

ICN MEMBERSHIP – OPPORTUNITIES AND CHALLENGES FOR A COMPETITION AUTHORITY

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Ten years of membership in the International Competition Network have given us many influences and experiences, ranging from the technical level of specific instruments to the very broadest policy level considerations. The initial ten years of participation in ICN working groups and conferences have also been very rewarding for all staff that have had the opportunity to participate and, in this process, to acquire both new influences and contacts from across the world of competition policy and enforcement. In this paper we would like to share our experiences and hopes for the future now that the ICN faces a new decade and the future direction and agenda of the network must be set.¹

The Swedish Competition Authority was not one of those competition agencies which participated in setting up the ICN in October 2001. But we joined soon after and we participated in the first ICN annual conference in Naples, Italy, in September 2002.

1. WHY DID WE JOIN THE ICN?

During the first years of the new millennium international cooperation was high on the agenda of many competition authorities. Several new platforms to facilitate cooperation were created in Europe and elsewhere and amongst them the International Competition Network.

In September 2000 the Swedish Competition Authority organized an international conference in Stockholm, “Fighting cartels – why and how?”, which gathered more than 200 participants from many competition agencies. Prominent speakers at the conference such as EU Commissioner Mario Monti

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and Joel Klein, Jim Griffin and Scott Hammond from the Antitrust Division of the US Department of Justice underscored the importance of international cooperation and enforcement between competition agencies in order to combat international cartels. Commissioner Monti said in his intervention that *“as no World Policeman or World Court exists, there is an absolute need for an intensive cooperation between the antitrust authorities of different countries in today’s global economy”*.

In September 2000, the European Commission also launched its proposal for a new Regulation on the enforcement of the competition rules of the EC Treaty (now Articles 101 and 102 of the Treaty of the Functioning of the European Union). During the Swedish Presidency in the spring of 2001 and until the final adoption of the new enforcement regime in December 2002, the mechanisms of cooperation required to ensure a consistent and effective enforcement of the EU rules in the Member States were extensively discussed in the Council. The final result, EC Regulation 1/2003, entered into force in May 2004. The European Competition Network (ECN), now consisting of the competition authorities of the 27 Member States and the European Commission, is today the most comprehensive cooperation between competition authorities in the world, and forms an important part of the Swedish Competition Authority’s every-day work.

In the year 2000 a platform for discussion and exchange of views between the heads of the European competition authorities, ECA, was created. In their annual conference in April 2001 the heads of these agencies decided to set up a mechanism for exchange of information concerning mergers notified to their authorities which also were notified to other competition authorities in the EU and the European Economic Agreement (EEA) area. The purpose was to facilitate cooperation between those authorities to which a planned merger had been notified.

The competition authorities of the Nordic countries have closely collaborated during more than 50 years. This cooperation has further developed in the last decade, due to convergence of the national competition laws, and an increase in the number of antitrust cases and advocacy issues with common denominators. As a result of this collaboration, since 1998, joint reports on competition have been published almost every year. In addition, a cooperation agreement was concluded between Denmark, Iceland and Norway in 2001, which Sweden also signed and joined in 2003. The agreement allows for exchange of confidential information between these competition authorities.

At an international level there are also other platforms which promote cooperation with countries that have recently adopted competition laws or are in

the process of doing so, UNCTAD is one of these and considered a special forum. In 2001, for the first time, the OECD Competition Committee arranged the annual Global Forum on Competition to which a number of countries in various stages of implementation of competition policy are also invited to attend alongside the permanent members of the OECD. In the WTO, a special working group also dealt for some years with trade and competition policy until the conference in 2004 in Cancún struck this item off the WTO agenda. The work clearly demonstrated the need for cooperation between competition authorities with a close eye on the international trade perspective.

To conclude, it was in this environment of increased awareness of the need for international cooperation that the International Competition Network was set up. And it was against this background that the Swedish Competition Authority supported its creation and considered membership as the natural course to take.

2. DEVELOPMENTS AND ACHIEVEMENTS OF THE ICN FROM OUR PERSPECTIVE

The following comments do not aspire to give a comprehensive account of the impressive results in terms of work product, network creation, awareness and other achievements that the ICN has developed during its existence. For that purpose various reports have been drafted, many of which can be found on the ICN homepage (which in itself is an achievement). The comments below are simply made from our own perspective.

