



Unilateral Conduct Working Group 2010-2011 Work Plan

A. *MISSION AND GOALS*

The Unilateral Conduct Working Group was established at the fifth annual ICN conference in May 2006. Its primary objectives are to examine the challenges involved in addressing anticompetitive unilateral conduct of dominant firms and firms with substantial market power, facilitate greater understanding of the issues involved in analyzing unilateral conduct, and promote convergence and sound enforcement of laws governing unilateral conduct.

The Working Group is co-chaired by the U.S. Federal Trade Commission and the German Bundeskartellamt. The Group is supported by a substantial number of NGAs from around the world. The Working Group holds periodic teleconferences with all members of the Working Group and NGAs.

To achieve its mission, the Working Group strives to:

- Provide a forum for the sharing of experience and the fostering of consensus.
- Promote greater international convergence and increase understanding of differences regarding unilateral conduct standards.
- Help members improve the quality of their unilateral conduct enforcement.
- Encourage the use of economic analysis in unilateral conduct enforcement.
- Deepen understanding of the strengths and weaknesses of various remedial options in unilateral conduct cases.
- Strengthen cooperation among competition agencies in their review of unilateral conduct cases.
- Promote implementation of Recommended Practices and greater understanding of barriers to implementation.

A description of the Group's past work is attached as **Annex A**.

B. *PROJECTS FOR 2010-2011 (in order of priority)*

(1) *Develop a Unilateral Conduct Workbook*

The Working Group will begin a "workbook" on the analysis of unilateral conduct, similar to the April 2006 Merger Guidelines Workbook. The workbook will be based on the Group's conduct work, recommended practices on dominance, and reports on the objectives of unilateral conduct laws, assessment of dominance, and state-created monopolies. The Group will identify the principles regarding specific types of unilateral conduct on which there is agreement as well as remaining areas of disagreement. In the first year, the Working Group will develop an outline of topics to be addressed and draft one or two chapters, to be chosen following discussion at the 2010 annual conference.

(2) *Conduct a Unilateral Conduct Workshop*

The Working Group will hold a workshop in Brussels on December 2-3, 2010, aimed at furthering understanding of issues raised in its reports and Recommended Practices and promoting their implementation. The Group will decide on the project's specific objectives and the topics on which it will focus. The Group will use an evaluation to obtain feedback from delegates.

(3) *Discuss Recommended Practices or Other Guidance*

The Working Group aspires ultimately to propose Recommended Practices for the analysis of unilateral conduct, but recognizes that different views may make achieving consensus difficult. The Group will discuss when it would be most promising to begin this work, whether to start with a general analytical framework or specific types of conduct, and if the latter, which conduct..

(4) *Hold In-Depth Discussions of Unilateral Conduct Issues*

The Working Group will conduct discussions on issues of mutual interest that arise in analyzing unilateral conduct, possibly including through training webinars. The discussions will aim to increase understanding of different approaches and their advantages and drawbacks.

(5) *Consider Further Reports on Conduct*

During the past three years the Working Group has prepared several reports on agency practice regarding specific types of unilateral conduct, including predatory pricing, exclusive dealing, tying and bundled discounting, loyalty discounts and rebates, and refusals to deal with rivals. For each report, the Group sent a questionnaire to member agencies and NGAs on agencies' approaches to analyzing the conduct and how they distinguish pro-competitive from anticompetitive conduct. The Working Group will consider continuing this work by examining additional types of conduct, to be determined following discussion at the 2010 annual conference. Working Group members identified as potential topics price discrimination, excessive pricing, and other forms of conduct that the Group has not yet addressed.

C. *IMPLEMENTATION*

The Working Group will promote implementation of its work, particularly the Recommended Practices, including by coordinating with the Advocacy and Implementation Network Support Program. More than a dozen agencies reported using the Group's work product to help analyze cases or as a reference, and several others use them for training or to benchmark their practices against those of other agencies as described in the reports. The Working Group will, including during its 2010 Workshop, seek to identify impediments to implementation, and members and NGAs will be encouraged to promote implementation in comments on laws and guidelines and in speeches and articles.

D. *TIMELINE*

Annex B sets forth the schedule of the Group's teleconferences, the date of the workshop, and notional time frames for teleseminars (to be completed following the annual conference).

