

## **Cartel Working Group**

### **2019 - 2022 Work Plan**

#### **MISSION**

The mandate of the Cartel Working Group (CWG) is to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct, both domestically and internationally, across the entire range of ICN members with differing levels of experience and resources. At the heart of antitrust enforcement is the fight against hard-core cartels directed at price fixing, bid rigging, market allocation and output restriction.

#### **ORGANISATION**

The CWG is co-chaired by the Administrative Council for Economic Defense (CADE) Brazil, the French Competition Authority (Autorité de la Concurrence) and the Russian Federal Antimonopoly Service (FAS Russia). It comprises two sub-groups:

*Subgroup 1: Legal Framework ('SG1')* is co-chaired by the Hungarian Competition Authority (GVH) and the Turkish Competition Authority (TCA).

*Subgroup 2: Enforcement Techniques ('SG2')* is co-chaired by the Netherlands Authority for Consumers and Markets (ACM) and the Fiscalía Nacional Económica of Chile.

SG1 and SG2 aim to improve the effectiveness of anti-cartel enforcement for the detection and punishment of hard-core cartel conduct by:

- examining legal and conceptual challenges of anti-cartel enforcement and policy;
- identifying and sharing specific investigative techniques;
- advancing the education and information sharing agenda of the CWG.

There are currently 66 member agencies in the CWG, divided across the two sub-groups, which range from large authorities with significant experience in cartel enforcement to smaller or younger agencies with limited experience and differing resources at their disposal. In addition, NGAs from 34 jurisdictions participate in the work of the CWG.

## **LONG TERM GOALS**

Through their participation in the work of the CWG, the CWG members seek to address the challenges of anti-cartel enforcement, and strive to achieve the following outcomes:

- Share views on the challenges of cartel detection in the digital era and on the most effective enforcement tools in the fight against cartels (exchange of expertise between competition agencies with various levels of experience);
- Identify good practices in different areas of anti-cartel enforcement;
- Raise the awareness by new and developing competition agencies of the significance of the fight against hard-core cartels;
- Provide assistance to newer anti-cartel enforcement agencies; and
- Encourage new members to join the organization as well as enhance the involvement of NGAs.

Relevant information on the activities of the CWG is disseminated through the ICN Annual Conference and Cartel Workshops, the ICN Newsletter, Enforcers and NGAs roundtable discussions through webinars and various ad-hoc papers, publications and conference calls.

## **2019 - 2020 STRATEGIC PLAN**

The goal of the CWG is to contribute actively to the advancement of anti-cartel enforcement across the entire membership (irrespective of the level of experience or resources available), by advocating improved cooperation between member agencies; promoting the dissemination, implementation, visibility and accessibility of CWG work products; and encouraging broader engagement with the CWG's work, particularly from newer enforcement agencies and NGAs.

The CWG will strive to increase the number of its members and to offer a general discussion platform for both experienced and younger agencies in order to increase the cooperation between its members at both the management and working levels.

The CWG will endeavour to engage agencies new to anti-cartel enforcement in the work of the group. Every effort will be made to focus the work products on issues of relevance to all member agencies, including younger agencies, which are encouraged to actively participate in the discussion of such topics. The CWG will also work to encourage increased involvement of NGAs in the work of the group.

The CWG will strive to ensure the continued high quality and usefulness of its output. To this end, the CWG will continue to proactively seek the feedback from the ICN member agencies and NGAs, in order to maintain the relevance of the CWG work product.

In view of an overwhelmingly positive response from member agencies regarding the CWG's existing work, the CWG will continue organizing the annual Cartel Workshop, Roundtable Discussions through webinars; as well as developing and updating its key work products, such as the Anti-Cartel Enforcement Manual, the Anti-Cartel Enforcement Templates and the ICN-liaison framework for the promotion of sharing of non-confidential information.

While other work and topics will be discussed among the membership and evaluated for each annual work plan, the CWG will continue its efforts in the following primary areas.

### **1. Promote familiarity with, and use of, existing work product and projects**

The CWG will evaluate the implementation and use of its work products by member agencies, identify barriers to increased use, and encourage further dissemination of existing work. To achieve this, the CWG will actively pursue the broadest possible involvement of agencies and NGAs in all of its on-going projects, ensuring geographic balance and a good mix of new and experienced agencies.

