

# THE ICN AT TWENTY - WHO IS GLOBAL IF NOT THE ICN? ICN MILESTONES AND THE FUTURE OF THE AGENCIES NETWORK

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## I. Intro

Even after nearly 20 years, I am still impressed that our network of agencies is not a vision but reality. Every year when all member agencies and NGAs come together at the ICN Annual conference to reflect on what we have done and to define the future, we can really see what we have created. Looking back on the birth of the ICN in Naples in 2001 and comparing that time to today's conferences, we realize that the ICN has taken us a long way. The ICN is unique in the way it operates on a purely informal and voluntary basis and is nonetheless the most important organisation for competition agencies in the world today.

## II. Five milestones

The ICN is a vibrant organisation. Every year we have many in person, or as in the last year, virtual events – workshops, teleseminars and webinars. The working groups develop work products that serve as a basis for global standards. When the ICN was established and took up operation, I was involved as Head of the International Unit of the Bundeskartellamt which is a founding member of the ICN and I was a member of the MWG group in 2001 on its way to establishing the first ICN Recommended Practices. The foundation of the ICN was a formative experience for everyone involved and when I look back on special steps in the development of the network, I also look at highlights in the context of my work in international business.

Given the dynamic nature of the network, there are many ICN highlights, but I will pick only five milestones which I think illustrate the unique features of our network:

1. The first milestone is the foundation of the ICN. That was a big step. We take today's status for granted, which shows how well the system works. But things did not go as smoothly at that time.

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2. The ICN's first Recommended Practices are the second milestone. They stand for two ICN characteristics: speed and impact.
3. Opening up the ICN to new topics is the third milestone which illustrates the member-driven nature of the network.
4. The fourth milestone, the ICN Framework for Competition Agency Procedures (ICN CAP) could only be accomplished because of the level of trust and confidence members have in the ICN, as well as their willingness to break new ground.
5. The fifth milestone is the focus on digital topics which marks the transition to the ICN's future.

### **1st Milestone: How it all started**

At the Steering Group Meeting at the first ICN Annual Conference in Naples on 29 September 2002, it was observed that the conference was the first item on CNN's business news. But it was by no means a given that we would get there. ICN was a novel idea: a group of competition authorities formed to satisfy the need for a forum that would help further cooperation and facilitate convergence as an answer to overambitious unsuccessful attempts by governments.

Improvement in cooperation had been discussed for years and the debates on how to address competition in the context of globalisation were at times emotional and sophisticated. There was a common understanding that competition agencies needed to cooperate more closely, the question was how. When discussions started in the early 1990s, several well-established organisations dealing with competition issues already existed: the OECD, UNCTAD, and cooperation also took place at regional level. But despite the fact that well-respected international organisations already operated successfully, there was a strong desire to take multilateral cooperation to the next level. However, it was unclear which direction to take.

Very different approaches were discussed, sometimes in parallel for years, including the most ambitious vision of all, a global competition law, an international antitrust authority and a dispute resolution panel. An international competition framework within the WTO was considered and this really got underway at the Singapore WTO Ministerial in December 1996, when the EU initiated a Working Group on the Interaction between Trade and Competition Policy. Shortly afterwards, a whole new plot strand was initiated: The International Competition Policy Advisory Committee (ICPAC) was established in November 1997 "to address the global antitrust problems of the 21st Century". This time, the driving force was not Europe but the US. In its final report, issued in February 2000, ICPAC proposed the creation of a new venue, a Global Competition Initiative, where government officials, private firms and non-governmental organisations could consult on antitrust matters. ICPAC recommended that this Global Competition Initiative be directed towards greater convergence of competition law and analysis,

common understanding, and common culture. And then things happened fast. ICPAC's recommendation for a Global Competition Initiative was embraced. Joel Klein and Mario Monti expressed their support for the initiative. Following these endorsements, the International Bar Association convened the Ditchley Park meeting in February 2001 to discuss feasibility and on 25 October 2001, top antitrust officials from 14 jurisdictions – Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the US, and Zambia – launched the ICN.<sup>2</sup> Shortly before the first ICN Annual Conference in Naples, a new name for the new organisation had to be found. The initial idea and working title of the ICN had been “Global Competition Network”. But after the riots on the occasion of the G8 meeting in Geneva in 2001, the word “Global” had become a somewhat taboo word and the Italian Competition Authority feared new protests at the first Annual Conference if a “Global” organisation was to hold a conference in Naples. In a quite spontaneous teleconference, the new organisation was renamed the International Competition Network, the ICN we know today.

