Motta then introduced the two panelists: *Shyam Khemani*, World Bank Group, Washington, D.C., and *Gesner Oliveira*, Getúlio Vargas Foundation, São Paulo, presenting the results of a study of independence of regulatory agencies

Dr. Khemani started by observing that competition agencies do not have many friends. The case studies indicated that there were three key elements to a successful competition advocacy in regulated sectors: (1) empowerment, (2) transparency and accountability in their procedures, and (3) an active role of competition agencies. (1) Empowerment can consist of statutory power to present legislation, as is the case, *e.g.*, in Portugal. In other countries, one finds informal arrangements, for instance in the USA, where the competition authorities can appear as *amici curiae* or influence debates through press releases. (2) In Brazil, the competition agency is represented within the government. However, such status does not

create sufficient transparency. (3) As to the active role of competition agencies, Dr. Khemani emphasised that it is not enough that they assert in a general fashion the benefits of competition. Instead, they should seek to offer alternative, pro-competition policies for specific sectors.

Responding to Dr. Khemani's contribution, **Mr. Oliveira** agreed on the need for a clear articulation of competition agencies' powers: 81 out of 86 agencies surveyed had some kind of jurisdiction. There was, however, some bias in the answers of agency staff, and responses, at any rate, came predominantly from agencies more engaged in advocacy. He went on to state that agencies needed to form "winning coalitions"; they have to develop their ability to find more "friends" and to better organize those friendships they have. Finally, agencies need to convince consumers of the benefits of competition in regulated sectors as well. This is best done by effective enforcement of general competition laws.

Mr. Oliveira then turned to the study by the Getúlio Vargas Foundation on the need for independence of regulatory agencies. Independence is crucial for guaranteeing that these agencies are friends and not enemies of competition and that they actually seek to increase consumer welfare. Independence, however, is a complex issue. To some extent, it is historically determined. There are several ways of measuring independence. One way is to consider actual and formal independence. Formal independence is neither sufficient nor necessary, but relevant; on the other hand, it is difficult to measure actual independence. The report applies eight criteria to measure formal independence: (1) the process of nominating leading personnel, (2) their technical background, (3) the term of their appointment, (4) budgetary autonomy, (5) collective or individual decision making, (6) rights of recourse to the courts, (7) transparency of decision making, publication of decisions, and consultation of the public; (8) quarantine periods for personnel after quitting the service of the regulatory body. The study found that there was no variance among sectors or legal traditions regarding these criteria. There is also no relationship between the Human Development Index and the independence of regulatory bodies. He suggested that this may be due to the "credibility gap" of governments themselves regulating these industries. This would explain why in developing countries, too, one found independent regulators.

In his concluding remarks, **Dr. Khemani** remarked that a future survey may take the views of companies in the regulated industry into consideration when assessing the independence of the regulatory authority. Real independence depends on the quality of the appointees, particularly of appointees to the helm of an authority. He also wondered whether there might not be a market test for the independence of the regulatory authority. Such a test could measure the performance of companies in the privatized sectors of the economy, taking their bond yields as a starting point. This was based on the observation that investment was higher where competition was introduced.

Questions and comments from the floor were offered; first, by an NGA who pointed out that there is less of a need for competition advocacy where competition principles are embedded in the economy. Usually, that would not be the case for "younger" agencies. He asked what the agencies should do in such a situation: express the loss of consumer welfare or propose regulation? He also asked about the role of competition agencies in privatizations. Mr. Khemani replied that this depended on the specific circumstances of each country as well as on the degree of empowerment of the competition agency concerned. However, if a competition authority is fairly independent and can roughly determine the cost of bad regulation it should use the media. The representative of the Italian competition agency reported that his organization has, under its statutory powers, issued more than three hundred

recommendations. Of these, however, only a few have been followed. Timing, in this respect, is of the essence: agencies should intervene as early as possible, preferably when the government is still contemplating a bill, and at any rate, before any decisions on the bill are reached in the legislature. Mr. Khemani agreed that timing is extremely critical. Mr. Oliveira recommended statutory provisions enabling competition agencies to participate in privatizations and to give their opinion on sector-specific legislation.

C. Presentation on Consumer Relations

The work of the subgroup on consumer relations was introduced by **Sally Southey** of the Canadian Competition Bureau. She reminded participants that consumers are traditionally identified as the prime beneficiaries of competition enforcement. The subgroup's work relates to two main fields: consumer outreach and the effect of institutional structures on enhancing consumer perspectives of a competition agency. Since the last ICN conference in Seoul, the group has produced a report on "Activities Undertaken and Lessons Learned", drawing together and analyzing case studies of successful and unsuccessful consumer outreach. Also, a "Consumer Outreach Workshop" took place in Paris on 16 February 2005.

Ms. Southey then introduced the panelists: *Eleanor M. Fox*, Walter J. Derenberg Professor of Trade Regulation, NYU; *Jorge Jaeckel*, Superintendencia de Industria y Comercio, Colombia; and *Sheridan Scott*, Commissioner, Canadian Competition Bureau.