A look into the rear-view mirror shows that during the first ten years the ICN has embarked on new areas of work, one after another. It has, however, stayed true to its initial mission of providing a platform for discussions “*on competition, by competition stakeholders – all the time*”. It first gathered momentum with significant work on jurisdictional and procedural aspects of merger control and followed on with substantive issues in the same area. The 2004 work plan demonstrates that the focus then slowly broadened to include cartel work. A further development came at the ICN annual conference in Cape Town, South Africa, in 2006, when it was decided to enter into more comprehensive work on unilateral conduct. In parallel with these substantive issues, in the first years of the ICN, a working group on advocacy worked with projects to identify effective approaches to support members’ advocacy efforts. This working group was re-established in 2008 and has in recent years concentrated its work on market studies and on best practices with regard to advocacy. Agency effectiveness is another working group, which was created in 2009 and addresses a wide range of

institutional and organisational subjects, such as strategic planning and prioritisation, communication and accountability.

The final work products produced by these working groups takes various forms and formats: best practice recommendations, case-handling and enforcement manuals or handbooks, reports, templates on competition and legislation which allows comparisons between different jurisdictions etc. A visit to the ICN website demonstrates the wide range of work undertaken and the variation of ways in which it can be used. All forms of work product do however have in common that they allow competition agencies worldwide to benchmark their own activities as well as to advocate in their jurisdictions the need for an agency structure and working tools which are on par with their international peers.

In a statement of achievements presented at the annual conference in Istanbul in 2010, it was indicated that these work products are not achievements in themselves but rather intermediate steps towards achieving the goal of improved enforcement and advocacy. In order to become achievements, the work products must influence change in the real world, that is, lead to changes in legislation and performance. The work products of the ICN can be brilliant tools, but they should not be thought of as outcomes in themselves.

The Swedish Competition Authority shares the long term goals of improved enforcement and advocacy and ensuring that the work products are steps to achieve the goal. However, we believe that an additional benefit for a competition authority and its staff can be found in the working process undertaken in the workgroups and the dialogue between members and NGAs. As stated below, we believe that the working process gives rise to new ideas on how to make our investigations and internal working methods more efficient and on how to use transparency as a means to improve our communication with stakeholders.

The working methods of the ICN have also developed over time. Break-out sessions were introduced at the annual conference in Naples back in 2002 and have now become a regular component of the annual conferences as have the workshops. From our perspective this insightful means of continuously striving for the conferences to be dynamic and inclusive, where all participants are encouraged to share their experiences, has become a key feature of the organisation, which sets it apart from other conferences or international forums. The organisational idea of breakout sessions has indeed been a useful way to stimulate discussions in smaller circles, whilst over the years the plenary sessions have been used primarily for drawing conclusions as well as for discussing future work. An important challenge for the ICN, with the ever increasing number of members and NGAs at the annual conferences and at the workshops, is to maintain and develop working methods that provide added value to all

participants. A development where break-out sessions become too crowded and allow only for a limited number of interventions should be avoided.

Questionnaires have been a method of information gathering from since the very start when the ICN initiated its work on merger control. The questionnaires are generally very ambitious which means that they cover many areas and contain a large number of questions. This in itself could diminish the ambition of the responding authority – the effort to provide full answers to all questions may simply be too resource-consuming, especially for smaller agencies. Teleseminars and lately webinars have become increasingly used as a standard method in some working groups. The advantage is that they provide the opportunity to have a dialogue without needing to travel. It may however be challenging to conduct discussions in these formats if the number of speakers is not rather limited. Most of the teleseminars we have participated in have been very well prepared and carried out and staff are generally positive about the use of this working method. However, the more carefully planned such a teleseminar is, the more it may hamper spontaneous comments. Use of new technologies will no doubt render these types of conferences even more effective. Even though an increasing number of participants make it more challenging to ensure that everyone can intervene in the conversation, we believe this to be one area where the ICN is contributing to setting best practices in effective working methods.

3. BENEFITS FROM A COMPETITION AGENCY'S PERSPECTIVE

The ICN is an informal network which addresses practical enforcement and policy issues, that is, issues concerning the core business of any competition authority. The informal nature of the network is an added value to the participating agencies and is perhaps the ICN's main "competitive advantage" compared to other forums of international exchange.

The membership in itself imposes no or very limited administrative or financial burden on an authority. As opposed to many other international organisations or networks, the ICN membership imposes no regulatory obligations on the authority. The ICN has from its inception been very clear about being a network of competition agencies, not countries. This is important as it carries with it the advantage that participation in the ICN workflow does not require instructions to the competition authority from its government.

The ICN work products, for instance the recommended practices, are not binding on the authority or the country it represents. The membership also does not

imply any financial commitments for the authority – financial contributions are voluntary. Every authority is free to choose its own level of participation in the work of the ICN and can select the items of special interest to the authority. It means, from our perspective, that ICN membership leaves the authority the freedom to independently determine the level of involvement and the flexibility to adjust it over time, if circumstances requires it to do so.

