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**Agenda Item 3e. Report of the discussion group on international
cooperation**

Contribution by
ICN

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Introduction

The International Cooperation Network (ICN) welcomes the discussion on international cooperation promoted by UNCTAD Secretariat.

International cooperation is one of the core objectives of the ICN: the founding document of the organization, the *Memorandum on the Establishment and Operation of the International Competition Network*, states that “*ICN will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation*”. In May 2011, when the ICN presented its *Vision for its Second Decade*¹, effective international cooperation was declared as one of the four high-level goals to pursue in the second decade. This leading principle was confirmed by the ICN Chair in the “ICN Vision Statement” of September 2013, whereby he highlighted that “*the dissemination of competition experience and best practices, the formulation of proposals for procedural and substantive convergence, the promotion of competition advocacy and efforts to facilitate effective international cooperation have become the core business of the ICN in the Working Groups and in special projects*”.

More recently, in the 2016 follow-up report² tracking progress made with respect to the goals highlighted in its *Vision*, an ICN survey revealed that several competition authorities wish for more cooperation between younger and more experienced agencies.

There are three major lines of action by which the ICN has sought to facilitate international cooperation.

As a starting point, the ICN has encouraged competition agencies to exchange views and experience on international cooperation in case-related enforcement activities, in order to gain a better understanding of the benefits and main obstacles to effective cooperation.

Furthermore, on the basis of the insights stemming from experience sharing, the ICN Working Groups on Mergers and Cartels have developed a number of documents aimed to be hands-on tools in specific cooperation cases. Such documents include recommended or good practices, guidelines, toolkits and templates.

Finally, since the first practical obstacle to international cooperation is to liaise with the relevant competition agencies, the ICN created dedicated contact lists.

The main outcomes for each of these three work streams are briefly illustrated below.

¹ ICN 2011, “The ICN’s Vision for Its Second Decade”, available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>

² ICN 2016, “The future of the ICN in its second decade - Final Report”, available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc1089.pdf>

1. Analysis of issues and opportunities for international cooperation

A comprehensive overview of the benefits and obstacles of effective international cooperation emerged from a joint project between ICN and OECD and was further discussed by ICN members when setting high level goals and future work for its second decade.

In April 2012, the ICN and the Competition Committee of the Organization for Economic Cooperation and Development (OECD) decided to launch a joint survey on international enforcement cooperation. They conducted a survey to gauge the successes and weaknesses of current cooperation frameworks, and to seek members' view on possible future work. The first section of the survey asked competition agencies to assess their experiences in international cooperation qualitatively, including both international and regional co-operation. The questions touched upon the objectives and importance of international co-operation, and an assessment of its costs, benefits, and usefulness. Other sections focused on legal instruments for cooperation and on experience with formal cooperation, in particular experience with provisions for international comity. The results of the survey were detailed in the *Report on OECD/ICN Questionnaire On International Enforcement Cooperation*, published in 2013.

The survey indicates that international cooperation is a policy priority for a large majority of competition agencies; respondents emphasized that the globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement. Many agencies, especially newer ones, tend to see cooperation in enforcement not just in a case-specific context, but also in a broader framework, particularly as a way to build enforcement capacity, exchange experiences, and share methodologies. In this respect, building relationships based on trust is seen as an essential element of international co-operation, and international *fora* play an important role in forging these relationships.

Importantly, agencies underscored that even exchanging non-confidential information and general views can be very useful in investigations, and might be sufficient in many cases.

The survey showed that for non-OECD agencies, which may in general have less experience with international enforcement cooperation, exchanges with other agencies are very beneficial. Experience-sharing may help them to develop investigative strategies and strengthen enforcement even at the national level.

The overall assessment of experience with international cooperation was extremely positive for almost all respondents, who had found that international cooperation had been useful to their enforcement strategies and that, though they faced some costs (especially in terms of resource and time constraints), overall the benefits outweigh the costs.

In the 2016 second decade follow-up report, ICN members and NGAs suggested a number of practical measures with a view to enhancing inter-agency cooperation including: experience sharing and information exchange between younger and more experienced agencies via teleseminars and meetings

or ad-hoc trainings/seminars as well as information sharing via databases, platforms and case studies showing the efficiencies and benefits resulting from inter-agency dialogue.

2. Supporting documents

The constant sharing of experience and views by competition authorities within the ICN, enriched by the findings of the survey on international enforcement cooperation, have been the basis for a number of ICN work products that support ICN members in undertaking cooperation initiatives.

Most of the existing documents in this field have been developed by the ICN Merger Working Group and the Cartel Working Group, to provide hands-on guidance that takes into account the specificities of cooperation in the field of merger review and anti-cartel enforcement respectively.

