

ICN Steering Group International Enforcement Cooperation Project



Introduction

One of the core tasks that the ICN affirms in its mission statement is “to facilitate effective international cooperation”. In June 2011, the ICN Steering Group decided to consider a potential project for the ICN in its Second Decade to assess member agencies’ needs with respect to international enforcement cooperation and identify appropriate work to be carried out by the ICN to address those needs. The purpose of this paper is to summarize the discussions, input, and reactions on the topic to date and to present a proposal for future work by the ICN on international enforcement cooperation for approval by the ICN membership at the 2012 Annual Conference.

In considering this Project, we have taken into account four questions:

- what are the needs of ICN member agencies with respect to international enforcement cooperation?
- does existing ICN work address those needs?
- does existing work outside of the ICN address those needs? and
- what additional work should the ICN undertake now?

The Need for International Enforcement Cooperation

Businesses around the world work in a globalized way. This applies not only to large multinational corporations with production, services and/or sales in many different jurisdictions around the globe, but also to smaller firms that, even if based in only one or two or a few different jurisdictions, have business relations with firms in other jurisdictions. The interconnection and globalization of the world’s economies are here to stay. There may be debate about how quickly this interconnection and globalization will increase, what the effect of the economic downturn will be over the mid and longer term, and which economies will prosper most. But no one doubts that interconnection and globalization are, and will continue to be, key features of our economies and business relations and that they will increasingly impact agency enforcement, consumers, and economies worldwide.

Historically, international enforcement cooperation has tended to be practiced on a bilateral basis and by only a few jurisdictions or groups of jurisdictions (*e.g.*, the ECN) around the world. This is changing. The last few years have witnessed international enforcement cooperation involving agencies from six continents demonstrating that cooperation is now a global phenomenon. The consensus is that this trend will continue to develop over the years to come, driven by the continued globalization of business and commerce and the need for efficient and effective enforcement by agencies. International enforcement

cooperation helps to avoid inconsistencies in remedies and outcomes of enforcement actions, and it also helps businesses reduce their costs of compliance. The general experience thus far is that the more international enforcement cooperation increases, the more complex it becomes in practice as agencies with different legal powers, experiences, traditions and cultures seek to work closely together. Finding the tools and the ways to take these objectives forward will require open dialogue, respect and trust of all the participants involved.

The Project's Objectives

The Project will address how competition agencies around the world should most effectively operate in view of the economic and business trends summarized above. It will recognize the strides in international cooperation that agencies, and groups of agencies, have made to date. It will ask whether agencies risk falling behind in terms of international cooperation and globalization. And it will seek to assist agencies around the world in discussing what their goals, and methods, for enhanced cooperation can be in the future. It will also seek to articulate a role for the ICN and to identify appropriate goals and potential work, including which actions are likely to be 'quick wins' and which may be medium or longer term goals.

The Project will seek to be practical and realistic. The purpose will not be to redesign the instruments of competition enforcement around the world, but rather to work within the current framework in which competition agencies are mandated to enforce their respective competition laws within the ambit of their respective legal authorities. The Project's objective will be to facilitate the enhancement and intensification of enforcement cooperation, and to do so in a way that is beneficial for all ICN members. It is likely to result in practical recommendations for competition agencies and businesses in the field of international enforcement cooperation.

The Project will break new ground as, consistent with the ICN's Second Decade objectives, it will be a 'cross-cutting' project drawing together experiences from, and seeking to develop ways forward for, all three enforcement areas – cartels, mergers, and unilateral conduct. Cross-fertilization of ideas between these three areas, to the extent appropriate, will likely be a key driver of the Project as it proceeds. This will undoubtedly enrich the discussion and the output but it will also involve some logistical challenges (addressed below).

Scoping the Project

In scoping this Project ahead of presenting this paper for discussion and approval at the 2012 ICN Annual Conference, we have:

- had discussions with the Steering Group, and the Steering Group has considered written proposals and updates from us in meetings in October 2011, January 2012, and March 2012
- had useful consultations with the co-chairs of each of the ICN's enforcement topic Working Groups: Cartels, Mergers, and Unilateral Conduct
- reviewed the 2011 ICN Enforcement Cooperation Roundtable findings and questionnaire responses
- conducted a preliminary review and stocktaking of existing ICN Working Group work product on international enforcement cooperation and the work of other organizations (*i.e.*, OECD, UNCTAD) (see Appendix).

Existing and Complementary Work

As explained above, in considering the need for this Project, account has been taken on a preliminary basis of existing ICN work product and also of the work product of other multilateral organizations. Notwithstanding this work product, the discussions and findings of the ICN Enforcement Cooperation Roundtable hosted by DOJ and FTC in Washington, DC in March 2011, as well as our consultations about this Project with the Co-Chairs of the ICN Cartel, Merger and Unilateral Conduct Working Groups, and with Steering Group members, indicate that there is more work that could usefully be done by the ICN in the area of international enforcement cooperation (see further below).