The first few years of the organisation resulted in fast growth and very lively discussions, and even though the ICN has a superlight structure and no headquarters and staff like other organisations, it has managed to develop its own stable institutional framework. Indeed, the growth of the ICN is quite impressive and we take pride in the fact that the organisation is attractive not only to mature agencies but also to young agencies. Today the ICN's membership is as diverse, in terms of agency size, organisation, enforcement environment, geographic diversity etc., as our tasks, and this factor is one of the main assets of the ICN.

## **2nd Milestone: The First ICN Recommended Practices**

The first flagship project and earliest success story was the adoption of the Recommended Practices for Merger Notification and Review Procedures. Multi-jurisdictional mergers had become one of the main challenges for competition authorities and companies and they were a key factor in the decision to establish the ICN. The first Annual Conference in Naples in September 2002 focused on issues arising in the context of mergers subject to multi-jurisdictional review. In Naples the Merger Working Group's Notification and Procedures Subgroup presented a set of Guiding Principles and Recommended Practices for Merger Notification and Review Procedures which were the starting point for procedural convergence in international merger control regimes and encouraged competition authorities to further coordinate their approach and to create a level playing field for business, legal certainty and efficiency. The subgroup was chaired by Randy Tritell, US FTC, who is one of the few people to have joined all the ICN annual conferences and who has been a member of the ICN steering group ever since. I remember the discussions very well as I participated in the subgroup in my capacity as Head of the International Unit together with about a dozen other agencies and the OECD.

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<sup>2</sup> ICN, “About > History”, [www.internationalcompetitionnetwork.org/about/history.aspx](http://www.internationalcompetitionnetwork.org/about/history.aspx), accessed 6 Aug 2018.

The Recommended Practices of the Merger Working Group are an example of the direct influence that the ICN's work products have on antitrust regimes, including mature agencies. After the first annual conference, the then President of the Bundeskartellamt received a letter from a representative of the Studienvereinigung Kartellrecht, the association of German-speaking lawyers from Germany, Austria, Switzerland and Brussels specialising in competition law, who had joined the conference, and emphasised in his letter that if the Recommended Practices really were implemented, this would prompt legislative changes. And indeed, living up to the ICN's recommendations was one facilitating factor in bringing about a domestic reform in Germany which strengthened the local nexus of merger control. Taking stock at the 5th Annual ICN Conference in Cape Town in May 2006, the ICN Chair observed in his opening speech that notwithstanding the non-binding nature of the Recommended Practices, by March 2006 already 33 ICN member jurisdictions had made changes to their merger control regime, bringing their system into greater conformity with the Recommended Practices.

### **3rd Milestone: Opening the ICN to New Topics - Flexible and Member-driven**

In identifying the content of its work and accomplishing it, the ICN is member-driven in every sense. The high degree of participation in the ICN has never impaired the ICN's flexibility. The ICN works very well without a formal secretariat, permanent employees or its own budget, relying only on very dedicated staff in the various competition agencies and many Non-Governmental Advisors around the world. No other relevant organisation is so closely geared to the desires and needs of its members. The ICN's flexible and member-driven bottom-up approach can realize ideas quickly and has enabled the ICN to take on new topics and adapt its structure accordingly. This bottom-up approach is a unique feature of the ICN, a feature I consider extremely important to preserve. This observation still fits today, but it was made in Bonn in 2004 by Ulf Böge, then President of the Bundeskartellamt and ICN Chair in his closing speech at the 4<sup>th</sup> ICN Annual Conference.