### **2. Expand existing work products**

The CWG will revisit or update, as necessary, its existing work products, which are of fundamental importance to members' anti-cartel enforcement. Sample topics include the following: efficient and effective leniency programmes, investigative tools and techniques for cartel detection (e.g. enforcement cooperation, searches, interviewing, digital evidence gathering, etc.), sanctions, settlements and international cooperation. This may include updating Chapters of the Anti-Cartel Enforcement Manual, assessing whether additional chapters would be useful, and whether other, additional good practice or guidance documents would benefit the ICN with respect to anti-cartel enforcement.

### **3. Develop new practical guidance and avenues for exchanging effective enforcement practices**

The CWG will continue to develop new practical guidance and experience sharing projects on important issues in anti-cartel enforcement, e.g., investigations and leniency. The CWG will consider new topics for written products and roundtable discussions. Particular efforts will be made to deliver products targeted at newer

agencies and to encourage their participation in the CWG. The CWG will be a forum for the discussion and evaluation of recent developments linked to the digital economy, emerging issues, and upcoming trends in the field of anti-cartel enforcement. To this end, the CWG will make additional relevant material accessible on the ICN website. The CWG will also explore the synergies of collaboration between the ICN and other international organisations, e.g., OECD.

#### **4. Organise annual Cartel Workshops**

The Cartel Workshops will present and discuss topics covered by CWG work products and significant emerging policy issues relevant to day-to-day enforcement techniques. Annual Cartel Workshops will emphasize practical experience, and will include real life case examples and hypothetical scenarios. Workshop topics will be evaluated each year based on feedback to ensure relevance for, and participation from, a wide range of ICN members, including issues of particular interest to newer agencies. Examples of possible topics include: enhancing the attractiveness of leniency programmes, enforcement cooperation, the interaction of public and private enforcement, cartels detection, dual-track criminal and civil or administrative regimes, determining penalties, settlements, compliance programmes and public anti-cartel awareness campaigns.

#### **5. Strengthen the inclusiveness of CWG working procedures**

The CWG will:

- Encourage more ICN members to join the CWG and encourage increased levels of participation from members within the CWG;
- Explore new and creative ways to improve the accessibility of CWG updates and work product, including the consideration of the following:
  - Keeping the CWG page on the ICN website up-to-date;
  - Use of online discussions and webinars;
  - Use of online or electronic newsletters;
  - Use of the ICN blog;
  - Translation of CWG work products; and
  - Web-based training tools (i.e. Workshop materials).
- Include work of interest to NGAs and projects amenable to NGA participation.

## **6. Contribute to the broader work of the ICN**

The CWG will continue to participate in, and contribute to, the broader work of the ICN, including the Annual Conference and regular updates to the ICN website. The CWG will cooperate with the ICN horizontal coordinator in the planning of its events and with other ICN Working Groups on issues of common interest, where appropriate.

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### **Cartel Working Group Sub-Group 1 - Annual Plan**

#### **2019 - 2020 Projects**

Pursuant to its Mission and Long-Term Work Plan, the CWG SG1 will work on the following projects during the 2019 – 2020 ICN year:

1. Enhancing coordination on leniency matters;
2. Webinars/call series on five topics:
  - a. Leniency: Good Practices and Lessons Learnt;
  - b. Damages Claims in Cartel Cases;
  - c. How to Detect and Assess Bidding Cartels;
  - d. Information-sharing: Boundary between explicit and tacit collusion;
  - e. Use of presumptions in establishing existence of and participation in cartels;
3. Continuation of the Asia-Pacific friendly calls.

#### **Responsible parties**

The work will be co-ordinated by the SG1 co-chairs: the Hungarian Competition Authority and the Turkish Competition Authority.

#### **Project 1 – “Enhancing coordination on leniency matters”**

The project builds, to a great extent, on the good practices and the findings outlined in the report prepared by SG1 in the 2018-2019 ICN year (“Good practices for incentivising leniency applications”) and develop guidance on good practices for cross-border leniency coordination. This project is intended to provide

a detailed, practical “checklist” for agencies to assist them in engaging with other agencies in coordination when there is a joint leniency applicant. The guidance document will address key areas of coordination with the two parallel aims of making enforcement more effective and helping to reduce disincentives for applicants.