In carrying out this Project, the ICN will need to be mindful of other initiatives in the international enforcement cooperation field. Some (*e.g.*, the JFTC's proposed cooperative merger framework in the Merger Working Group) fit well within the framework of this Project; others (*e.g.*, OECD's ongoing work on international cooperation) are likely to be complementary to this Project; and yet others (*e.g.*, the ECN) may provide insights for this Project.

Specifically in relation to the OECD, the Competition Committee has identified international enforcement cooperation as one of its two "strategic themes" for 2012-2014. The ICN and the OECD share the goal of promoting effective enforcement cooperation, and the OECD Secretariat and the ICN Steering Group have communicated during the scoping phases of their respective projects. Coordination between the ICN and the OECD will be essential to enable advantage to be taken of synergies between the two projects (*e.g.*, developing a joint survey to solicit agency input) and to avoid duplication between the two projects.

Preliminary consensus

From our consultations to date, there appears to be consensus on the following:

- 1. Enforcement cooperation is a critical aspect of competition agency enforcement in matters that have cross border effects. As such, this topic should be a priority for the ICN.**
 - the Second Decade Vision paper states that “[m]any ICN members consider that helping to promote substantive international cooperation on enforcement matters should continue to be one of the ICN’s main goals”
- 2. Work on enforcement cooperation is closely interconnected with the ICN convergence mission.**
 - greater convergence is driven, in part, by greater cooperation between competition agencies – in particular, through their interactions with each other in the course of their enforcement work
 - ICN’s convergence work, through its promotion of shared standards and procedures, helps supports greater case cooperation
- 3. Promoting effective enforcement cooperation is a worthwhile objective in itself, apart from its impact on convergence.**
 - cooperation is critical to avoid conflicting outcomes and remedies
 - cooperation fosters efficient investigation within available resources and reduces unnecessary burdens for parties and agencies
- 4. The ICN, with its practical focus on competition policy and enforcement and near universal membership of competition agencies, is well suited to raise awareness of international enforcement cooperation.**
 - examining the variety of cooperation tools and practices used by competition agencies
 - developing practical recommended practices or other guidance
 - facilitating the day-to-day practice of international enforcement cooperation
- 5. Further ICN work on international enforcement cooperation should maintain its focus on practical output and address agency practices.**
 - identification of the benefits, challenges and opportunities of international enforcement cooperation
 - experience sharing of agency practices
 - consensus building to develop practical guidance and recommendations
 - engagement with NGAs
- 6. Parties to investigations play an important role in facilitating agency cooperation.**

- perceptions of the overall benefits of international enforcement cooperation
- concerns relating to the treatment of confidential information

7. There are commonalities and differences in international cooperation across enforcement areas for mergers, cartels, and unilateral conduct. There is scope for further ICN work on the topic both within working groups that address enforcement issues and in broader, cross-cutting efforts.

- work within one working group may inform work elsewhere
- enforcement cooperation is currently more prevalent in relation to cartels and mergers than unilateral conduct

8. There are other international enforcement cooperation initiatives and contexts on which ICN work could draw, including other international organizations and networks, and domestic cooperative relationships between competition agencies and others.

- for consideration within the context of ICN work
- potential for consultations, collaborative work

9. There are also factors that have been identified as impacting international enforcement cooperation. These include:

- differences in investigation timetables and, more generally, in investigation procedures
- asymmetries in publicly available information about investigations and actions in other jurisdictions
- legal rules on the protection and exchange of confidential/statutorily protected information; legal rules on privilege
- information exchange tools such as party and third-party waivers in relation to confidential/statutorily protected information and cooperation agreements
- limits to agencies' resources to devote to international enforcement cooperation
- the potential to save investigative resources and avoid duplication of effort/work sharing
- extent of familiarity with contacts, practices, procedures and governing rules at other agencies
- extent of experience of individual agencies and trust between agencies
- language differences; time zone differences
- incentives of parties to facilitate cooperation: their perceptions of benefits and concerns about treatment of confidential/statutorily protected information

Proposals for future ICN work on international enforcement cooperation

Taking account of all the considerations summarized above, a phased approach to work on this Project is regarded as appropriate (see below).

In addition to a phased approach, there is also a need for continued coordination of the work to be done in relation to this Project so as to maximize the cross cutting nature of the work. In other words, although there will be considerable work to be done within the Working Groups and, indeed, the expertise within the Working Groups will be very important and informative to the work to be carried out, a mechanism will also be needed to ensure there is discussion and cross fertilization of ideas and proposals between the relevant Working Groups. For the avoidance of doubt, this coordination role will be neither top-down nor bottom-up but rather a facilitating role between the Working Groups.

Phase 1: 2012-2013

- Survey member experiences and needs related to international enforcement cooperation. This survey of members should be done jointly with a similar planned 2012 OECD survey on international enforcement cooperation.
- Working Groups to identify opportunities to raise the overall awareness of the benefits of and challenges to international enforcement cooperation (e.g., via Working Group seminars and workshop sessions) and evaluate existing international enforcement cooperation-related work for broader application across the ICN.
- Assess the joint ICN-OECD survey results, and develop recommendations on the feasibility for developing ICN guidance on international enforcement cooperation and for appropriate future work at the Working Group level.
- Create a central webpage for existing ICN cooperation-related work.

