

## ICN STEERING GROUP

### PROJECT ON WORKING WITH COURTS AND JUDGES

#### I. PURPOSE.

In June 2011, the ICN Steering Group decided to consider Working with Courts and Judges as one of three substantive projects. The goal of this paper is to: 1) summarize the key issues identified by SG members in previous discussions and through bilateral contacts with the project co-leaders; and 2) propose future work by the ICN for consideration and approval by the ICN membership at the 2012 Annual Conference.

#### II. SCOPE AND OBJECTIVES.

- a) When considering the application of competition law it is vital to take into account the review process carried out by the judiciary. In this respect, there is interest among ICN members in discussing how to improve the way that competition agencies (CAs) work with courts and judges.<sup>1</sup>
- b) The project aims to identify issues that might usefully be addressed by ICN and which play to ICN's strengths (e.g., actions that ICN agencies can act on domestically, issues on which NGA engagement would be useful).
- c) The project should be agency-focused, identifying practical and realistic ways that agencies can improve their cooperation with the judiciary, rather than ways of changing judicial behaviour (especially having in mind judicial independence and the need for agencies to keep an appropriate distance from judges outside the courtroom).
- d) It will build on all the hitherto initiatives of the ICN<sup>2</sup>, ECN, UNCTAD and OECD in this area.

---

<sup>1</sup>See *The ICN's Vision for its Second Decade*.

<sup>2</sup>For example, see "*ICN Report on Competition and the Judiciary (2006)*" and "*Competition and the Judiciary 2nd Phase Report - Case Studies (2007)*"

### **III. IDENTIFIED HIGH-LEVEL ISSUES**

#### **1. Challenges and lessons learned in presenting agency decisions and/or pleadings in courts**

This working topic refers to the identification of tools and tips to ensure that agency decisions and/or pleadings are drafted in a way that is helpful for judges (e.g., how to articulate arguments, use of plain language, avoiding misinterpretation, etc.). Its goal is to understand the various ways in which agencies interact with courts in enforcement matters, and how agencies approach their interaction with courts, with a view to identifying lessons learned.

Competition agency decisions and pleadings should be understandable to the widest audience possible, including judges and in particular non-specialized judges. Therefore, it is in the best interest of authorities to take utmost care in drafting their decisions. Future ICN work could include:

- **Decision drafting tools and tips, referring to (for example):** (a) Usage of plain language, i.e. avoidance of complicated, technical language, (b) Clarity, i.e. (i) inclusion of a summary of all relevant points of fact, (ii) reference to the relevant legal basis, case law and decision practice, (iii) selection of clear standards of proof (iv) checking of eligibility for legal and economic reasoning, and (c) Provision of numbers and examples;
- **Organizational/agency effectiveness questions/checklist:** (a) Who is in charge of drafting decisions and/or pleadings within the agency (a case handler or a member of the legal service, or both?), (b) Are economists required to summarize their analysis in a language that is accessible to non-specialists, (c) Is the CA's board composed of lawyers and economists, (d) Do the persons in charge of adjudicating the case use the "Daubert tests" - as a judge might do - when assessing the reliability of economic evidence submitted by parties? i.e. if the assumptions and data are reliable, relevant, verifiable and sound and if the results of economic analysis are consistent and convincing.
- **Experience sharing regarding the usefulness of guidelines on the calculation of penalties:** It seems to be a shared experience among SG members that while courts uphold CA decisions, they often reduce the level of fines. This might be caused by the judges not entirely agreeing with or understanding the criteria

applied by the competition agency in the calculation of the fines. ICN might foster discussions on how to address this problem and draw the attention to the importance of linking the fining element of a decision to other issues, such as (potential) damages and effects as well as the importance of deterrence. An ICN project could also allow members to share experience in developing Guidelines explaining the criteria for fines' calculation.

## **2. Economic analysis – presenting economic evidence to the judiciary.**

As 2008 OECD policy roundtables showed, some CAs still have rather limited experience with presenting advanced economic evidence to courts. Nonetheless, acceptance of the importance of economics has been reflected not only in the enforcement practice of CAs but also in the attitude of the courts. In countries that are more experienced in this respect, CAs apply a wide range of various techniques (with varying degrees of success) aimed at helping judges understand complex economic evidence.