Professor Fox summarized the results of the survey on the "Effect of Institutional Structures". The survey identifies the costs and benefits of combining the "consumer protection" function and "competition" function within a single agency. The benefits are (1) a sharper focus of competition law on consumers and a broader consumer welfare perspective; (2) synergies, namely enhanced efficiency and less political intra-agency conflict and reduced communications problems as well as the possibility of using the consumer protection investigation as a basis for a competition case; (3) goodwill derived from consumer protection initiatives can be transferred to the competition side of the agency, thereby building a stronger constituency for competition and enhancing credibility of the agency. There are, however, drawbacks to such a combined agency, which Professor Fox identified as: (1) a potential flood of individual consumer complaints which eats up time and resources; (2) differences in skills and methodology required for the respective analysis, despite their similarities; and (3) the raising of unwarranted consumer expectations.

Mr. Jaeckel explained that his agency is a combined entity. The experience of the Colombian Superintendencia shows that consumer protection and competition combine perfectly. Information provided by consumers may be correct or wrong. Still, such information is important for getting a complete idea of what is going on in the market. There is an inherent link between consumer protection and competition policy. Misleading advertising is clearly anticompetitive. Still, a counterbalancing is needed in case consumer protection would distort competition. A different problem arises from the sharing of the budget by two sections within the agency.

Ms. Scott underlined that, outside Quebec, Canadian consumers are less organized than those in other jurisdictions and have less understanding of the benefits of competition. In order to raise consumer awareness, she reported that the Canadian Competition Bureau has organized a series of four meetings a year with nine associations that reach out to consumers, like the association of retired people. The Bureau has also re-designed its website, using plain

language throughout. She did, however, warn against creating false expectations with consumers as to what competition policy can achieve in the short term.

After these contributions, Ms. Southey presented a **video**²¹ produced by the Canadian Competition Bureau showcasing public awareness programmes of thirty ICN member agencies, ranging from, *e.g.*, TV commercials, TV documentaries, cartoons and school education programmes to getting media coverage on successful enforcement actions.

After this entertaining presentation, Ms. Southey hinted at an upcoming and very similar project on business outreach.

VI. Breakout Sessions

The plenary session on Competition Policy Implementation was followed by breakout sessions in which participants discussed topics for the future work of the Competition Policy Implementation and Cartels Working Group. The conclusions of the discussions were presented in the session for approval of work and future work plans on the third day of the conference.

VII. Implementation session

At the outset of this session, **Eduardo Pérez Motta**, moderator of the session and President of the Mexican Federal Competition Commission (MFCC), praised the achievements of ICN thus far: the great majority of competition agencies belong to the network; several fruitful conferences were held; and work had yielded tangible results in core areas of competition policy; noting that the ICN could now concentrate more on the implementation of these results.

Mr. Pérez Motta proceeded to describe the Mexican experience with implementation of ICN recommendations in the mergers sector. Mexico, which uses a preventive approach in merger control, requiring notification of transactions above a certain size, reviews a considerable number of international mergers: out of 131 mergers notified to the Mexican Federal Competition Commission, eighty-one were international mergers involving 31 different countries. Mr. Pérez Motta noted that globalization has increased the importance of international convergence and cooperation. The MFCC has entered into bilateral co-operation agreements with the USA, Canada, Chile, Korea and the EC. Additionally, competition chapters have been inserted in several free trade agreements (NAFTA, trade agreements with Colombia, Venezuela, Israel, Uruguay, EFTA and Japan). Regarding convergence, Mexico's merger regime underwent a series of revisions to implement the ICN Recommended Practices for Merger Notification and Review Procedures. Regarding the required nexus to the jurisdiction, notification thresholds, timing, review periods, requirements for initial notification, conducting investigations, procedural fairness, transparency, confidentiality, inter-agency coordination, and review of some proceedings, Mexico is now fully in line with ICN recommendations or will be so shortly. To conclude, he stressed that merger review instruments need to be more effective in order to prevent anticompetitive activities.

Maria B. Coppola, representing the International Antitrust Division of the U.S. Federal Trade Commission, reiterated that the implementation of members' experience in the field of