Phase 2: 2013-2014¹

Based on the above recommendations, decide how individual Working Groups will undertake appropriate projects and also pursue cross-cutting ICN guidance work on international enforcement cooperation.

Such work may include:

- sharing experiences on Working Group calls and at workshops/conferences
- compilations of member practices, rules, treatment of confidential information, etc.; promotion of ICN Model Waiver
- practical tips and other guidance
- practical recommended practices or other guidance

¹ Note that the OECD's planned roundtables on related work on cooperation are scheduled until October 2014.

Longer-term

- Evaluate progress of international enforcement cooperation work within the ICN at the Working Group and cross-cutting levels.
- Consider opportunities to explore new/developing intensified international enforcement cooperation methods.

The work to be done under each of these phases is likely to be developed and expanded as the Project continues.

Conclusions and Measurements of Success

Based on the consultations for this Project, there is a clear desire by ICN members for the ICN to pursue work on the topic on international enforcement cooperation. Given the scope of ICN membership, the active involvement of and engagement with a diverse set of non-governmental advisors, and the ICN's commitment to dialogue and practical work product, the ICN should strive to make a meaningful impact on international enforcement cooperation in its second decade. The ICN should enhance its roles of resource and advocate for international enforcement cooperation by promoting the objectives and experiences of, and methods and tools for, such cooperation.

Measures for success in this endeavor will include: an increase in awareness of the benefits of international enforcement cooperation and an agency culture of cooperation; continued increase in the instances of agency-to-agency international enforcement cooperation reflecting the enforcement needs of cross border matters; and the continued development of a robust array of ICN work product, shared experience and guidance in relation to effective international enforcement cooperation.

The Steering Group recommends this Project to ICN members, and seeks their approval to launch the Project.

U.S. Department of Justice

Turkish Competition Authority

March 2012

Appendix

Existing ICN Work Product on International Cooperation

[ICN Recommended Practices for Merger Notification and Review Procedures](#), Recommended Practice X, Interagency Coordination (2004)

[ICN Guiding Principles for Merger Notification and Review](#), Guiding Principle 6, Coordination (2002)

ICN Merger Working Group [Model Confidentiality Waiver](#) (2005)

ICN Cartel Working Group paper, [Cooperation Between Competition Agencies in Cartel Investigations](#) (2007)

ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (*ongoing*)

ICN Merger Working Group Framework for Merger Review Cooperation (*pending*)

OECD Recommendations on international cooperation

[Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade](#) (1995)

[Recommendation of the Council on Merger Review](#), Section B: Coordination and Cooperation (2005)

[Best practices for the formal exchange of information between competition authorities in hard core cartel investigations](#) (2005)

UNCTAD

UNCTAD is responsible for a set of UN [equitable principles and rules for controlling restrictive business practices](#) (the “UNCTAD set”), adopted in 1980 and maintaining and periodically reviewing a model competition law, as a guideline for countries seeking to introduce such a law for the first time. The UN Set is a non-binding multilateral agreement on competition policy that provides a set of rules for the control of anti-competitive practices, recognizes the development dimension of competition law and policy; and provides a framework for international cooperation and exchange of best practices.

UNCTAD Study on [Competition Provisions in Regional Trade Agreements](#) provides an analysis of relevant free trade agreements which contain competition rules.

Asia-Pacific Economic Cooperation (APEC)

APEC includes a forum (the Competition Law and Policy Group) for the exchange of views, technical cooperation and discussion of competition issues among its members.

[Cooperation of Regulatory Authorities in Competition Enforcement](#) (*project proposal*) (2010)

Selected Instruments

Cooperation between competition agencies occurs through various formal and informal agreements and arrangements; cooperation also takes place in their absence. Such formal instruments include cooperation agreements, memoranda of understanding, best practices, free trade or common market agreements and mutual legal assistance treaties for criminal cases. A few indicative examples are provided below and are not intended to be comprehensive.

Examples:

- [Agreement](#) between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1991)
- [Cooperation Arrangement](#) Between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Laws (2000)
- [Agreement](#) between the Government of Japan and the European Community concerning cooperation on anti-competitive activities (2003)
- [US-EU Best Practices on Cooperation in merger investigations](#) (2011)
- [Memorandum](#) on Cooperation between the Federal Antimonopoly Service of the Russian Federation and the Turkish Competition Authority (2011)
- The European Competition Network (ECN):
 - [Commission Notice on cooperation within the Network of Competition Authorities](#) (2004)
 - [Best practices for cooperation among EU national competition authorities](#) (mergers) (2011)
- [Agreement](#) between Denmark, Iceland, Norway and Sweden on co-operation in competition cases (2001, 2003)
- [Treaty](#) between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters (2001)