Difficulties pertaining to communicating economic reasoning and empirical evidence to courts, and reasons why courts reject economic evidence, may in part be due to a lack of guidance from the authorities, or ineffective presentation in the courtroom. Therefore, it appears that two major issues have been identified on which further ICN work could focus on:

- a) How to present economic analysis effectively to judges. In antitrust cases, market definition and assessment of competitive effects may require extensive use of economics, although different analyses may apply. Nevertheless, in order to avoid problems with interpretation of economic reasoning and empirical evidence, many agencies try to present those as simply as possible, explaining all the essential concepts and avoiding overly “technical” terminology.
- b) The relationship between quantitative and qualitative economic analysis, and how these relate to the legal burden of proof.

ICN work on this issue would obviously build on previous work done by OECD (e.g. OECD “Presenting Complex Economic Theories to Judges” 2008) and would concentrate on different strategies employed by various agencies to overcome the difficulties. The exchange of experience could result in preparation of guidance and/or recommendations for competition agencies aimed at increasing their effectiveness in

presenting economic evidence to courts while at the same time considering the issue of the how much evidence and in what detail should be presented to the courts.

### **3. Other types of interaction with courts and judges**

While the foregoing topics focus on the issues that arise when an agency is before the court and a direct party to the proceedings (e.g., in the context of judicial review or prosecuting a case), there is a second category of issues that arise when the agency is not a direct party to the case as, for example, in the context of private enforcement where an agency may act as an *amicus curiae*.

Also it is worth noting that there are many countries in which private enforcement means civil actions being heard by local civil courts not specialised in antitrust (most of the EU Member States). Therefore, if a competition law case is brought, these courts are faced with very specific legal issues, e.g. the balance between provision of information to claimants and protection of leniency applicants or the economics-based quantification of damages.

An ICN project might consider addressing these and other issues that arise under abovementioned second type of interaction with courts and judges in order to produce additional tools and tips that may help CAs in working with the judiciary.

## **IV. POSSIBLE, FUTURE ISSUES TO BE CONSIDERED.**

There are two additional issues that have been identified by SG members as possible topics that may be considered in the future for ICN work:

- a) Learning around institutional design: it may be useful to understand and acknowledge the differences between how an agency presents its case challenging specific business conduct or a transaction before a trial court (prosecutorial systems) on the one hand, and how an agency's decision on specific business conduct or a transaction is presented for review by a panel or commission (administrative systems), on the other hand. Are there useful lessons about the details of the design of the system and elements needed to make the system work well? For example, has it proved useful for generalist judges to be able to appoint their own economic experts or what are the various instruments available to authorities to interact with courts (such as *amicus curiae* interventions)?

- b) Dialogue: ICN may consider in the future opening attendance of ICN events, conferences and workshops to judges, and/ or seeking the courts' - or more suitably their associations' (e.g. the Association of European Competition Law Judges) - advice on how CAs can improve presenting competition cases to the judiciary.

## V. RECOMMENDATIONS FOR FUTURE ICN WORK

Further work might be conducted in two stages:

- a) Stage 1: The Polish Office of Competition and Consumer Protection's (UOKiK) Special Project for the ICN 2013 Annual Conference.
- b) Stage 2: Incorporation of the project to the Advocacy Working Group 2013-2014 Work Plan.

Taking into account the scope and identified high-level issues it will be crucial for both UOKiK and Advocacy WG to pay attention to avoid possible overlap between the first two issues identified in the paper especially in the context of Guidance for CAs on drafting decisions. For instance, decision drafting tools and tips could also include tips for presenting economic evidence.

Contact details of Project Leaders:

**Aleksandra Maczynska**  
Deputy Director  
International Relations and  
Communication Department  
Office of Competition and Consumer  
Protection  
Plac Powstańców Warszawy 1  
00-950 Warsaw, Poland  
tel. 0048/ (22) 55 60 387  
fax 0048/ (22) 826 11 86

**Radoslav Depolo**  
Judge  
Chilean Competition Tribunal  
Agustinas 640, 19th Floor  
8320219 Santiago, Chile  
tel. +562 7538301  
www.tdlc.cl  
e-mail: [rdepolo@tdlc.cl](mailto:rdepolo@tdlc.cl)