²¹ http://www.internationalcompetitionnetwork.org/annualconferences_bonn.html

merger notification procedures had noticeably increased. She described a two part implementation study undertaken by the Merger Notification and Procedures subgroup. The first part was a monitoring activity that analyzed the conformity of ICN members' merger review systems with selected Recommended Practices (RPs). This monitoring project will serve as a comprehensive baseline study from which to evaluate future changes. The second part was a study of actual implementation efforts, based on interviews with 27 jurisdictions that have made or proposed changes that bring their merger laws into greater conformity with the RPs. Notwithstanding the non-binding nature of the RPs, at the time of the Seoul conference in 2004, 22% of members with merger laws had made or planned revisions. By 2005, the subgroup was aware of 54% of ICN members with merger laws that had done so or planned to do so, with three members using the RPs in the adoption of first time merger provisions. Based on the results of the interviews, the RPs act both as a catalyst for change, for instance in the case of Australia, and as a benchmarking tool, for instance in the cases of Brazil and Russia. In another jurisdiction, the RPs were used to convince decision-makers not to re-introduce market share thresholds for notification. Ms. Coppola highlighted four lessons to be learned. First, it can be useful to start with changes agencies can implement internally, as this does not overburden their resources. Second, the RPs are more persuasive if used in conjunction with other internationally accepted instruments. Third, building consensus among interested constituencies facilitates reform. Fourth, agency officials, private practitioners, and academics can play an important role in bringing about the changes required. Finally, she presented a "tip sheet" that can facilitate: (1) identifying areas for change; (2) implementing change, *e.g.*, by applying model language used in other jurisdictions; and (3) building consensus by winning the private sector as an ally.

Ronald A. Stern, Vice President and Senior Counsel for Antitrust of the General Electric Company, remarked that the results of the ICN's work were only intermediate steps: implementation is the ultimate goal. Since the ICPAC Report of 2000, awareness of international problems in the field of merger review has increased considerably. In particular, unnecessarily burdensome regulation is coming under scrutiny. In the past five years, significant progress has been made in solving these problems, but, still, much needs to be done. Mr. Stern pointed out five priorities for future action that would eliminate inefficiency of the merger review system. First, the burden of determining whether notification is required should be reduced. To this end, notification thresholds should prefer turnover thresholds as quantifiable criteria to a market share approach. Second, notifications should be required only if there is a significant local nexus. From this followed his call to abandon notification requirements triggered solely by either worldwide turnover criteria or solely by the combined local turnover of the parties in favor of a requirement that each party to the transaction have significant local turnover in the relevant jurisdiction (counting only the local turnover attributable to the portion of the seller that is being acquired). Third, initial notification requirements should be simplified by, *e.g.*, avoiding unnecessary translation costs. Fourth, unduly burdensome post-notification requirements should equally be reduced. Fifth, merger review procedures should be simplified in cases that are clearly unproblematic in order to speed up completion of the transaction. Mr. Stern noted that studies suggested that more than 90% of notifications do not raise substantive issues. He explained that implementation can be facilitated through ICN's leadership, cooperation within other groups, like the European Competition Network, and by building on the workshop in 2006 of the ICN Merger Notification and Procedures Subgroup. In addition, the support of the legal and business community should be secured.

Mirna Pavletic-Zupic, representing the Croatian Competition Council, reported on the Croatian experience in implementing the ICN Recommended Practices. The Croatian Competition Act was amended in 2003; in 2004, merger by-laws were adopted. The amendment follows the example of German and Hungarian law. There were two main reasons for these reforms: first, the desire to bring Croatian merger provisions in conformity with EC Law and international best practices; second, to reduce the burden of merger review. Also, simplification of procedures answered the perceived lack of resources. The RPs were used as a benchmarking tool with the following results: (1) *Nexus*: at least two parties sell goods or provide services in the Croatian market; (2) *Thresholds*: global turnover of at least € 137m, and two parties with domestic turnover of at least €13.7m; (3) *Timing of notification*: possibility of notification prior to executing an agreement; (4) *Review periods*: simplified review of non-problematic transactions; (5) *Initial notification*: the agency provides guidance through a maximum of information for businesses; (6) *Conducting of investigations*: definitive deadlines; earlier termination of second phase if no substantive competition concerns exist; (7) *Procedural fairness and transparency*: third parties are kept informed, external review of the decision, information through a website in English, updated Merger Template linked to ICN website, publication of decisions; (8) *Inter-agency coordination*: cooperation and coordination with 27% of ICN members; (9) *Periodic reviews*: three times in the last three years. Ms. Pavletic-Zupic reported that the RPs also served as a basis for consultation during the peer review of the new Croatian merger provisions. Implementation of the ICN's RPs contributed considerably to reducing the number of notifications and increasing transparency and legal certainty.

Mark Pearson, representing the Australian Competition and Consumer Commission (ACCC), reported on the Commission's experience in working with the Handbook on Merger Investigative Techniques. He contrasted two cases, one before and one after having worked with the Handbook, one with a negative, the other with a successful outcome. The investigation relying on the Handbook proved the relevance of Chapters 2 to 4 of the Handbook. In accordance with Chapter 2 of the Handbook, the ACCC drew up a work plan. It developed different theories of the harm possibly suffered through the alleged anti-competitive conduct, identified locations, the affected markets, and the information needed, and planned the logistics for interviews. The plan remained dynamic throughout the investigation, and was updated whenever the progress of the investigation so required. Concerning Chapter 3 of the Handbook, the ACCC aimed at developing reliable evidence, and in so doing, almost fully implemented the blueprint in the Handbook. In accordance with Chapter 4, economic evidence was not taken first, but was used to test other information gathered. By contrast, ACCC's investigation before using the Handbook did not follow a systematic approach, there was no written plan, witnesses were not used in a convincing manner, and there was too much reliance on economic evidence. Over all, the Handbook provided most relevant and practical guidance and allowed the agency to focus on the case and to rely on the facts and not on mere theory.