The first ICN Working Groups dealt with mergers and advocacy because it had become apparent that the increase in multinational cross-border mergers meant that the competition authorities had to increase their efforts. After the first Annual Conference in Naples, the ICN established the Working Group Capacity Building and Competition Policy Implementation chaired by DG COMP and the South African competition agency. Taking into account the responses of members to new topics to be taken up by the ICN, the 2nd ICN Annual Conference in Merida, Mexico, in June 2003, decided to set up the Antitrust Enforcement in Regulated Sectors (AERS) Working Group chaired by the French and the Italian authorities. The 3rd ICN Annual Conference in Seoul in 2004 marked a crucial step for the network. At that time there were different views on the areas of competition law enforcement that should be covered by ICN, and one view was to focus on mergers. However, the Steering Group came to the conclusion to open up the network to new topics which is best illustrated by the foundation of the Cartel Working Group in Seoul,

inter alia in response to queries from Ulf Böge. Already only one year later, at the Annual Conference in Bonn, the Cartel Working Group presented two chapters of the Anti Cartel Enforcement Manual. More ICN Working Groups followed. The ICN Working Group on Telecommunications Services, co-chaired by the Canadian Competition Bureau, the Italian Antitrust Agency and the South Africa Competition Tribunal, was set up in 2005 just six weeks after David Lewis proposed the topic and presented its report at the 5th Annual Conference in Cape Town in 2006. In Cape Town the ICN established the Unilateral Conduct Working Group chaired by the US FTC and the Bundeskartellamt which in its first year saw a level of participation unprecedented in the ICN, with 40 working group member authorities and 80 non-governmental advisors. The group elaborated questionnaires and compiled a Report on the Objectives of Unilateral Conduct Laws and Assessment of Dominance, and State-Created Monopolies. And then the group took a bold step and decided to set forth in developing Recommended Practices on the Assessment of Dominance on the basis of this report. At the beginning of this project, quite a few people thought it was very doubtful that the group would ever achieve this aim. Given that dominance analysis is discussed controversially even within jurisdictions and their agencies, it seemed all the more difficult, if not impossible, for a number of agencies from different legal traditions and systems to agree on Recommended Practices. But each and every member of the Working Group made great efforts and in long and controversial but also highly interesting, constructive and fruitful discussions the group eventually reached consensus and presented the Recommended Practices at the 7<sup>th</sup> Annual conference in Kyoto.

Today we have five operative working groups, but the current structure is never more than a mere snapshot. Agencies are confronted with issues different to those identified when ICN was established. ICN projects follow its members' needs and the ICN's structure ensures direct input from its membership. All ICN working group members are involved when work plans are drafted, and the whole ICN membership is asked to provide input at regular intervals. Shortly before completing its first decade of existence, the ICN took stock and asked its members to consider the benefits of ICN participation and to identify any improvements needed. The results of this process helped establish the Second Decade report, a long-term vision and strategy paper for the ICN. Five years later, in 2015, we conducted a follow-up and invited ICN member agencies to complete surveys addressing their participation, views on work products and implementation, and ideas for the ICN's future. The corresponding report provided valuable impulses for our network and again demonstrated the ICN's practical relevance and real-world impact. It turned out that more than half of the respondents had used ICN guidance documents to develop or revise internal procedures, guidelines and best practices, and that agencies frequently refer to ICN work products when engaging in competition advocacy and use ICN products as an important source of information and inspiration to support, advance, or improve proposals to review or amend national competition laws. Now it is time for the Third Decade-Project to assess the tools, topics, and operations of the network in order to provide a roadmap for the ICN's work during its third decade.

