

Unilateral Conduct Working Group 2018-2021 Work Plan

MISSION

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 analysing unilateral conduct of dominant firms and firms with substantial market power, facilitate greater understanding of the issues involved in analysing unilateral conduct, and promote convergence and sound enforcement of laws governing unilateral conduct.

ORGANISATION

For 2018-2019, the Working Group will be co-chaired by the Australian Competition and Consumer Commission, the Italian Competition Authority, and the South Africa Competition Commission which replaced the U.S. Department of Justice after the 2018 annual meeting in New Delhi. The Group is comprised of over 60 ICN members and is supported by a substantial number of NGAs from around the world. The Working Group holds periodic teleconferences with all members and NGAs.

LONG TERM GOALS

To achieve its mission of examining and facilitating understanding of issues related to unilateral conduct and vertical restraints, the Working Group strives to:

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

2018 - 2021 STRATEGIC PLANS

The Working Group proposes the following areas of future work, taking into account feedback from the Second Decade Project and considering factors suggested by the Steering Group, *i.e.*, the audience for the Group's work product; a balance between implementing existing work product and creating new work product; the focus on core projects; a balance between work that is ripe for convergence efforts and comparative dialogue; projects that complement the institutional strengths and impact of ICN's mission; projects that encourage inclusiveness and broader member and NGA engagement; and initiatives that are well suited to ICN's practical, project-oriented nature.

1. Promote greater convergence and increase understanding regarding unilateral conduct standards

- Continue drafting a Unilateral Conduct Workbook on the investigation and analysis of unilateral conduct based on the Working Group's reports on unilateral conduct, Recommended Practices on dominance, and reports on the objectives of unilateral conduct laws, the assessment of dominance, and state-created monopolies. The Working Group will identify analytical principles regarding types of conduct on which there is agreement, as well as remaining areas of disagreement.
- Continue work on the analysis of unilateral conduct through comparative reports. The Working Group may examine types of conduct that it has not previously covered in its reports, such as excessive pricing and price discrimination.
- Identify issues arising from past conduct work for further study. For example the Working Group may further explore the various tests for identifying exclusionary conduct, foreclosure analysis, the role of recoupment in predatory pricing cases, and the role of intent in unilateral conduct cases.

2. Promote greater understanding regarding standards for assessing vertical restraints

- Consider issues in the treatment of vertical restraints by ICN members, with a view to promoting increased understanding where differences in standards arise, and, where possible, convergence.
This programme of work will include development of a series of papers, based on hypothetical vertical restraint scenarios, examining the effect on competition and potential resulting efficiencies, following the

recommendations developed by the Working Group in a report¹ (approved by the Steering Group) which was the result of a consultation process with the UCWG members. These papers will include an examination of the common/ divergent approaches used in the assessment of the vertical restraints scenarios in various jurisdictions.

3. Deepen understanding of the strengths and weaknesses of remedial options

- Consider work on remedies in unilateral conduct cases, which may include the types, effectiveness of, and experiences with remedies, in order to understand what agencies have learned about the use of various remedies in unilateral conduct cases. The Working Group might also survey Members regarding their experiences of remedies.
- Future work may include a study of remedies in cases involving vertical restraints. This may include types of remedies, their effectiveness, and experiences with remedies generally, in order to understand what ICN Members have learned about the use of various remedies in these cases. This programme of work may include a short survey of Members regarding their experiences with remedies.

4. Promote implementation of work product and provide training opportunities

- Promote implementation of the Working Group's work product, particularly the Recommended Practices and Workbook (including the chapter on Analytical Framework), including through workshops and webinars and the use of the self-assessment tool to be developed in 2018-2019, by coordinating with the Promotion & Implementation Team.
- Continue to identify barriers to implementation and ways to overcome them, including seeking volunteers to translate work product into other languages.
- Encourage Members and NGAs to promote implementation when commenting on laws and guidelines and in speeches and articles.
- Conduct a series of training webinars. The Working Group will develop a curriculum drawing on the Working Group's work product and agencies' experience that addresses topics ranging from the assessment of dominance

¹ The report is available at: <https://icn2017.concorrenca.pt/downloads/materials/UCWG-vertical-restraints-outcomes-of-consultation-process-report-f.pdf>

to the design of remedies. Consider collaborating with other Working Groups to develop an antitrust basics webinar series that includes unilateral conduct.

- Help develop modules on unilateral conduct for the ICN Training On Demand Project. The Working Group will provide its expertise and support to the ICN Training On Demand Project when it starts to produce training modules on the analysis of unilateral conduct.

