AWG Proposal for Competition Assessment Project

Proposal:
The proposal is for the Advocacy Working Group to build on the momentum of support for work on competition assessment and develop guidance work on competition assessment addressed to ICN members.

Origin of the project:
Competition impact assessment of draft and existing legislation is a key tool in promoting competition friendly legislation and a decisive factor in building a strong competition culture.

Following up on from the Steering Group Chair’s Vision Statement and the plenary of the first ICN Advocacy workshop that took place in Paris on 27 October 2012, the French Autorité de la concurrence and the Mexican Comisión Federal de Competencia suggest leading a project within the Advocacy Working Group to draft a new ICN product.

Demand:
In many ICN member jurisdictions, economic policymakers do not consistently consider the impact on competition in formulating policy. This can be particularly true in economies without a strong competition culture.

At the same time, the financial crisis and ensuing economic downturn have made it more urgent than ever that competition agencies are equipped to guard against anticompetitive practices generally – addressing private restraints through enforcement actions, and government restraints with advocacy initiatives. Advocacy is potentially more important than enforcement these days in many jurisdictions across the economic spectrum, as trust in markets has been shaken by the economic downturn. This has caused policymakers to be more receptive to protectionist arguments at a time when competitive markets and economic growth is crucial.

More generally, when policymakers address broader general interest issues, in particular when their purpose is to govern the provision of public services, to change the distribution of resources between various categories of the population, to protect consumers or to remedy market failures, national legislators may take legitimate action that has an unnecessary or unanticipated adverse impact on competition.

Product:
As described more fully below, the proposal is a work product that consists of best practices (1) for competition agencies on competition impact assessment, and (2) for conveying competition impact considerations to policy-makers.

Interplay with existing instruments:
This new product will complement and build on existing tools, in particular the OECD Recommendation on Competition Assessment and OECD Competition Assessment Toolkit (CAT) and past ICN work, including the ICN advocacy toolkit and past AWG teleseminars.

The success of competition assessments related initiatives (such as in Australia) and the successful application of the OECD Competition Assessment Toolkit (such as in Mexico) suggests that by engaging in this topic, the impact of the ICN’s work in this area could be very important.
There are also a number of guidelines developed by national jurisdictions for competition assessment (eg Bulgaria, Chile, Colombia, France, Gambia, Indonesia, Lithuania, Spain) and sound practice of advocacy in a number of other jurisdictions that will provide a useful basis for the ICN’s work.

**Value added of ICN work:**
ICN guidance work would add value to the existing work of the OECD Council Recommendation on Competition Assessment and the CAT. There are three factors: the value of having multiple actors with the same message, the difference in membership, and the ICN format.

First, by having best practices with similar messages, the ICN and OECD offer a resounding corroboration of the principles being advocated.

Second, the difference in the composition of the two bodies is an important difference. The OECD offers a statement of the developed worlds’ governments, while the ICN offers a statement of the competition agencies of the world, with a much wider geographic reach.

A further value ICN adds is the format used in other ICN practices offers a different type of tool for agencies to use. OECD Council Recommendations tend to be more general statements, whereas ICN Recommended Practices usually have more detail. The format of “black letter” recommendations allows for a clear statement of norms while the detailed commentary allows the practices advocated to be tailored to address diversities of situations, potentially allowing for more adaptability needed by the ICN’s broad membership.

Last, the ICN could include additional topics and it would include process issues in the relations of agencies with their own policymakers.

**Timing:**
The proposal is to form two small work teams of individual members and NGAs who would prepare outlines and then initial drafts for comment by the working group. The goal is to prepare a preliminary work product gathering the results of the workteams for the 12th Annual conference in Warsaw, Poland for discussion during a break-out session.

Taking into account the comments made during the conference, the AWG would prepare a revised and more final product, which would then be peer reviewed and finalized, and presented for adoption by ICN members at the 13th Annual conference in Marrakech, Morocco.

**Proposed content:**
For the substantive practices, while the precise contours would further definition, the following broad topics could be covered:

- Identifying and classifying the objectives of the proposed or existing legislation that is the subject of the assessment;

- Identifying the nature of the restrictions (entry, exit, quantity, standards, price, supply of goods and services by public authorities or by companies holding exclusive rights) and how
they affect competition (limits on number or range of suppliers, reducing ability or incentives of suppliers to compete, etc.);

- Analyzing the possible competitive effects of the legislation
- Collecting data; and
- Assessing alternatives and proposing mitigation measures.

By way of example, a practice on analyzing the effects might draw on the various ways agencies have done this – for example, through counterfactuals, cost benefit analyses, or other metrics, but also through more qualitative analyses.

For the practice on assessing alternatives, this would look at broad categories in the reasons for the restrictions and then identify alternative procompetitive approaches. For negative externalities, for example, alternatives could include imposing a tax or charge on the activity so financial costs are better aligned with economic costs (while taking into account possible side-effects if the aid may benefit selected industries or create other competitive distortions within an industry), creating tradable but limited rights to engage in the harmful or depleting activity, imposing and enforcing minimum standards to minimize externalities.

As for process aspects, the following topics could be covered:

- **How to trigger advocacy on draft legislation or reforms to improve competition regulation**
  - Having a legislation that provides for compulsory opinions from competition agencies on certain matters and allow the Parliament to ask directly agencies for their opinion. Examples of existing legislations, their scope and effect could be described in a condensed and brief manner
  - Incorporating competition impact assessment within regulatory impact assessment and/or quantification of administrative burdens or SME tests
  - Explore possibility of other possible advocacy tools to government on legislation Possible examples: the AGCM’s draft annual bill on competition, the CNC’s or Lithuanian competition council’s power to challenge regulation in court, Mexico’s and Australia’s national competition review

- **Communicating on existing opinions and priorities for advocacy work, so that government and Parliament are aware on existing expertise within competition agencies**

- **Monitoring government work programmes to identify upstream potential for future opinions**

- **Building a network of competition advocates with government, Parliament, other public authorities and regulators** (single points of contact within government departments and bodies responsible for drafting or reviewing bills, use of former agency staff in public authorities, use of MoUs or networking with sector regulators, presence in parliamentary hearings)

- **How to maximize impact of competition assessment on government and Parliament**

- **Formal vs. informal opinions: advantages and drawbacks**
Possible examples: DG COMP, OFT, Czech, Latvian, Lithuanian and Polish authorities (informal opinions), France, Spain (formal published opinions); binding (Romania) vs. non-binding opinions

Use of sector inquiries for conveying recommendations of public policy aiming at spurring competition or improving competition regulation
Possible examples: the UK Competition commission’s sector inquiries, sector inquiries containing recommendations of public policy (France, Italy, Spain, other?)

Questions to be discussed:

- Does the AWG endorse the launch of a new ICN product and its general purpose and positioning?
- Should we aim to create good practice, best practice, or recommended practices?
- Does the AWG agree with the proposed timing?
- Does the AWG agree with the proposed content? Do AWG members have further suggestions to complement the proposed content?
- One thought was to include very short case studies from members on their processes, so as to show that possible ways and means to achieve the same objectives are possible? If so, should a call for case studies be made or should the agencies responsible for the drafting look for possible examples and check with the relevant authorities? For the substantive practices, the goal would be to reference different systems, and vet carefully with a wide array of systems. Is that appropriate?
- Are there volunteers to contribute to this work product? If so, for the section on ways and means or the substantive areas?