#### **4th Milestone - The ICN CAP**

In 2019, the ICN established a new instrument on procedural fairness in competition law investigations and enforcement proceedings, the ICN Framework for Competition Agency Procedures (CAP). At the Annual Conference in Cartagena a remarkable panel with speakers from the US DOJ, FAS Russia, JFTC Japan, DG COMP, COFECE Mexico, South African Competition Commission and the Bundeskartellamt presented the CAP to the ICN membership and it went into effect with over 60 agency participants. The ICN CAP is an opt-in framework, open to all agencies including those that are not ICN members. It builds on fundamental principles of fair and effective agency procedures fully consistent with the extensive work of the ICN in this field such as non-discrimination, transparency, notice of investigation, timely resolution, confidentiality protections, impartial enforcement, opportunity to defend, representation, and judicial review, reflecting the broad consensus within the global competition community. It allows for agency-to-agency dialogue to increase understanding of differences in agency procedures, and promotes transparency about agency procedural rules through templates that explain how each participant's procedures match ICN CAP principles. The starting point was the MFP project brought forward by the US DOJ in June 2018 which has been developed into the ICN CAP as an ICN Steering Group project.

Fair and effective agency investigative process is essential to sound competition law enforcement and important for the legitimacy and acceptance of our work as competition enforcers; it is important for the acceptance of the entire system worldwide. The first set of principles on procedures was developed by the Merger Working Group. Procedures have also been addressed by other working groups and by an overarching long-term project on investigative process which produced Guiding Principles and Recommended Practices for Investigative Process. With the CAP the ICN has taken a next step and now offers a comprehensive package of classic ICN work products and the innovative CAP.

There are two more reasons that make the CAP an ICN milestone. First, the ICN CAP again showed the network's ability to act flexibly and quickly. Second, and maybe more significantly, it illustrates the trust which competition agencies place in their network - in their natural habitat as one Steering Group member put it. The ICN CAP is the result of intensive and at times controversial discussions around a core issue: should it stand alone or under the umbrella of ICN? The ICN Steering group put a lot of effort into the project in order to keep it within the established multilateral framework of the ICN where it is easily accessible and acceptable to as many countries as possible and to avoid the fragmentation of multilateral competition agreements and organisations.

And is it relevant? If the International Chamber of Commerce (ICC), the Association of Corporate Counsel (ACC), the Association of in-house competition lawyers (ICLA) and the

United States Council for International Business (USCIB) decide to publish a joint press release to welcome the ICN CAP, it clearly shows that it is well received.

### **5th Milestone – The Digital Economy**

Finally, I consider the ICN's work on digital topics a milestone because the question of whether the ICN is able to handle the revolution we are witnessing today will be decisive for its future. Digital technology is transforming the global economy, new services are rapidly changing existing industries. Competition agencies are called upon to act and provide answers. They are in the spotlight and as the head of a competition agency I can confirm that if you have to be in the front line, it is a great advantage if you are not alone. The digital economy raises many new issues about competition law and related policy areas. There are big challenges for enforcers: we have to be quick in order to prevent irreparable harm; some market areas are already highly concentrated, which makes abuse control our main tool, and finally, large parts of our established legal framework are not tailored to data-driven business models. These challenges are supranational in scope which makes it so important to keep exchanging on them and establish standards together.

The ICN recognized these challenges early. At the 2015 ICN Annual Conference in Sydney, the ACCC presented a special project on online vertical restraints, the plenary discussed “Unilateral Conduct in the New Economy” and breakout sessions were dedicated inter alia to cross-platform parity agreements and the hotel booking platform cases. In Porto the Unilateral Working Group looked at the challenges of big data. In India ICN members and NGAs discussed among other issues effective advocacy in the digital world and merger reviews in the digital economy. ICN kept this focus and the digital economy became one of the overarching themes of the 2019 event in Cartagena, and at the 2020 ICN Annual Conference in Los Angeles more plenary topics than ever before dealt with the digital economy. At the 2021 Annual Conference hosted by the Hungarian competition authority, the Cartel Working Group discussed the role and challenges of digitalisation in a cartel investigation and the Unilateral Conduct Working Group addressed dominance in digital markets.

In February 2020, the ICN Steering Group started a new project on competition law enforcement at the intersection between competition, consumer protection, and privacy. This was in response to the fact that the relationship between these areas of law and policy was brought into increasing focus by changes in information technology and the growth of large technology platform ecosystems which revolutionize the collection and use of personal and non-personal data.

