

THE ICN AT 20 – LOOKING AHEAD

Margarida Matos Rosa

President of the Portuguese Competition Authority (AdC)

1. Origins and key aspects of the ICN

The International Competition Network (“ICN”) is a rather unique case of informal project-based cooperation between competition agencies on a global scale. Its origins trace back to the work of the International Competition Policy Advisory Committee (“ICPAC”), a group which addressed global competition issues and cooperation in the context of economic globalization, following the Uruguay Trade Round in the late 1990s. In its final February 2000 report,¹ ICPAC proposed the creation of a Global Competition Initiative – a ground zero for the future ICN– focused on promoting convergence of competition rules worldwide.

Following international recognition of the necessity and viability of promoting cooperation and advocating for best practices in competition matters around the globe, in an era of economic globalization, the ICN was created in October 25th, 2001.² The creation of the ICN was directly linked to the liberalization of, and resulting increase in, world trade, which led to a call by the international community for a global competition agenda.³ Its establishment followed that of the World Trade Organization (“WTO”) in 1995, and took place somewhat later than other global standard-setters, such as IOSCO⁴ (launched in 1983), IAIS⁵ (founded in 1994) or ICER⁶ (2000, as WFER).

The ICN was initially founded by 14 competition agencies⁷. Since then, the ICN has grown with an overarching success in developing both advocacy and enforcement cooperation strategies, alongside a global proliferation of competition regimes. It has seen its membership increase to nearly 150 member agencies – a remarkable growth for a specialized – yet informal – network about to reach the end of its second decade of existence.

As a global network of competition agencies, organized *by* and *for* member agencies, the scope of the ICN’s portfolio of projects inevitably has to embrace challenges in different jurisdictions – including challenges that both “newer” and “established” agencies face. In

¹ See International Competition Policy Advisory Committee, Final Report (2000): <https://www.justice.gov/atr/final-report>

² See <https://www.internationalcompetitionnetwork.org/about/>

³ P. Lugard (ed), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Cambridge – Antwerp – Portland: Intersentia, 2011, p. 10.

⁴ See International Organization of Securities Commissions (IOSCO): https://www.iosco.org/about/?subsection=about_iosco

⁵ See International Association of Insurance Supervisors (IAIS): <https://www.iaisweb.org/page/about-the-iais>

⁶ See International Confederation of Energy Regulators (ICER): <http://icer-regulators.net/history/>

⁷ Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia. See International Competition Network (ICN): <https://www.internationalcompetitionnetwork.org/about/>.

its early years, the ICN focused on three goals: establishment, working modes and expansion of the organization.⁸ This was a prolific period in defining areas of mutual interest, promoting recommended practices and finding different methods of promoting coordination between member agencies. Later, during its second decade of existence, four high-level goals were identified by the ICN: (1) encouraging the dissemination of competition experience and best practices; (2) formulating proposals for procedural and substantive convergence through a results-oriented agenda and structure; (3) supporting competition advocacy; and (4) facilitating effective international cooperation.⁹ These objectives have been the premise for the core work of the ICN in recent years and have allowed the network to distinguish itself from the work of other international networks, which include the Organisation for Economic Co-operation and Development (“OECD”) or United Nations Conference on Trade and Development (“UNCTAD”) – producing complementary policy products.

The ICN, as a project oriented network that does not rely on a permanent secretariat, carries out much of its activities in working groups which bring together member agencies and non-governmental advisors (“NGAs”). Once a year, the ICN gathers at its annual conference to discuss working group projects, which include both advocacy and enforcement policies. Member agencies are able to participate in these working groups without committing to specific amendments to their law or policy – a “soft law” approach that fosters a wider participation. As such, the ICN’s work is effective in providing added value in the exchange of experiences, in the development of convergence and in international enforcement cooperation between members. This has boosted the discussion on handling competition matters that have cross-border impacts, such as mergers, cartels, unilateral conduct, agency effectiveness and advocacy. Overall, the ICN has been a ubiquitous network in the promotion and discussion of the most significant and trending global competition issues.

The ICN’s vibrant work has resulted in clear achievements, including recommended practices,¹⁰ case-handling and enforcement manuals, reports, templates on legislation and rules in different jurisdictions, databases, toolkits and workshops, proving itself to be an increasingly relevant actor in the global competition scene.¹¹

The Portuguese Competition Authority (*Autoridade da Concorrência*, or “AdC”) has been an active participant in the production of a wide range of ICN work products and has shared its experience in the promotion of competition rules, contributing to an increasingly effective competition legal framework. Simultaneously, it has also benefitted from several landmark work products produced in the ICN context.