Regardless of an authority's involvement in the ICN's work, all members have continuous access to the work process in the various working groups, without the obligation to actively engage in it. The fact that an authority has given priority to certain ICN working groups does not necessarily mean that it has no interest in following the work in other areas. The transparency and access to work in progress and not only to the final work products is, in our view, one of the major benefits of the ICN. The questionnaires, teleseminars, webinars and the workshops have also on many occasions provided valuable input in areas to which we had not given priority. Elaborating answers to questions about "how" and "why" has often provided food for thought and started useful discussions within the agency. This way of providing the impetus to challenge existing practices and traditions is one of the means by which the ICN has contributed to spreading best practices among its members.

Participation in the workshops arranged by the different working groups provides highly valuable personal contacts across the globe. This is an important additional benefit of the ICN, which has significantly lowered the threshold for making personal contacts to other agencies. Such contacts may often improve the quality and persuasiveness of the agency's advocacy work, allowing additional examples to guide and strengthen this work.

The ICN has developed an impressive body of work including recommended practices, reports, templates on legislation and enforcement manuals. The list is far from exhaustive. The Swedish Competition Authority has used a great deal of this work as a reference for our internal work as well as externally in our advocacy work. An example is the work of the Notification and Procedures Subgroup of the Merger Working Group which was used when Sweden changed its thresholds for mandatory notification of mergers some years ago.

4. CHALLENGES FROM A COMPETITION ENFORCEMENT AGENCY PERSPECTIVE

As pointed out above, a benefit of the ICN is that any member is free to decide on its level of involvement in the ICN work. At the same time the main challenge to

a competition authority is no doubt the resource restraint. The informal character of the ICN and the independence and freedom for the authority to choose its level of engagement means also that the government does not allocate specific budget or resources for ICN work.

In our view, active participation in all working groups is almost impossible for a competition authority of our size with about one hundred officials dedicated to competition enforcement and advocacy. It means that a selection of the issues to cover must be made. Then, even after we have decided which ICN activities to engage in, conflicts of interest are bound to arise over time. Every official who participates in the various working groups do so in addition to their daily enforcement tasks. When a pending case at the authority requires their attention, it may be difficult to give priority to the ICN work. We are therefore grateful to other agencies for finding the resources to take on special tasks such as the burden of chairing working groups.

Another serious challenge for an agency of our size would be to host an ICN annual conference or even a workshop, which today normally attracts about 150 participants. This doubtlessly requires special budget allocations and expressed support from the government. Again, we are grateful to those agencies who have found the means to take on these challenges over the first ICN decade.

Another important challenge is to find effective internal means to spread the ICN work product to all those inside the agency who would benefit from it, and conversely to find effective ways of ensuring that staff member's experiences are fed into on-going ICN projects. Our ambition here is to at least ensure transparency by means of making such material available on the agency's internal website. In addition, we strive to organise internal presentations or discussions on ICN matters periodically, but here the ICN products compete for available time with domestic issues and work product from other international forums.

5. THE ICN IN THE NEXT DECADE – OUR EXPECTATIONS

The first decade of ICN is now being celebrated. This informal network of competition authorities from around the world looks back on very successful years. This success is clearly shown in the quality and quantity of its work products and the number of new competition authorities that have joined and actively participate in its work.

We expect the ICN to continue as a practical, result-oriented network which addresses practical competition enforcement and policy issues. Its main competitive advantage is precisely the focus on issues related to the core business of competition authorities around the world. We also expect the ICN to continue as an informal network. We understand that this is a major challenge for a network that has grown so much in numbers – of members and work products. However, here, in our view, also lies the major benefits of the ICN – to be an open network to which every competition authority in the world could adhere and where we interact as peers, not nations.

But we also expect the ICN to develop. On the agenda for discussion at the annual conference in The Hague in May 2011 are naturally the goals that the ICN should try to achieve in the coming years. New areas of work will certainly be discussed. The ICN takes on board consensus-based projects to enhance international convergence and cooperation. In our view the ICN should not refrain from working with projects where no consensus is likely to be achieved. Demonstrating differences of opinion and approaches leads to informed divergence and also demonstrates that there is no “one size fits all” in that particular area. Such a result may be as useful as any best practice document and provides valuable guidance in itself to member authorities and policy makers.

A potential area for more in-depth consideration could be to take up work concerning cooperation arrangements between competition authorities. Such agreements can go a long way towards improving the enforcement activity of each participating agency. Second-stage agreements which allow for exchange of confidential information are even more likely to provide for effective enforcement cooperation between competition authorities. Several cooperation agreements exist around the world, in various forms and levels of enforcement cooperation.

The working methods of the ICN could also be further explored to ensure that as many authorities as possible have a real opportunity to participate in the working groups. But most importantly, the ICN should continue with its core business of having working groups discussing and promoting effective means of dealing with the core tasks of its members in the fields of advocacy work as well as merger control, unilateral conduct and cartels. Providing agency officials with a network in which to continuously strive for improving these key areas is the glue that will continue to keep the ICN together.