Tsuyoshi Takahashi of the Japan Fair Trade Commission (JFTC) reflected on East Asian experiences with technical assistance (TA) projects. East Asian ICN members account for only seven out of 89 ICN members: three East Asian countries have well-established competition laws and policies, two have a few years of experience with implementing and applying such laws, another two have recently introduced competition laws, and three countries are planning to do so. Mr. Takahashi reported that the JFTC is actively involved in TA activities and presented a list of TA projects in East Asia. This region accounts for 164 out of 320 TA projects worldwide. According to him, effective TA requires better

coordination between recipients and donors, and the efforts of the Technical Assistance subgroup are improving this coordination. The Technical Assistance Report presented for Bonn also highlighted what the JFTC has found in its own programs, that a sense of real involvement in planning TA on the part of recipients is another critical element of effective TA. Otherwise, recipients may easily be overwhelmed by the mass of information imparted, so that donors' resources go to waste. The results of the Report should encourage donors and providers to move in this direction. Mr. Takahashi then pointed out the role of the JFTC in East Asia, namely as a bridge between ICN members and non-members. A meeting of the heads of the competition agencies of East Asian countries took place in Bogor (Indonesia) in May 2005. ICN members and non-members participated, discussing, among other topics, effective TA implementation. These discussions are to continue next year, and will incorporate the results of the ICN's technical assistance study. Mr. Takahashi pointed out how important it is for the ICN to cooperate with non-members in newly emerging competition law jurisdictions. Such non-members should be granted access to day-to-day activities of ICN, *e.g.*, via telephone conferences.

In a **comment**, a representative from Poland reported that in her country, merger law was reviewed in 2004 and amended effective May 1, 2005 in conformity with Poland's own experience, with Regulation (EC) No. 139/2004 (the EC Merger Regulation), with the OECD guidelines, but also with the ICN's RPs and merger-related materials. In particular, the previous dominance test was replaced with a test of substantial lessening of competition; there is no notification deadline anymore; instead, mergers can be notified anytime if there is a concrete intention to merge; and the exemption below 20% market share has been abolished.

Reacting to an interjection from an NGA from Mexico concerning reforms of the merger review system in that country, Mr. Pérez Motta explained that these reforms rely on a two-track system, including a fast-track review for unproblematic cases.

VIII. Panel on Expectations of and Challenges for Younger Competition Authorities

David Lewis, Chair of the Competition Tribunal of South Africa, chaired the panel of younger competition authorities. In February 2005, a meeting of the Steering Group took place, which created a panel dedicated to the specific role and needs of developing countries within the ICN. Mr. Lewis contemplated the reasons for founding the ICN. Economic globalization means that national competition laws are not well-suited to cope with the increasing number of multinational mergers and international cartels. The increasing number of market economies around the world has led to a remarkable expansion of competition laws within 10 years. In contrast to other organizations, like UNCTAD, OECD, and WTO, the ICN has some marked distinguishing features, in particular the central role of competition agencies and its network character. From the outset, the participation by young agencies of developing countries and transition economies in the ICN was considered of high importance to the ICN, and not as a mere "act of charity". Mr. Lewis underlined that the internationalization of antitrust cannot be successful without including these agencies that often have to grapple with the same international cartels and mergers as their more experienced counterparts. To date, 91 competition agencies, from Albania to Zambia, are members of the ICN. Accordingly, the ICN work program reflects the diversity of its membership. However, these agencies have very diverse levels of capacity and experience and a very diverse array of domestic needs and resources. Hence, a special effort is required if developing countries and transition economies are to take part actively in the ICN's work.

Mr. Lewis asked the panelists to elaborate on the following overarching question: What do new competition agencies expect to gain from ICN membership? This question was divided into three parts. (1) Is there a need for new forms of cooperation between agencies? (2) Are there new topics that should be discussed in the view of younger agencies? (3) Does the ICN need a new form of organization and structure in order to maximize participation by agencies especially from developing countries?

This diversity of younger agencies was reflected in the composition of the panel, which comprised *Bruno Sobral*, Secretariat for Economic Monitoring (SEAE), Brazil; *Mihai Berinde*, Competition Council of Romania; *Mirashan Ramburuth*, Competition Commission, South Africa; *Khalifa Tounakti*, Ministry of Trade and Handicrafts, Tunisia; *Bambang Adiwiyoto*, KPPU Indonesia; and *Barbara Lee*, Jamaica Fair Trade Commission.