5. Facilitate discussion and enhance cooperation

- Continue to facilitate discussion of issues that arise in analysing unilateral conduct. The Working Group will hold a Workshop in Stellenbosch, South Africa in November 2018. Two or three teleseminars will be held each year and the Working Group also will consider organizing workshops and/or plenary and breakout sessions tailored to the needs of less experienced agencies. The Working Group may hold additional conference calls to enable Members to delve into issues of mutual concern, identify commonalities and differences in approaches, and better understand the relative advantages and drawbacks of different policies.
- Consider ways in which to enhance communication among Members, including a blog, discussion forum, and/or quarterly newsletter, e.g., posting cases, articles, or other public information on the ICN blog or a dedicated page on the ICN website.
- Consider work on cooperation in enforcement in these areas, which may include: the objectives of cooperation; the types of cases that may benefit from cooperation; cooperation tools; impediments to cooperation; confidentiality and privilege considerations; cooperation on remedies; how parties can facilitate cooperation; and what makes for effective cooperation.

6. Expand participation by Members and NGAs

- Actively encourage Working Group Members and NGAs, and as appropriate ICN Members and NGAs from outside the Working Group, to participate in the group's work, workshops, teleseminars, and webinar training sessions through regular e-mails and other communications.

- Encourage continued participation by economists to further explore unilateral conduct from traditional economic and law and economics perspectives (error costs, optimal rules). Economic input would also be valuable to the Working Group's efforts to develop teleseminars, workshop programs, and training webinars. Economic input could also inform the development of the Workbook and foster consensus regarding the analysis of types of unilateral conduct.

Unilateral Conduct Working Group

Annual Plan

2018-2019 Projects

Pursuant to its Mission and Long-Term Work Plan, the UCWG will work on the following projects during the 2018-2019 ICN year:

A. Written Work Product

(1) Develop the Vertical Restraints Project

In 2018-2019 the UCWG will continue its work program to develop a series of papers based on three hypothetical vertical restraint scenarios. The papers will examine possible effect on competition and potential resulting efficiencies of three types of vertical restraints. The aim of the papers is to highlight the commonalities and the differences in the analytical assessment across a number of ICN jurisdictions.

An interim report was presented at the annual conference in New Delhi², reporting on the progress made with the drafting of the first paper which address across platform parity clauses in an hypothetical scenario of online travel agents. A number of ICN members and NGAs was asked to provide the possible case theories, efficiency arguments and areas of further inquiry as relevant to this hypothetical scenario, thus providing valuable inputs for the paper.

Similarly, in 2018-19 the UCWG will consider the other two scenarios (an offline retail environment and an online selective distribution model): the two papers will be developed by the project leader ACCC, in consultation with a project group of volunteers from ICN member jurisdictions and NGAs.

This project is being led by the ACCC and a small group of ICN member agencies.

(2) Self-assessment tool for the RPs on Dominance / Substantial Market Power

The objective of this project to (i) promote/test the familiarity of the 2006 ICN Recommended Practices on Dominance/Substantial Market Power among the ICN members, especially the younger ones and (ii) offer them a tool to self-assess the adherence or conformity of their law and practice to the ICN standards. A questionnaire with yes / no questions will be drafted with a view to representing a self-assessment tool which will help

² The interim report is available at: <http://icn2018delhi.in/images/ICN-UCWG-draft-Vertical-Restraints-Project.PDF>

agencies to compare how their practice in assessing dominance compares with the Recommended Practices (RPs).

This project will be led by the Competition Commission of India.

(3) Webinars

The Working Group will hold 3 webinars on issues of mutual interest that arise in analysing unilateral conduct. The discussions will aim to increase understanding of differences in standards in relation to unilateral conduct and their advantages and drawbacks, and to promote recent UCWG work products such as the Analytical Framework and the Recommended Practices on Assessing Dominance/Market Power. Webinar topics are to be discussed with the Working Group and might include: assessment dominance in digital / innovative / multi-sided markets; practical aspects of unilateral conduct investigations (evidence, due process, time frame, experts etc.); application of competition law in regulated sectors; unilateral conduct and IP / SEPs.

This work will be led by the three Co-Chairs.

June/August 2018	Preparation for first webinar.
September 2018	First webinar held.
October/November 2018	Preparation for second webinar.
December 2018	Second webinar held.
January/February 2019	Preparation for second webinar.
March 2019	Third webinar held.

(4) Scoping work for future projects

In 2018 the Working Group will commence a new multi-year project exploring content for future Chapters of the Workbook (see Annex I for a range of possible topics). This scoping work is expected to involve webinars and may include a short survey of members on a specific topic.