⁸ Andreas Mundt, *Focus, inclusiveness and implementation – The ICN as a key factor for global convergence in competition law*, ICN Chair’s Vision Statement, 2013:

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNSGMundtVision.pdf>

⁹ International Competition Network, *The future of the ICN in its second decade – Final Report*, Presented at the ICN Steering Group Meeting, 15 June 2016, Paris, p. 4:

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/ICN2dDecade2016.pdf>

¹⁰ See <https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/icn-freecs/>

¹¹ ICN Factsheet and Key Messages, April 2009, p. 8-9:

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf>

The steady growth of the ICN did not occur without an extensive reflection on its work by its members and various stakeholders, conducted throughout its existence – the ability to adapt to the different challenges of globalization impacting its members has always been one of the key reasons for the network’s success. In that regard, in 2010, reaching the end of the first decade of existence of the ICN, former Chair John Fingleton requested ICN members and participating NGAs to assess the network’s accomplishments and identify further objectives for the future.¹² In May 2011, the ICN presented the Second Decade Project reflecting on a new vision for the ICN. Following the Second Decade Project, in 2015, ICN’s Chair Andreas Mundt proposed a reassessment of the ICN’s goals. The final report on “The future of the ICN in its second decade”, presented at the ICN Steering Group Meeting on the 15th of June 2016, in Paris, contained several suggestions from ICN members and NGAs, both on goals and process, as well as on topics and type of work products. An example of a successful feature of the ICN’s work product, driven by the network’s innovative spirit, is the implementation of the ICN Training on Demand, which created a comprehensive curriculum of virtual training materials, organized in different modules. These materials have been widely acceptance and used in the international competition community.¹³ This ability of the ICN to be creative and responsive to the circumstances of globalization has been key in its continued success in both addressing enforcement and policy issues, as well as in providing avenues for substantive and procedural convergence.

The ability of the ICN to sustain and increase its relevance on a global scale necessarily depends on its proximity to the needs of members and being as flexible and dynamic as possible in order to face multiple globalization challenges. A clear example is the challenges brought by the digitalization of the economy, which have an increasingly global impact on the scope of agencies’ work, as we reach the end of the second decade of the ICN’s existence. The ability of the ICN to actively foster the discussion and the sharing of experiences and policies – as well as mutual work between agencies – on recent trending phenomena, such as, for instance, issues in digital ecosystems, data or algorithms – to which the AdC has contributed,¹⁴ in the midst of a global discussion – is certainly the path to increase its relevance and further attract participation from its members and NGAs.

That is one of the true challenges for the ICN: to bolster its vigorous spirit and ability to promote the discussion of innovative issues, improving enforcement and advocacy of competition law on a global scale, while respecting differences that may exist or emerge between legal frameworks.¹⁵ However, and while innovation should play a key role in the

¹² International Competition Network, *The future of the ICN in its second decade – Final Report*, Presented at the ICN Steering Group Meeting, 15 June 2016, Paris, p. 3: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/ICN2dDecade2016.pdf>

¹³ See <https://www.internationalcompetitionnetwork.org/training/>

¹⁴ See AdC, *Issues paper on Digital Ecosystems, Big Data and Algorithms*, 2019: http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf

¹⁵ H. M. Hollman and William E. Kovacic, “The International Competition Network: Its Past, Current and Future Role”, (2011) *Minnesota Journal of International Law*, p. 284.

ICN's agenda, its members should not overlook "newer" agencies' challenges and should continuously embrace their needs, thereby promoting wider global cooperation.

2. What the future could bring

The ICN has built its strengths and distinctive features on what could have been considered its weaknesses: informality, project-based work, and diversity of its members (in terms of size, maturity, geography, political, economic and social context). Instead, this has made the ICN rather unique in the landscape of international cooperation, let alone in the field of competition policy.

Those idiosyncrasies are also the key to the challenges that lie ahead for the next decade, namely (i) enlargement, (ii) implementation; and (iii) the ICN's institutional role. Some thoughts on each of these challenges are shared below.

Enlargement and the implications of a global network

The ICN is rightly a global network that has expanded to all continents. Each year, new agencies join the network, adding further nuance and experience, as well as challenges.

New members are encouraged to join as soon as a competition agency is established in a given jurisdiction. Even before a competition agency is formally established, the ICN may play a role in offering guidance to the setup of new agencies, by means of its work products and by allowing observers to attend its events.

However, the expansion of the network poses the challenge of language barriers. In order for ICN work products to become everyday tools within an agency, language barriers may need to be addressed so as to maximize the effectiveness of competition policy enforcement.

As ICN members become more numerous, the challenge of encouraging the participation of NGAs on a global level also becomes more prominent. When a competition agency joins the ICN, it is desirable that the NGAs from that jurisdiction become active members as well. The ICN benefits greatly from the participation of NGAs, as does the full competition ecosystem. NGA engagement enriches the discussions both at the level of the ICN and internally, fostering the maturity of local competition communities. Again language issues may impair NGA participation.

With a view to addressing such concerns, the AdC has volunteered its resources by translating a set of work products into Portuguese as a means to amplify their usefulness and impact among Portuguese-speaking jurisdictions. Furthermore, it has promoted sessions in Portuguese language in key ICN events so as to enhance participation from Portuguese-speaking countries.