Ms. Lee reflected on forms of cooperation. She stressed that cooperation in the framework of ICN is based on partnership (almost like in a family) and mutual understanding even if differences persist. She proposed four kinds of measures: (1) Assistance to developing agencies in carrying out economic studies and to publicize the benefits accruing from competition; (2) Internship programs in the form of exchanges of staff. From these, both younger and experienced agencies could profit. Experienced agencies could learn “how to work miracles”, i.e. how to achieve very much with next to nothing. (3) Contribution to advocacy programs in developing countries. Jamaica, for example, holds an “Annual Lecture Day” to which officials from experienced agencies could contribute. (4) Mentorship programs could provide for the “adoption” of a younger agency. These would consist of bilateral exchanges and contacts between agencies or between individual officers.

Mr. Tounakti discussed possible forms of cooperation that so far economically more advanced countries have not lent to competition law enforcement in the developing world. Without such cooperation, agencies in developing countries risk being marginalized in the fight against international restraints of competition. Such restraints, like international cartels, are usually initiated in the developed world, but harm competition worldwide including competition in recently liberalized markets of developing countries. Agencies in the developed world, under the effects doctrine, only protect their own markets. Therefore, they will neither take into account harm caused abroad nor see any need to cooperate with agencies from developing countries. The latter, however, are not able to protect themselves without information provided by their counterparts in the developed world. The Tunisian agency, for instance, has never been consulted on international anticompetitive practices or mergers nor informed of such restraints by another agency. Against this background, Mr. Tounakti recommended developing mechanisms of mutual information and early warning about international restraints within the framework of the ICN. Also, assistance programs (to be funded by donor countries) should enable young agencies independently to deal with complex questions surrounding, e.g., the relationship between competition law and intellectual property.

Mr. Ramburuth noted that cooperation needs not take place exclusively within the framework of the ICN; there can also be informal cooperation between agencies. As an example, he referred to TA provided by the Federal Trade Commission and the Department of Justice of the USA to South Africa, and to cooperation between the agencies of South Africa on the one hand and Zambia and Kenya on the other. On the question of how the ICN could participate in providing guidance as to how TA could be formalized, he suggested that the ICN could formulate guidelines and best practices for concluding bilateral and regional cooperation agreements. Moreover, TA should deal with real-life cases of, e.g., behavior of a

firm abusing its dominant position; there could also be more case studies and technical workshops on specific issues.

Mr. Adiwiyoto noted that the most important objective was to create a competition culture. He specifically endorsed the institution of mentorship programs, which he considered more effective than other types of technical assistance. This would involve assistance by teams of two or three senior instructors from experienced agencies, preferably with knowledge of the local competition culture. These teams should help the receiving authority with its work on specific cases, for instance in their evidence gathering.

Mr. Berinde proposed to set up a permanent group of experts from developed agencies who are familiar with the situation in individual developing countries. This group would grant TA and provide information in real-life situations. He also encouraged the organization of seminars and conferences with other international organizations working on competition issues, like OECD, UNCTAD, and the European Community. Moreover, he suggested short- and long-term missions of experts from established agencies to young agencies, as well as more workshops. Romania had also had good experiences with bilateral cooperation protocols, which proved helpful in developing administrative capacity. Although he emphasized the importance of taking up more issues specifically relevant to young agencies, he warned against dividing ICN members in two groups. ICN has to act with one voice.

Mr. Lewis then led the panelists to discuss what new topics could be addressed by ICN.

Ms. Lee welcomed the World Bank databank project announced the previous day, involving a comparative study of ICN members' competition laws. She suggested that a glossary of competition law terms be drawn up which would give young agencies quick orientation and structured access to other ICN members' jurisprudence on these matters. She also identified the need for the ICN to deal with more practical issues, *e.g.*, how cases may be presented in courts.

Mr. Sobral recalled the two objectives of ICN: (1) convergence of procedural and substantive law; and (2) solutions for enforcement issues of common interest. Whereas he conceded that convergence towards the ICN's recommended practices is a fruitful endeavor, he criticized that the ICN has lost the second objective out of sight, despite its crucial character for developing countries. He mentioned the example of Brazil, where markets have been liberalized but competition enforcement has not developed at the same pace. Overall, a competition culture is still lacking, not least among the judiciary. Fines are not collected, sentences not enforced. Many reforms are still pending. He pleaded for continuing work on the topic of implementation, coupled with efforts to promote competition advocacy. This should reach out to consumers, regulators, and the business community. Therefore, he especially underlined the importance of advocacy concerning the judiciary.

Mr. Berinde concurred with Mr. Sobral's call for greater emphasis on advocacy. He added that young agencies also need help with practical issues such as information gathering, allocation of human resources in accordance with the importance of a given case, and staff policy. The ICN could develop an inventory of advocacy measures.