### **Project 1 – Milestones**

May 2019	Detailed description of the project and list of potential topics.
by beginning of September 2019	work team lead solicits from WG members case examples of international coordination to include these into the guidance document
by mid-September 2019	Building mostly on existing CWG work products and case examples received from the WG members the work team members prepare a first draft report
end of September 2019	circulation of the initial draft report for the WG members
7-10 October 2019	Presentation of the project at the Cartel Workshop
October – December 2019	Fine-tuning of the report on the basis of feedback received during the Workshop, comments sent by the WG members and outcome of webinar 1
February 2020	circulation of the draft report to the WG members for second reading
March – April 2020	revision of the draft, finalisation of the report

### **Project 2 – Webinars/call series on five topics**

SG1 plans to organise five webinars on various cartel-related topics.

#### **Project 2/a – Leniency: Good Practices and Lessons Learnt**

This webinar will complement the work under the above Project 1 “Enhancing coordination on leniency matters” to allow competition agencies and NGAs to share their experiences regarding leniency-related cooperation of competition agencies in multijurisdictional cases.

### Project 2/a – Milestones

June 2019	Elaboration of suggested discussion topics for the webinar
July 2019	Identification speakers, moderator and finalisation of the programme
September 2019	Organisation of the webinar

Potential date of the webinar: 18 September 2019.

### Project 2/b – Damages Claims in Cartel Cases

The webinar aims to address questions about damages claims followed by cartel decisions of the competition authorities. The webinar will provide an opportunity to discuss answers to critical questions such as who is eligible to claim damages, how damages are calculated, whether factual presumption is enough in evaluating damages claims and others.

### Project 2/b – Milestones

September 2019	Elaboration of suggested discussion topics for the webinar
October 2019	Identification speakers, moderator and finalisation of the programme
November 2019	Organisation of the webinar

Potential date of the webinar: 13 November 2019.

### Project 2/c – How to Detect and Assess Bidding Cartels (Agency only)

The webinar aims to share jurisdiction's experience on bidding cartels. Firstly, the webinar will focus on detection methods that are used and found fruitful by the authorities. Secondly, peculiarities of tender markets will be discussed with respect to assessment of the cartel documents, gravity of the infringement (magnitude and length) and other possible aspects. This webinar is hoped to complement the webinar held on "Cooperation between competition agencies and public procurement authorities" in February 2019.

### Project 2/c – Milestones

October 2019	Determining the topics for the webinar
November-December 2019	Identification speakers, moderator and finalisation of the programme
January 2020	Organisation of the webinar

Potential date of the webinar: 22 January 2019.

### **Project 2/d – Information sharing: Boundary between explicit and tacit collusion**

Information-sharing between undertakings may result in many efficiencies. However, it is also known that information exchange among competitors may lead to explicit or tacit collusion. This webinar aims to explore the boundary between explicit and tacit collusion with a specific focus on information-sharing.

#### **Project 2/d – Milestones**

November 2019	Elaboration of suggested discussion topics for the webinar
December 2019- January 2020	Identification speakers, moderator and finalisation of the programme
February 2020	Organisation of the webinar

Potential date of the webinar: 19 February 2020.

### **Project 2/e – Use of presumptions in establishing existence of and participation in cartels**

Presumptions are fundamental legal tools to derive unknown facts from known ones, shift the burden of proof and reach legal conclusions. In cartel cases, many presumptions are used such as parental liability presumption, only plausible explanation presumption in concerted practice cases and by object/per se illegality of price-fixing agreements. This webinar will discuss different types of presumptions, why they are used, whether they serve the purpose and are compatible with the legal principles and general legal framework.

### Project 2/e – Milestones

January 2020	Elaboration of suggested discussion topics for the webinar
February-March 2020	Identification speakers, moderator and finalisation of the programme
April 2020	Organisation of the webinar

Potential date of the webinar: 15 April 2020

### Project 3 – Continuation of the Asia-Pacific friendly calls

CWG SG1 will organise two webinars at a time friendly to ICN member agencies and NGAs in the Asia-Pacific region. The webinars will consist of replay of some presentations of the projects 2/a-e in order to facilitate the discussion by member agencies and NGAs in the Asia-Pacific region. Presentations replayed will be selected in consideration of the interest of members in this region.

Concerning projects 2 and 3, in addition to the regular email invitations for joining the CWG SG1 webinars, these events (including the Asia-Pacific friendly calls) may also be publicised in line with the ICN policy on social media and in the form of publicity material, such as flyers, at the 2019 ICN Cartel Workshop.

