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The ICN's Bright Future

Law360, New York (May 11, 2010, 1:29 PM ET) -- Undeterred by chaotic flight schedules caused by Icelandic ash, more than 500 representatives from competition agencies around the world and nongovernmental advisers (NGAs), who are representatives from consumer groups, business, academics, and the legal and economic professions, gathered in Istanbul, Turkey, at the end of April for the Ninth Annual Conference of the International Competition Network (ICN).

Today, 112 agencies in 99 jurisdictions are members of the ICN, and next year will be the start of the network's second decade.[1] This offers an appropriate juncture to both look back at the ICN's achievements and to ask the question: What's next?

When it comes to networks, the ICN is unique. It is the only international organization dedicated to "all competition, all the time." [2] Unlike most other intergovernmental networks or organizations, its membership is composed of representatives from competition agencies, not governments. NGAs also participate directly, and more than 100 NGAs attended this year's ICN conference.

Another distinguishing characteristic of the ICN is that it is virtual. Some commentators have even compared it to the popular networking site, Linked-in, [3] as its work is not done by a secretariat, as is the case with the OECD, World Bank or UNCTAD. [4] Instead its work rests on the shoulders of its members who form working groups with NGAs and conduct discussions, typically via teleconference and e-mail.

The range and detailed work product that the ICN has developed in just under a decade is impressive — especially when you consider that all its participants have other day jobs. Achievements have been made in many areas, including merger review, anti-cartel enforcement, unilateral conduct, competition advocacy, and competition policy implementation. [5]

Work product consists of recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, databases, toolkits, and workshops. [6] At this annual conference alone, the ICN issued, among other things, recommended practices for merger analysis on market definition and failing firms, a report on Refusal to Deal, and outlined plans for a virtual training program. [7]

Why are members of competition agencies around the world so hard at work developing recommended practices, toolkits, etc., that are freely available to other agencies? Commentators have struggled with this very question ever since the formation of the ICN and other so-called Transnational Regulatory Networks (TRNs) that involve specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries. [8] This question has also led them to express doubts about the ICN's future. [9]

Part of the reason why the ICN has been so successful is likely because competition enforcement is relatively new for most nations.[10] From the late 19th century through the first half of the 20th century, only the United States enforced its statutes forbidding anti-competitive practices. Some jurisdictions, such as Canada in 1899, had competition laws on the books but barely enforced them.[11] By 1975, the only jurisdictions that actively enforced their competition laws were Germany, the European Union and the United States.

This did not last long, however, as with the fall of the Soviet Union and China's market-orientated reforms, the number of nations adopting market-based systems expanded exponentially. Today, the number of jurisdictions enforcing competition laws numbers approximately 110.[12] Since they are new to competition enforcement, new market-based systems are looking for guidance.

It is also not enough to simply copy another nation's laws. This is especially true of the Sherman Act, which first time readers might be inclined to consider as banning all restraints of trade. Instead, new agencies are striving to learn about the practical realities of antitrust enforcement and policy choices, which can often only be learnt through dialogue and experience. The ICN provides the forum for discussion and the requested guidance.

Another major advantage, especially for the more mature competition agencies, is cooperation among agencies and convergence in antitrust policy. Cooperation between agencies on cross-border cases reduces the risk of suboptimal enforcement if an agency is unable to obtain evidence from other jurisdictions, and inconsistent outcomes if different jurisdictions reach different conclusions about the same practice.

It is hardly a coincidence that the concept of ICN came directly out of recommendations of the International Competition Advisory Committee (ICPAC) that was formed in 1997 by then U.S. Attorney General Janet Reno and Assistant Attorney General for the Antitrust Division Joel Klein — the same year that the McDonnell Douglas/Boeing case exposed a rift between the EU and U.S. competition agencies.[13]

Following a meeting in Ditchley Park, England, in February 2001 of more than 40 of the world's senior competition officials and practitioners to discuss a new organization directed exclusively at international antitrust enforcement, the ICN was launched in October 2001.

But what does the next decade have in store for the ICN? This is very much on the minds of the ICN leadership. The chair of the ICN's Steering Group, John Fingleton, asked attendees at the Istanbul conference to "take stock of what we have done, where we are going, and how we are getting there." [14] He also suggested that there should be more debate on how to measure the ICN's future success as many of the ICN's perceived benefits are "soft," flowing from experience sharing and relationship building that are hard to measure.

Along these lines, one of the principle discussions during the Istanbul conference was entitled: "Planning for the ICN's Second Decade." [15] The breakout sessions on this topic sought input from members and NGAs on how ICN can be most relevant to their needs. Attendees suggested that convergence should continue to be the network's main goal, as well as a continuing emphasis on the development of relationships.

Interestingly, participants also suggested that the ICN do less, but better: focusing more on use of work product and implementation of ICN's best practices, meeting the needs of younger agencies, and engaging with a diverse range of NGAs. Since the chorus seemed to be a call for more of the same, perhaps this alone demonstrates the success of the ICN's last decade and justifies hopes of a bright future for the ICN.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] John Fingleton, *The International Competition Network: Planning for the Second Decade*, Address at the 9th Annual Conference in Istanbul, Turkey (April 27, 2010), available at www.oft.gov.uk/shared_ofst/speeches/689752/0410.pdf.

[2] ICN Factsheet and Key Messages, available at www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

[3] See www.linkedin.com/.

[4] Eleanor M. Fox, *Linked-in: Antitrust and the Virtues of a Virtual Network*, 43 *Int'l Law* 151 (2009).

[5] See *Introduction to the International Competition Network*, available at www.internationalcompetitionnetwork.org/uploads/vco%20toolkit%20introduction%20to%20icn%20april%202010%20complete.pdf.

[6] These materials are all freely available on the ICN Web site, see www.internationalcompetitionnetwork.org/.

[7] ICN News Release, *International Competition Network Plans for the Second Decade*, available at www.internationalcompetitionnetwork.org/uploads/library/doc615.pdf.

[8] Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA J. Int'l L.* 1 (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *Yale J. Int'l L.* 113 (2009).

[9] See Lawson Hunter & Susan Hutton, *Global Competition Initiative: A "Headless Horseman?"*, in *International Antitrust Law & Policy: 2000 Fordham Corporate Law Institute* ch. 3 (Barry Hawk ed., 2001); *U.S. and Canadian Antitrust (Panel Discussion)*, in *International Antitrust Law & Policy: 2000 Fordham Corporate Law Institute* 45-59 (Barry Hawk ed., 2001).

[10] William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in *Competition Policy in the EU Fifty Years on from the Treaty of Rome* 314-43 (Xavier Vives ed., 2009).

[11] *Id.* at 314.

[12] Fingleton, *supra* note 1, at 1.

[13] See FTC Statement, *CCH Trade Reg. Rep.* [1997 – 2001 Transfer Binder] ¶ 24,295 (July 1, 1997) (closing the investigation into the Boeing/McDonnell Douglas merger but observing that “[t]here has been speculation in the press and elsewhere that the United States antitrust authorities might allow this transaction to go forward ... as the United States ... needs a single powerful firm to serve as its “national champion.”) On July 30, 1997, the European Commission concluded that Boeing had a dominant position which would be strengthened by the merger but ended up clearing the merger on the basis of

significant commitments by Boeing. See *Boeing/McDonnell Douglas*, Case IV/M877, O.J. L 336/16 (Dec. 8, 1997).

[14] Fingleton, *supra* note 1, at 1.

[15] See ICN Ninth Annual Conference Program, available at www.icn-istanbul.org/submenu/program.aspx.

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