Implementation – extracting value from the ICN

The ICN work product portfolio has greatly expanded over the years, both in terms of format and substantive issues covered. The obvious ensuing challenge is to promote its awareness and implementation, closing the gap between ICN guidance and practice by agencies. Implementation is a long-standing priority of the ICN, and there have been

many successes in this regard, resulting in legislative reform or overhaul of internal procedures.

The ICN Promotion and Implementation (“P&I”) group, currently co-chaired by the AdC, Mexican Federal Economic Competition Commission (“COFECE”) and the United States Federal Trade Commission, is tasked with the mission of “*raising awareness of ICN work product and promot[ing] its implementation, engaging members, working groups, and non-governmental advisors*”,¹⁶ using simple but effective tools, such as the work product catalogue, peer-to-peer contacts, and sessions in key ICN events to showcase successful implementation stories.

However, awareness and implementation are wider ICN concerns which are also taken into account by Working Groups. Working Groups provide self-assessment tools for member agencies (e.g. self-assessment tools of the Merger Working Group on the Recommended Practices for Merger Notification and Review Procedures), that are instrumental in identifying areas of reform and sparking internal debate on whether amendments of legislation or agencies’ practice are in need. Awareness and implementation are as important to the success of the ICN as the production of new work products.

The challenge of engagement and participation in ICN events is also linked to a wider membership. Geographic dispersion of members calls for ensuring regional diversity in the hosting of ICN events. It is clear that events’ geographic dispersion is key to maximizing attendance and awareness from a wide array of regional stakeholders. Formats and contents of ICN events are made relevant to the region hosting them. Nevertheless, ICN events combine overarching goals which make sure that each agency can benefit from such events; such goals include substantive discussions, experience-sharing, training and networking. Agendas and speakers thus ensure that each event is relevant for all agencies, irrespective of their maturity. Thorough discussions among members while planning each event are therefore the right approach so as to ensure that the goals of inclusiveness and relevance are attained.

Institutional engagement and positioning

The ICN interacts with global, regional and domestic competition communities and networks, such as the OECD, UNCTAD or, at regional levels, the Association of Southeast Asian Nations, the African Competition Forum or European Competition Network. This allows the ICN to enhance its relevance for its membership and reach a wider audience. But as competition policy evolves worldwide – alongside a proliferation of *fora* for debate – exploring synergies, complementarity and experience-sharing with other institutions and networks is a motto for the future.

Meanwhile, the ICN also reaches out to other areas of regulation and public policy. But in order to attain a higher impact, and higher effectiveness of competition policy, that dialogue may need to be strengthened in coming years. Competition policy does not develop in a vacuum in any jurisdiction. The interplay of competition policy with consumer policy, privacy and data regulation, or sector regulation is a topical issue, which

¹⁶ See <https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/implementation/>.

poses the challenge of preserving the advantages of a specialized network while allowing for dialogue with other policy areas.

Moreover, the ICN may reflect on playing a wider institutional role, namely when approaching policy-makers. As technical and methodological issues of competition policy (re)enter the political debate, the ICN may be called to play a role in developing expert consensus. The ICN may contribute to communicate a competition point of view in wider policy. For instance, the ICN may be the international expert voice on issues such competition and trade, or competition and industrial policy, or even competition and financial stability.

Recently, the ICN served as a platform to reach a wider policy consensus on due process – i.e. the ICN Framework on Competition Agency Procedures (“CAP”)-, reaching out to non ICN members. As other policy concerns emerge, there may be areas where the ICN could wish to provide a specific platform for members and non-members to adhere to particular principles.

Embedding competition in other policies

The advancement of institutional engagement discussed above finds a rare opportunity in the aftermath of the Covid-19 pandemic and consequent economic shock. As countries endeavour to support – whether financially or through other means - their economies while triggering reform in areas such as climate change and digitalization, the ICN and its members may find it important to voice the benefits of competition principles¹⁷. Competition as a catalyst for economic recovery, across sectors and across countries, is the message that the ICN can lever on with other institutions. In this rare occasion of economic recovery across the globe, the ICN may significantly induce an increased adherence to principles of competition policy such as reducing unnecessary barriers to entry and expansion, promoting competitive and efficient public procurement procedures and ensuring competitive neutrality in state support.

3. Final words

The ICN has developed over time as a success story of a global, flexible, and competition-agency-based network. It has crafted its very own identity. More importantly, it has achieved its goals of promoting convergence, implementation of internationally recognized recommended practice and exchange between authorities, colleagues and with the wider community.

As a mature – yet vibrant – group, the ICN is now well-positioned to have a stronger and much needed institutional presence in the policy-making sphere, alongside other global and regional actors. In this manner, ICN will more effectively voice the benefits of competition policy, particularly in a post-pandemic economic recovery scenario

¹⁷ See for example, *The role of competition in implementing the economic recovery strategy*, Autoridade da Concorrência (AdC), June 2021
http://www.concorrenca.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Other/Documents/2021%20-%20AdC%20contribution%20on%20economic%20recovery.pdf