### Project 3 – Milestones

Two calls in October 2019 and March 2020.

June 2019	Determining the topics for the different sessions and establishing the program of the call series
September 2019	Identification speakers, moderator and finalisation of the programme
October 2019 and March 2020	Organisation of the two webinars

Potential dates of the two webinars: 30 October 2019 and 18 March 2020

## **Cartel Working Group**

### **Sub Group 2 - Annual Plan**

#### **2019 - 2020 Projects**

In line with the CWG mission and long-term work plan goals, the CWG SG2 will work on the following projects during the 2019-2020 ICN year:

1. Big data and cartels project;
2. 2019 Cartel Workshop (Brazil);
3. Implementation
  - a. "ICN Framework for the promotion of the sharing of non-confidential information"
  - b. "Anti-Cartel Enforcement Template"

#### **Project 1: Big data and cartels project**

In the context of a growing digital world, SG2 launched in the past year a new work stream on the impact of digitalization in cartel enforcement, i.e. the "Big data and Cartels" Project". It was envisaged - as a first step - to produce a scoping paper based on various sources, including the 2018 Cartel Workshop and the two SG1 webinars on "Digital cartels and algorithms" and "Cooperation between competition agencies and public procurement authorities" that were concluded in 2018-2019. The Paper sought to outline the main aspects of the potential role of data as a vehicle for collusion and as a tool for detection.

The draft scoping paper was circulated prior to the 2019 ICN annual conference in Cartagena. It will now be further reviewed and expanded in the work year 2019-2020, with a view to being presented at the 2020 ICN Annual conference. In the meantime, the issues at stake will be discussed in the course of the 2019 Cartel Workshop. In consideration of the content and findings of this work product, the CWG will assess whether it may be necessary to update one or several chapters of the Anti-cartel enforcement manual on "Digital evidence gathering" or "Investigative strategy" in the following work year.

#### **Project 2: 2019 ICN Cartel Workshop (Brazil)**

The 2019 Cartel Workshop will take place in Brazil in October 2019. The CWG Membership in cooperation with the Brazilian host will determine the theme and agenda topics of the 2019 Workshop.

## Project 2 – Milestones

April - July 2019	Formation of the Workshop agenda, including the allocation of speakers.
June – September 2019	Logistics management (venue, website, materials, registration etc.)
August - September	Presenters and moderators to prepare and submit material for Workshop
7 – 10 October 2019	2019 ICN Cartel Workshop
November 2019	Feedback and review process

## Project 3: Implementation

### 3/a - The ICN Framework for the promotion of the sharing of non-confidential information ("ICN liaison")

In 2015, the ICN CWG SG 2 commenced work to establish a Framework for the promotion of the sharing of non-confidential information to give agencies 'a place to start' in building stronger relationships and sharing information. The Framework was designed to foster a "pick up the phone relationship" for improved cooperation for effective cartel enforcement and for information gathering related to other agencies' enforcement by supporting member agencies to gain more experiences of information exchanges.

In 2019-2020, SG 2 will:

- Maintain and encourage use of the Framework's 'request procedure' document to ensure both the requestor and requestee understand expectations and the type of information that can be requested using this framework.
- Maintain the database of current contact officers for participating agencies.
- Encourage the sharing of experience in using the Framework to help support its implementation by demonstrating its benefits to the membership.
- Promote the use of the Framework by sending periodical reminders to CWG Members about possibilities of information exchange it provides.
- Promote further use of the Framework in the form of publicity material, such as flyers in line with the ICN policy on social media.

### **3/b - Continuation of the Anti-Cartel Enforcement Template update Project**

In 2019-20, the SG 2 will continue the updating and promotion of the Anti-Cartel Enforcement Template to cover also existing rules on private anti-cartel enforcement. The templates provide information on existing legislation in force in the jurisdictions of the different ICN member agencies concerning anti-cartel enforcement. They also provide information for businesses participating in cartel activities or suffering from such activities about the applicable rules to enable them to file for leniency or file a complaint in one or more jurisdictions.

In 2019-20, SG 2 will:

- Encourage the completion or revisions of the template by the ICN member agencies
- Update the relevant section of the ICN website.
- Circulate relevant materials.