As all working groups conduct projects touching on digital issues, the Steering Group decided to introduce a new Vice Chair for Digital Co-ordination and in September 2021 confirmed Rod Sims, Chair of the Australian Competition and Consumer Commission, in this position to ensure the overarching co-ordination of projects and discussions on competition in the digital economy within the ICN.

### **III. What can you expect for the future of ICN?**

As nice as it is to enjoy what has been achieved in the past, what is more important is to look at what we have in mind for the future. If I were asked what I would expect for the future of ICN, I would answer: It will take hard work, it will take courage but it's worth it.

The ICN is still needed despite what has been achieved: the many good work products, the well established relationships. We are well advised to keep our eyes open, to look ahead and to use what we have achieved as a firm and welcome foundation because things are not getting easier. Globalisation and digitalisation create winners but also losers. They create fears. The fear of losing jobs, the lack of economic stability, the lack of sustainability. When governments try to address these issues, I do not see many endeavours to strengthen competition. What I see instead is a tendency to limit competition. I witness a general discussion about exceptions to competition and about public interest. I do believe that the ICN is quite different. When we as competition agencies address these issues, we have a common interest: competition and consumers worldwide. ICN is not a network of governments, it is not political, it is competition all the time - and should remain this way -, it is voluntary, all members are equal and there is no lead authority or primus inter pares, just consensus. This will also help us when dealing with the second topic which will lead to the major transformation of industries and business models and will require our greatest attention: sustainability. This is not just about whether environmental concerns can be taken into account, it is about advocating for competition which will be part of the solution.

Compared to a compulsory system, voluntary implementation logically leads to a limited impact. But this view somewhat misses the point. First, the ICN has impact as the examples above show, and second, a little change of perspective makes the situation very different. The ICN system gives us the opportunity to aim higher, to be ambitious, to agree on recommendations even if our legal system does not – yet – meet them, rather than having to agree on the lowest common denominator. However, a healthy sense of reality is always appropriate. Do we really change entire systems by demanding due process for antitrust law if we draft principles and recommendations and establish an opt-in framework? Systems that face many more fundamental challenges? I do not think there is a reason to give up. The ICN's achievements allow us to view the future with optimism.

When I took over the position as ICN Chair, I concentrated on three major aspects - focus, inclusiveness and implementation. Focus means that we want to make sure that the ICN chooses the topics that matter most and sets the right priorities. Inclusiveness refers to the impressive growth of the ICN which makes it more important to get everyone involved. It is also about the participation of our non-governmental advisors and inclusiveness is linked to the third aspect, implementation, because implementation will only happen if members are involved and convinced that we are doing the right thing. Implementation is the underlying goal of the ICN.



We do not want to produce papers for the sake of it. We work on guidance documents to achieve results and to have an impact. That is what the ICN was created for.

What does that mean for ICN members and NGAs? We praise the ICN's super-light structure and the opportunities it offers. But flexibility and freedom come at the price of responsibility. We authorities have not delegated responsibility for the ICN to an external organisation, we have to make sure ourselves that the system is up and running. This is true for the practical work in the working groups, for the administration of the network and for the selection of topics. And when it comes to substance, we have to remain ambitious and determined. Globalisation, digitalisation, and sustainability will continue to raise questions and pose new challenges. Agencies will have to explore new approaches and appropriate measures. But this does not mean that the relevant and partly unanswered issues should be kept out of the ICN. On the contrary, this is exactly why we should address them together in the ICN. The ICN is a mirror of the activities of its member agencies. And currently, agencies all around the world are restructuring and evolving to keep pace. Agencies have fresh ideas, they review their positions in the legal regime and in relation to other areas of law. As ICN members we view our cases from our perspective as competition law enforcers, but as then ICN Chair David Lewis put it when opening the 2009 ICN Annual Conference, competition law as the fundamental law of the market system cannot be confined to an island where its relationship with every other branch of economic and social policy is ignored. The rapidly developing world is forcing agencies forward, and pushing the ICN to help create a transparent level playing field for all actors. I am confident that the ICN provides its members with a strong basis and anchor.