This survey will form the basis of a report to members.

Jan/Feb 2019	Preparation of short survey
Feb/March 2019	Survey conducted
April 2019	Survey report

B. Workshop

The Working Group will convene a Workshop on the 1st and 2nd of November 2018, in Stellenbosch, South Africa. The theme of the Workshop is to be discussed with members but will provide a focus on the implementation of ICN work products. Preparations for the Workshop will be coordinated by the Co-Chairs in partnership with the South Africa Competition Commission. Steps for planning the Workshop will include selecting and arranging a venue; creating an agenda for the Workshop; coordinating and organising presentations from a variety of agencies; managing registration, etc. The projected timeline for this project is from April 2018 to October 2018.

This project is led by the South Africa Competition Commission.

April/May 2018	Preparation of Workshop Agenda
June/July 2018	Selection of speakers and moderators
September/October 2018	Preparation of the plenary and breakout sessions
November 2018	Workshop held
November/December 2018	Review of Workshop

C. Implementation & Training

The Working Group will promote implementation of its work, particularly the Recommended Practices on Predatory Pricing and Workbook Chapter on Analytical Framework, including by coordination with the Advocacy and Implementation Network Support Program. A number of agencies report using the Group's work product to help analyse 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 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.

(1) In-depth discussions of unilateral conduct issues and vertical restraints

The Working Group will hold teleseminars on issues of mutual interest that arise in analysing unilateral conduct. Pursuant to the long-term strategic goals of the Working Group, the discussions will aim to increase understanding of differences in standards in relation to unilateral conduct and their advantages and drawbacks.

(2) Implementation & Training

The Working Group will also organise a series of presentations in connection with its regular Member & NGA conference calls which will enable members to share: (i) experiences of recent unilateral conduct cases from their jurisdictions, (i) implementation stories related to

how agencies conform their law and practice to ICN standards. This project is pursuant to the long-term strategic goals of the Working Group to promote greater convergence and increase understanding regarding differences in standards in relation to unilateral conduct and vertical restraints and online platforms, facilitate discussion and enhance cooperation, and expand participation by Members and NGAs. In this regard, the self assessment tool to be developed in 2018-2019 (see above) will be a key tool for promoting convergence and mutual understanding and activities, such as teleseminars for sharing experiences and implementing stories, will be also considered in liaison with the Promotion and Implementation Team (P&I).

The Working Group will coordinate with the ICN Training On Demand Working Group in defining appropriate topics for new ICN Training On Demand modules, pursuant to the long-term strategic goals of the Working Group. In the event that new modules are identified for 2018-2019, the Working Group will assist the ICN Training On Demand Working Group in the planning and production of these.

(3) Enhance communication among Members

The Working Group will schedule regular communications between members and seek ways to make written information available to members related to the cases presented during the teleseminar series on recent unilateral conduct cases, with the long-term aim of starting an online case log of unilateral conduct cases to facilitate informal cooperation between member agencies. The Group will also make particular efforts to enhance inclusiveness and engage with members from new and developing country agencies. Efforts will be made to help officials from these agencies participate more fully in member calls and teleseminars. The Working Group will continue to host member calls at Asia-Pacific friendly times and will explore hosting member calls or teleseminars in languages other than English.

These projects are pursuant to the long-term strategic goals of the Working Group to facilitate discussion and enhance cooperation, and expand participation by members and NGAs.

D. Evaluation

Given the diversity of projects the Group considers project-specific evaluation techniques are appropriate. The success of the written work product as well as the training materials can be measured according to impact on policy or practice as well as the use of the work products and materials for training, teaching or other purposes. Success of the webinars can be measured according to participation and the use of the recordings that are posted online. The evaluation of past work products will be presented in the Group's Implementation & Activity report.



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Annex A

Written Work Product

Recommended Practices

Based on previous reports on the same topics, 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-created 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); and

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

Based on the report and Workbook chapter on the same topic, in 2013-2014 the Working Group developed Recommended Practices to assist agencies with the assessment of Predatory Pricing Conduct. The Recommended Practices were adopted at the 2014 Annual Conference. The Recommended Practices are available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc966.pdf>.

Unilateral Conduct Workbook

The Working Group is currently drafting a *Unilateral Conduct Workbook*. It has prepared chapters on the Objectives of Unilateral Conduct Laws, Assessing Dominance/Substantial Market Power, Predatory Pricing, Exclusive Dealing, Tying and the Analytic Framework for Evaluating Unilateral Conduct.