Mergers

With specific regard to mergers, the *Recommended Practices for Merger Notification and Review Procedures* encompass a specific Practice (number 10) devoted to interagency coordination, which has been reviewed in 2018. The Recommended Practices were inspired by the *Guiding Principles for Merger Notification & Review Procedure* (2002), which provide a set of overarching principles on several aspects of merger notification and review systems, including one principle on coordination and convergence.

Furthermore, in 2015 the ICN Merger Working Group issued a *Practical Guide to International Enforcement Cooperation in Mergers*, which is intended to serve as a voluntary and flexible framework for interagency cooperation in merger investigations and practical guidance for agencies seeking to engage in such cooperation, as well as guidance for merging parties and third parties seeking to facilitate cooperation.

Another document aiming at facilitating international cooperation in mergers is the *Model Confidentiality Waiver in merger investigations* (2005). It is a model form that merging parties and competition agencies can use for waivers of confidentiality protection regarding information that parties submit in the merger review process. An accompanying paper discusses the rationale for, content of, and use of waivers, along with illustrative agency waiver forms.

Cartels

The main ICN work products devoted to international cooperation in the field of anti-cartel enforcement are briefly described below.

The *Anti-Cartel Enforcement Manual* is a compilation of the investigative approaches used by ICN Members. Each chapter explores techniques employed at various stages of anti-cartel enforcement and identifies approaches that have proven effective and successful. One chapter (Chapter 9) is dedicated to

International Cooperation and Information Sharing (2013) and is intended to be a reference for competition agencies that are undertaking international cooperation or information sharing in the course of anti-cartel investigations.

The *Leniency waiver templates and explanatory note (2014)* is a tool to enable more effective cooperation from both the competition agencies' and leniency applicants' perspective, leading to better coordination of investigatory measures and potentially expediting the review and decision making process. The templates include *procedural waivers of confidentiality*, which allow competition agencies to coordinate on the procedural aspects of a cartel investigation, *full waiver of confidentiality*, which also enable the exchange of substantive information on the submissions made by a leniency applicant, and are complemented by an explanatory note, which provides guidance as to the use and usefulness of the waivers.

The *Charts Summarizing Information Sharing Mechanisms (2012)* and the *Report on Cooperation Between Competition Agencies in Cartel Investigations (2007)* are illustrative documents on the opportunities for international cooperation. The *Charts* summarize the mechanisms to share information obtained in relation to, and during, cartel investigations with other agencies. They cover informal cooperation, cooperation agreements, relevant provisions of national legislation, amongst others. The *Report* identifies the types of cooperation possible in cartel investigations, based upon the results of a questionnaire sent to ICN members. The report also identifies possible ways to improve cooperation.

In addition to the documents elaborated by the Merger Working Group and the Cartel Working Group, the ICN is currently producing a training module named *Introduction to International Cooperation*, in the context of the ICN Training on Demand project. This project aims to create a comprehensive curriculum of training materials to serve as a virtual university on competition law and practice for competition agency officials. The module on international cooperation, primarily addressed to new case handlers and newer agencies, will introduce the concepts and mechanics of international cooperation, based on existing ICN materials.

3. *Dedicated contact lists*

Both the ICN Merger Working Group and Cartel Working Group have created dedicated contact lists to the specific end of international cooperation.

The ICN *Framework for Merger Review Cooperation*, established in 2012, is intended to facilitate effective and efficient cooperation between ICN member agencies in merger reviews by identifying each agency's liaison officers.

The Cartel Working Group established a similar *Framework* in 2016 to assist competition agencies in knowing how to and whom to contact when seeking non-confidential information from other agencies with regard to cartel investigations.

Conclusions

The ICN believes that the initiative undertaken by UNCTAD Secretariat has the potential to improve and expand international cooperation between competition authorities, particularly for younger or less experienced competition agencies, by inspiring new ideas and initiatives, while promoting greater awareness and implementation of the existing work products.

As highlighted in the *Vision Statement* issued by the ICN Chair in September 2013, collaboration with other international organizations, including UNCTAD, is a crucial way for the ICN to promote inclusiveness. Therefore, the ICN is eager to support further work on international cooperation and share its experience, with a view to fostering convergence and mutual understanding worldwide.

Several areas of collaboration between UNCTAD and the ICN may be envisaged. For example, the two institutions might share contact lists at agency level. In addition, they might organize joint initiatives aimed at disseminating existing documents on international cooperation, encouraging experience sharing between competition authorities and fostering discussion on case studies of international cooperation, in order to identify the needs and views of specific agencies (e.g., less experienced competition authorities) or specific regional environments.