ANNEX A

Unilateral Conduct Working Group: Work to Date

Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies

In its first year (2006-07), the Working Group surveyed members and NGAs and produced a report on unilateral conduct that includes chapters on the Objectives of Unilateral Conduct Laws, the Assessment of Dominance/Substantial Market Power, and State-Created Monopolies. The report identifies increased agreement in many important areas, as well as areas of difference.

The report is available at: <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral.aspx>.

Recommended Practices

Based on the above reports, in 2007-2008, the Working Group developed Recommended Practices to assist agencies with the assessment of dominance/substantial market power and the application of unilateral conduct rules to state-create monopolies. The Recommended Practices were adopted at the 7th annual conference in 2008. The Recommended Practices are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>
(dominance/substantial market power);

<http://www.internationalcompetitionnetwork.org/uploads/library/doc318.pdf> (state-created monopolies).

Conduct Reports

In 2007-08, the Working Group began the second phase of its work (as provided in the Mandate) on the analysis of specific types of unilateral conduct. Through questionnaires it gathered information on agencies' approaches to assessing the conduct and the criteria that agencies use to distinguish between pro-competitive and anticompetitive conduct. The Working Group has examined: predatory pricing and single branding/exclusive dealing (2007-2008); tying and bundled discounting and loyalty discounts and rebates (2008-2009); and refusal to deal with a rival (2009-2010).

- ***Predatory Pricing and Exclusive Dealing/Single Branding:*** The group developed papers that summarize agency practice with respect to predatory pricing in 35 jurisdictions and with respect to exclusive dealing/single branding in 33 jurisdictions. The reports are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf> (predatory pricing);

<http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf> (exclusive dealing).

- ***Tying and Bundled Discounting, and Single Product Loyalty Discounts and Rebates.*** The group prepared papers that summarize agency practice with respect to tying and bundled discounting in 35 jurisdictions and with respect to loyalty discounts and rebates in 34 jurisdictions. The reports are available at:
<http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf> (tying and bundled discounting);
<http://www.internationalcompetitionnetwork.org/uploads/library/doc357.pdf> (loyalty discounts and rebates).
- ***Refusal to Deal with a Rival.*** The Group developed a paper that summarizes agency practice in 43 jurisdictions with respect to refusals to deal, including margin squeeze and denial of access to essential facilities. The report will be posted on the ICN website following the 2010 annual conference.

Teleseminars

The Working Group organized two teleseminars for members and NGAs to enhance understanding in areas of unilateral conduct law and policy. Teleseminars are particularly appropriate for areas in which there is not yet a consensus to support Recommended Practices. In November 2009, the Working Group held its first teleseminar, on excessive pricing, which over 150 members and NGAs attended; many participants also joined the webinar to follow presentations online. The program identified commonalities and differences in agencies' approaches, for example, by focusing on a recent case brought by a member agency. The second teleseminar, on remedies in unilateral conduct cases, was held in March 2010 and was attended by over 100 members and NGAs. Participants discussed the relative advantages and drawbacks of various remedies in unilateral conduct cases based on two hypothetical scenarios. Recordings of the teleseminars are available on the ICN website at <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars.aspx>

Workshop

The Working Group held a workshop in Washington, D.C., in March 2009 aimed at exploring in greater depth the issues raised in its Recommended Practices and conduct reports. Nearly 130 delegates from 35 jurisdictions attended, and an even greater number participated via a live webcast.

ANNEX B

Unilateral Conduct Working Group: Timeline 2010-2011 (to be completed in greater detail following the annual conference)

June 2	Initial conference call to discuss workbook, workshop, and teleseminar topics
June – September	Draft and discuss outline of workbook with members and NGAs
Early October	Teleseminar
October - November	Discuss work product
December 2-3	Workshop in Brussels
December - February	Draft and discuss first part(s) of workbook and any other work product
Week of February 7	Teleseminar
February	Draft and discuss first part(s) of workbook; discuss other outstanding issues (e.g., annual conference program and future work)
March 16	Complete first part(s) of workbook and discuss future work and annual conference program
March 30	Complete future work proposal and annual conference program