- Objectives of Unilateral Conduct Laws (Chapter 1). This Chapter, presented at the 2012 Annual Conference, serves as an introduction to the Workbook, and describes the relationship between objectives of Unilateral Conduct laws and standards of intervention applied by competition authorities in various jurisdictions. The Chapter is available at: <http://icn-rio.org/files/docs/unilat/icn%20ucwg%20objectives%20chapter%204-2%20to%20sg.pdf>.
- Analytical Framework (Chapter 2): This workbook chapter poses and explores basic questions an agency must address in formulating its enforcement policies, focusing on two key questions in unilateral conduct enforcement: ‘what is dominance?’ and ‘what makes conduct exclusionary?’; the Chapter is available at:

<https://icn2017.concorrenca.pt/downloads/materials/UCWG-Analytical-Framework-Chapter.pdf>

- Assessing Dominance/Substantial Market Power (Chapter 3). This Chapter, presented at the 2011 Annual Conference, discusses the steps agencies can take to define relevant markets and assess dominance, the data that might be useful, and how to obtain them. The Chapter is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf>.
- Predatory Pricing (Chapter 4). This Chapter, presented at the 2012 Annual Conference, seeks to complement the 2008 Predatory Pricing Report by providing practical guidance on conducting a predatory pricing investigation, including the use of price-cost tests, the data that might be useful and how information and evidence that an authority has collected may be interpreted. The Chapter is available at: <http://icnrio.org/files/docs/unilat/icn%20ucwg%20predatory%20pricing%20chapter%204-2-to%20sg.pdf>.
- Exclusive Dealing (Chapter 5). This Chapter, presented at the 2013 Annual Conference, seeks to complement the 2008 Single Branding/Exclusive Dealing Report by providing guidance on conducting an exclusive dealing investigation, including the nature of exclusive dealing arrangements, assessment of anti-competitive effects, and justifications and defences. The Chapter is available at: http://icnwarsaw2013.org/docs/icn_exclusive_dealing.pdf.
- Tying (Chapter 6). This Chapter, presented at the 2015 Annual Conference, seeks to complement the 2008 Tying and Bundling Report by providing guidance on conducting a tying investigation, including the evaluative criteria for assessing tying arrangements, assessment of competitive effects, and justifications and defences.

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

In its first year (2006-2007) 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, based on the answers of 35 jurisdictions and 14 NGAs, identifies increased agreement in many important areas, as well as areas of difference. The report is available at:

<http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral.aspx>.

Conduct Reports

In 2007-2008, the Working Group began the second phase of its work, 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 summarise agency practice with respect to predatory pricing in 25 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 and Rebates.*** The Group prepared papers that summarise 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 summarises agency practice in 43 jurisdictions with respect to refusals to deal, including margin squeeze and denial of access to essential facilities. The report is available at
<http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf>.

TRAINING & IMPLEMENTATION

Teleseminars

The Working Group has organised a number of 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. Teleseminars have covered excessive pricing (November 2009), remedies in unilateral conduct cases (March 2010), unilateral conduct in the pharmaceutical industry (November 2010), differential pricing (March 2011), price-cost tests in unilateral conduct cases (July 2011), abuse of dominance in the energy sector – a European

perspective (November 2011), objectives of unilateral conduct laws (March 2012), legal and economic assessment of exclusive dealing (July 2012), enforcement cooperation in unilateral conduct cases (November 2012), the role of intent in unilateral conduct cases (February 2013), unilateral conduct by state-owned enterprises (July 2013), the assessment of loyalty rebates and discounts (December 2013), commitments (March 2013), assessment of dominance in fast-moving markets (September 2013), categorisation and the assessment of non-price abuses (December 2014), Refusal to deal in regulated industries (March 2015), two-sided markets and unilateral conduct (October 2015), remedies in refusal to deal case (March 2016), 'What is Dominance?' (March 2016), Efficiencies in Unilateral Conduct Cases (October 2016) and Vertical Restraints (April 2017). Recordings of many of these teleseminars are available on the ICN website at

<http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral/works-hops-teleseminars.aspx>.

Workshops

Building on the successes of the March 2009 workshop in Washington DC on implementing the Recommended Practices and evaluating unilateral conduct, and the December 2010 workshop in Brussels, the Working Group organised regional workshops on the topic of Exclusive Dealing in Singapore in July 2012 and in Stockholm in September 2013 and Refusal to Deal in Turkey in November 2015. Materials and webcasts from the workshops are posted on the ICN website at

<http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral/works-hops-teleseminars.aspx>.