Mr. Ramburuth addressed two issues. First, he argued international trade policy instruments can be, to some extent, anticompetitive or, at least, permit anticompetitive conduct. As examples, he cited export cartels, protectionism, subsidies, and problems associated with the protection of intellectual property rights. Developed countries' agencies were sometimes

reluctant to tackle such aspects of trade policy instruments. He stressed that in this respect, competition policy should interact with other policies, and that competition agencies had a legitimate advocacy role to play in promoting trade laws that were in line with competition. Silence on these issues could undermine effectiveness of competition advocacy in developing countries. Second, he expanded on the relationship between competition agencies and the courts that often do not understand competition law. Due to their complexity, competition laws are not always easy to apply, and some judges have shown themselves cautious in undergoing the required training. In Zambia, for example, only three competition cases reached the courts in the last nine years; all of them were withdrawn.

Mr. Lewis invited the panelists to consider new forms of organization and structure to facilitate participation in the ICN by developing countries.

Mr. Sobral described the experience of the Brazilian agency: the best way to get involved in the ICN's work was via the subgroups where it was easy to participate and to encourage staff to do so. This was also the best and cheapest way to get very efficient technical assistance. He did, however, suggest ways in which participation in the subgroups' work could be rendered even simpler. He mentioned the use of Internet chats for conference calls. The work of subgroups should also be open to more agencies, for instance by allowing more co-chairing of sessions. By taking part in the discussions of the working groups, officials from younger agencies receive training on the topic and in teamwork. In addition, participation creates networks of individual officials. He therefore spoke out against a reduction in the number of working groups. Academic mentors could be called on to ensure the quality of the work. Finally, it might be a good idea to broadcast the annual conference on the Internet.

Mr. Tounakti expressed two concerns. The first was that the ICN is a virtual network. While this is cheap to run, it means that it will remain an elite network which makes participation by young agencies difficult. He suggested turning the ICN into a fully-fledged and permanent international organization with its own budget. His second concern was about the linguistic regime of ICN. In his view, to have one working language prevents participation by some young agencies and stifles ICN's expansion. It does also not adequately reflect the cultural diversity among members. He therefore pleaded for other languages to be allowed as working languages, for instance Arabic.

Mr. Adiwiyoto reminded delegates of the "Economic Development Institute" run by the World Bank in the 1970s. He suggested a similar training center specializing in competition law, to be located in a developing country and staffed with permanent personnel. The topics of instruction would be suggested by young agencies.

There were several **comments** from delegates reflecting the issues discussed by the panel. An NGA from India suggested a conference bringing together regulators from the utilities and financial sectors with competition agencies. There should also be participation by non-governmental organizations and of civil society. A delegate from Chile argued that a competition agency remains faceless if it does not engage in advocacy, which should also be directed towards the judiciary and legislature. A representative of UNCTAD advocated the participation by less-developed countries, but saw linguistic problems. He warned that admitting more working languages might mean opening Pandora's box. He shared the view that the problem in developing countries was not so much having competition laws at all, but implementing them adequately. As possible topics for further investigation, he suggested the overlap between competition policy, industrial and trade policy, and intellectual property. Finally, he pointed out that UNCTAD worked towards bridging the gap between developed

and developing countries. In this context, he announced a conference to be held in Antalya (Turkey) on November 14–18, 2005, to which young agencies and countries so far without agencies were invited. The delegate from Malta, who was also a member of the judiciary, reassured delegates that judges were not as ill-prepared to handle competition law matters as was sometimes argued; he drew delegates' attention to the Association of European Competition Law Judges. He called ICN to work with the judiciary as well. Mr. Khemani, speaking for the World Bank, explained that the Economic Development Institute is now called the "World Bank Institute". A glossary of competition law terms exists but is in need of updating. A reading list on competition law will soon be made available on the Internet. An NGA from Israel noted that three important topics are not yet on the ICN's agenda: combating export cartels; dealing with mergers which might have negligible effects in large economies but a large impact in developing ones; and abuse of market power in developing countries by companies from developed countries. Finally, an NGA from Germany, representing an association of German competition lawyers, offered help with competition advocacy in developing countries. With a view to increased convergence, he suggested that worldwide mergers affecting many countries be adjudicated by one country's competition agency only, with the others waiving their competences.

IX. Report from breakout sessions and approval of work; Future work plans; Steering Group elections

A. Reports from the Breakout Sessions

The last part of the conference started with reports from the breakout sessions. Separate reports were delivered on considerations and opinions expressed in the sessions on the work of individual working groups.

On the work of the **Merger Working Group**, for instance, broad support was expressed for the Merger Guidelines Workbook. New topics were proposed, like work on conglomerate mergers. The treatment of national champions attracted some discussion in the sessions. There was a general understanding that workshops on the Guidelines are helpful for implementing them. There was broad consensus with respect to the two new Recommended Practices on Remedies and Competition Agency Powers.

The **Antitrust Enforcement in Regulated Sectors Working Group** received broad approval for its ten recommendations on the banking sector. It was also noted that there are generally no good reasons for exempting regulated sectors from antitrust enforcement. As to the relationship between the competition authority and the sector regulators, there was support for the idea that this relationship should be regulated by law. This would prove to be vital especially in countries in which the competition authority is younger and less well established than the sector regulators.

On the work of the **Competition Policy Implementation Working Group**, there was general agreement that the input of recipients of technical assistance was needed in order to make technical assistance more effective. Concern was expressed on how to bring the work to the donor community. Suggestion was made that the WG could undertake a project to map recipient needs and donor abilities to see where matches might exist. There was discussion on how to enable recipient agencies to use technical assistance. There was general agreement about the importance of consumer outreach, but concern was expressed that the more difficult pro-competition message would be crowded out by the simpler pro-consumer message. There

was disagreement about how easy it is to articulate the competition message, but there was general agreement that agencies don't do it as well as they should. A suggestion was made that effective outreach can involve identification of the costs of anticompetitive regulation to consumers, thus making it possible for the political process to decide whether the cost was worth it. Mixing competition and consumer protection within one agency was discussed; while synergies were noted as was the possibility that competition can benefit from the public support generated by consumer protection activities, there were concerns that consumer protection could wind up taking over from competition work. It was noted that successful advocacy requires definition of the right time, right way, and right place in order to be effective.

Regarding the **Cartel Working Group**, the breakout sessions discussed the issue of sanctions and their deterrent effect extensively. Representatives from jurisdictions that have criminal fines strongly advocate them, whereas others think that administrative fines can be as effective. One jurisdiction even abandoned pursuing criminal sanctions after the judiciary required a high standard of proof because of obvious reluctance to consider participation in a cartel a serious crime. A strong concern related to the issue of how to prove a cartel based on mere economic evidence. More creative sanctions appear possible, like those damaging business reputation of the cartelists, excluding bid riggers from future contracts or kicking out the responsible CEO from the board of the company. Leniency programs were the second major topic of discussion in the breakout sessions. It was held that such programs only make sense for authorities that already have a strong enforcement record. Nevertheless, younger authorities envisage such programs given obvious difficulties in finding evidence. The work done by the ICN Cartel Working Group on leniency was generally held to be helpful. One jurisdiction even copied the Chapter on leniency programs in the Anti-Cartel Enforcement Manual.

B. Approval of work

On a motion by the chairman of the conference, **Dr. Ulf Böge**, President of the German Federal Cartel Office, the "Recommended Practices on Remedies and Competition Agency Powers" and the "Recommendations on Banking Regulation" were adopted.

C. Steering group elections:

Steering group elections are for two years, candidates are suggested by the outgoing steering group. The outgoing steering group recommended the agencies from the following countries: Australia, Germany, Canada, European Community, France, Ireland, Israel, Italy, Japan, Korea, Mexico, Russia, South Africa, USA (FTC and DOJ). These were elected unanimously by the plenary.

D. Future work plans

The **Merger Working Group** will continue to promote conformity of members' laws with the Guiding Principles and Recommended Practices, widen the use of the Investigative Techniques Handbook, and enhance understanding of the Analytical Framework. A Workshop on implementation of the Recommended Practices for Merger Notification and Review Procedures will be organized by the Notification and Procedures subgroup. The subgroup also will continue to encourage and work with members to keep templates and web links up do date. The Analytical Framework and Investigative Techniques Subgroups will be

merged into a Merger Investigation and Analysis Subgroup. The future work of this subgroup will consist of continued consultation and completion of the Merger Guidelines Workbook. The Merger Remedies Review Project will report the results of its survey conducted in 2004/5. The subgroup will hold regional workshops modeled on the Investigative Techniques workshop held in Brussels in 2004. This seeks to facilitate the use of the Investigative Techniques Handbook. Another workshop on a specific topic, possibly remedies or economic evidence, is under consideration.

Competition Policy Implementation Working Group: The Technical Assistance Subgroup plans to update and refine its report and database. This includes an inventory (“bulletin board”) of technical assistance projects, seminars and conferences, a donor contact list and guidelines for donors and recipients. In the Consumer Outreach Subgroup, Barbados has replaced South Africa in co-chairing the subgroup with Canada. The subgroup is considering a two-part focus on outreach to the business community, including preparation of a report and guidelines, and on identifying lessons learned by developing competition agencies. The work plans of the subgroup on Competition Advocacy in Regulated Sectors will shift its perspective to the judiciary. It had yet to finalize its workplan, but plans include an evaluation of how agencies and courts interact; identifying the methods of advocacy as presently practiced; and developing effective advocacy techniques to train judges. The subgroup will be co-chaired by Brazil and Chile.

Under the umbrella of the **Cartel Working Group**, the General Framework Subgroup will evaluate the responses to the report “Building Blocks for Effective Anti-Cartel Regimes” for possible follow-ups. Another project will examine questions of obstruction of cartel investigations. Yet another project will assess the current forms of co-operation and co-ordination among agencies in cartel investigations. There will also be a study of the interaction of public and private enforcement of cartel laws. The Enforcement Techniques Subgroup will plan a workshop to be hosted in Seoul (Korea), on November 8–10, 2005. Work on the Anti-Cartel Enforcement Manual will continue, especially regarding good practices for leniency programs and electronic gathering of evidence. As regards the Anti-Cartel Enforcement Template the work will continue for the rest of 2005 with the collection of data from agencies, which are going to be asked to fill in the template.

A **new Working Group on Telecommunications** was given a one-year mandate to study competition policy in the telecommunications sector. It will first take stock, drawing on work done by the ICN, OECD, and other bodies. It will focus on the state of competition in the sector in three to five developing jurisdictions. In a second step, it will identify lessons from the stocktaking exercise and work out optimal approaches. The group will be chaired by the competition agencies of Canada and Italy, and by the South African Competition Tribunal.

Dr. Ulf Böge, president of the German Cartel Office, urged members to participate actively in the ambitious and promising working plan for the upcoming year. He also mentioned the ICN Statement of Mission and Achievements, which had been drafted by the European Commission’s Directorate General for Competition.

X. Invitation to the 5th Annual ICN Conference in Cape Town 2006

David Lewis invited delegates to next year’s ICN conference, which is to take place in Cape Town, South Africa, on May 3–5. Details can be found on a dedicated website which will be linked to the ICN website. The number of participants is limited to 250 individuals.

XI. Closing of the Conference

Dr. Ulf Böge, as the host of this year's conference, delivered the closing speech. He was impressed with the quantity, quality and practical relevance of the work at the conference and with the resonance which, at over 400 participants from more than 80 competition agencies, made it the biggest ever gathering of competition agencies, legal practitioners, and academics. This augured well for its future. He reviewed the results of the working groups, which reflect the level of maturity the ICN has reached. Its current structure affords the ICN a maximum of flexibility. As examples of this flexibility, he mentioned the newly launched Telecommunications Working Group, which was proposed only a few weeks before the Bonn Conference. Concerning the proposal to give the ICN a more formal structure, *e.g.*, of an international organization, Dr. Böge warned that this would entail a completely different organization, and that the bottom-up approach of the ICN, which had been very successful so far, might get lost. Moreover, the panel on expectations of and challenges for younger competition agencies had shown the need to integrate agencies from developing and transition economies in the ICN's daily work. He cautioned, however, against the cost of adding further languages into which documents would be translated. He encouraged young competition agencies to set their own competition enforcement priorities, as this may be a prerequisite for the ICN's advocacy work. Many interesting and practical proposals had been made during the conference to better approach the needs of younger agencies. The organization of workshops on actual cases as well as internship and mentoring programs were among those that deserved further discussion. The next annual conference in Cape Town would also start dealing with a topic of particular concern for developing countries, namely the abuse of market power. At the end of the Fourth Annual Conference, ICN members could be proud of where the ICN stood, and optimistically look at the next conferences in Cape Town (2006), Russia (2007), Japan (2008), and Switzerland (2009). Dr. Böge ended his speech by thanking all participants, especially the chairmen of the working groups, the panelists, moderators, interpreters and the staff of the Federal Cartel Office, who had helped to organize the conference.

XII. Conclusions

The Fourth Annual ICN Conference, the largest ICN conference so far, clearly demonstrated how well established the network is today. The Bonn conference, presenting first results of the Cartel Working Group, showed that ICN will not hesitate to face new challenges where there is a clear need. Between the two conferences, all working groups proved to be extremely effective both in guaranteeing a high level of quality of the ICN's work and in convincing more and more ICN member agencies to participate in its work. Still, ICN continues to seek ways to enhance active participation of younger agencies and their staff in the working groups.

The Bonn conference also underlined the effectiveness of the ICN's work on convergence. This is clearly shown in the field of merger control, where more and more agencies streamline their rules and practices recommended by the ICN. In addition, the ICN has become an ally in advocating pro-competitive legislation. Agencies refer to ICN documents in order to convince their legislatures to adopt consistent competition laws.

Work and discussion within the Cartel Working Group underlined the need for intensified bilateral and multilateral cooperation between agencies from different jurisdictions. This is true in particular with regard to conflicting leniency programs and in the investigation of

international cartels, where evidence often is located in other countries. There may also be a need to involve ICN members from developing countries more in the international cooperation. Therefore, deepening the cooperation between ICN members will continue to be a goal of the ICN.

How to enable younger ICN agencies, from developing countries in particular, to participate in defining the ICN's agenda and to become more active in the work of the ICN continues to be a challenge. The Fourth Annual Conference made an important step in the right direction in setting up a panel with representatives from younger competition agencies. The Bonn conference gave such agencies a voice to be heard by more experienced agencies and, thereby, was a good start for continued efforts in including the concerns of developing countries and their agencies at the next Annual Conference. In this regard, choosing Cape Town as the host city for this conference, to be held on May 3-5, 2006, was undoubtedly a perfect choice.