

Cartel Regulation

Contributing editor
A Neil Campbell



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GETTING THE
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Cartel Regulation 2018

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ICN

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Driving global coordination and convergence in international cartel enforcement

Globalisation is the overarching theme of modern antitrust cartel enforcement. Once stubborn cultural attitudes regarding cartel activity are now gradually shifting. Many jurisdictions have moved to give their competition authorities broad jurisdictional reach and aggressive investigative tools, such as wiretap authority and compulsory process. There is also a burgeoning movement to criminalise cartel activity in places where it has previously been regarded as wholly or principally a civil matter. And the growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives for institutions to turn against their co-conspirators.

In this constantly evolving and increasingly crowded enforcement environment there is a distinct need for cartel enforcers to closely coordinate. The International Competition Network (ICN) Working Group was formed in 2004 to address this need: to drive global cooperation and convergence among cartel enforcement authorities in the prevention, detection, investigation and punishment of cartel conduct.

A need for coordination and convergence

For over half a century, from the enactment of the Canadian Competition Act in 1889 and the Sherman Act in 1890 to the mid-1940s, Canada and the United States were the only nations prohibiting cartels. In Europe, cartels were then still widely regarded as at least partly beneficial to the national economy. Several European nations even enacted legislation in response to the Great Depression, enabling the government to establish compulsory cartels or to force outsiders to join already existing ones. Especially during the Second World War, excessive concentration of economic power was used to create 'national champions', which were easy to control and which could outperform their foreign rivals.

In the aftermath of the war, the United States pressured Germany and Japan to break up their existing cartels and to put in place cartel enforcement regimes. At the same time, the United Kingdom adopted a new antitrust regime as part of its social policies to stimulate employment. Antitrust law was subsequently included in the 1957 Treaty of Rome as one of the key policy areas of the European Economic Community, laying the foundation for the European Commission's cartel enforcement practice. In the past few decades, cartel enforcement has spread from North America and Europe to virtually every major jurisdiction in the world. There are now antitrust authorities in over 125 countries across all continents actively pursuing cartel activity, and that list is growing.

Cartel enforcement by individual authorities over the years has also become more intensive and tougher than ever before. Both mature and new antitrust regimes have come to regard aggressive prosecution of cartel offenders as a primary policy objective. This is reflected in the ever-increasing penalties imposed on cartel offenders, the expansion of jurisdictions that are moving from mere civil or administrative enforcement towards a regime of criminal prosecution, as well as the growth in use of leniency programmes by regimes worldwide.

At the same time new and better-equipped enforcers are rapidly emerging on the world stage, and extraterritorial cartel enforcement has become standard practice for major enforcement jurisdictions. Whereas the United States was sharply criticised at first for the application of the Sherman Act to foreign conduct, the global antitrust

environment has come to firmly embrace the principle of extraterritorial cartel enforcement.

The ICN Working Group

In recognition of the increasingly crowded cartel enforcement environment, in 2004, the ICN established the Working Group to drive global cooperation and convergence among cartel enforcement authorities. The Working Group comprises cartel enforcers from around the world. Seven agencies govern the Working Group, with three agencies acting together as co-chairs of the Working Group and two agencies co-chairing each of the Group's two subgroups – namely, the Legal Framework and the Enforcement Techniques subgroups. Leadership of the Working Group is rotated among agencies to create an inclusive environment that provides a varied perspective by bringing together newer and older agencies and those in various geographical locations. It also helps ensure continuity of the work and long-term initiatives.

Among the principal functions of the Working Group is the development of best-practice resources for authorities. Equally important is the role the Working Group plays as a platform for bringing authorities together to promote information-sharing among jurisdictions.

Encouraging best practice

Fulfilling its mandate to address challenges in cartel enforcement and to bring together the wide-ranging experience and resources of ICN members, the Working Group provides digital seminars and resources designed to promote best practice in cartel enforcement. The Working Group's digital offering includes a mix of call and webinar series.

A call series on leniency was initiated by the Working Group in 2012. This series provides a platform for the sharing of experience and expertise and provides members with information regarding specific enforcement efforts and policy initiatives in other jurisdictions. The calls have ranged in topics from leniency fundamentals to common pitfalls and problems to interactions with private enforcement and multi-jurisdictional investigations. Some specific topics within these calls included presentations on the impact of criminal sanctions and private rights of action on leniency programmes, the role of markets in leniency programmes and the threshold for granting conditional immunity from the European Commission perspective.

A shorter series of Asia-friendly calls was also initiated to address how to design and implement leniency programmes. The first call in the Asia series showcased perspectives from Singapore and Taiwan, whereas the second call brought a different variety of experience by having the US Department of Justice as one presenter discuss how to design an effective programme. Over 40 member agencies participated in these calls and the content and slides of these calls are now available online for continued consultation and reference.

Between 2014 and 2015, two different substantive discussion calls were also held. The first was on the investigative powers to fight international cartels and the second was on sanctioning international cartels in the context of multi-jurisdictional investigations. This call series remains a focus and priority for the Working Group in the future.

In a move to further promote accessibility to information among jurisdictions, the Working Group made a commitment to release webinar series on areas of special concern and enforcement trends. The webinars have focused on topics including the impact of private enforcement on public anti-cartel enforcement and increasing cartel

deterrence through compliance programmes. For the past year, the webinars and call series have focused on investigative tools, detection methods, disclosure and discovery.

Along with the more interactive platform the Working Group designed for information-sharing in the digital context, the Working Group shares a wealth of knowledge in published reports. For example, volume one of the Building Blocks Report details the basic concepts of hard-core cartel conduct, the institutional and legal framework of agencies' anti-cartel units and the effectiveness of current penalties. The Working Group also provides the Anti-Cartel Enforcement Manual to serve as a tool for information sharing and best practices. The manual provides an overview of effective and successful anti-cartel enforcement techniques. The widespread reach of ICN members allows for a compilation of experiences and expertise that covers the nuances in jurisdictions. Instead of a static book relying on antiquated practices, the living document style of the online manual allows for up-to-date information on international experiences in the anti-cartel enforcement context. The wealth of knowledge present in the manual includes dialogue on topics ranging from investigation strategies and interview techniques to more cutting-edge topics of digital evidence-gathering and the relationships between competition agencies and public procurement bodies. The recent inclusion of the chapter 'Cooperation with Procurement Agencies' offers a practical toolset for working with procurement bodies and ensuring that public bidding procedures promote free and fair competition. The manual also provides an overview of searches, raids and inspections and the inclusion of other topics such as cartel case initiation and investigation strategies. Such depth and diversity in global best practice serves as a valuable practical resource for practitioners and regulators alike.

Notable additional resources have been added over the past year, including a checklist for efficient and effective leniency programmes and an updated version of the 'Setting of Fines for Cartels in ICN Jurisdictions' report that was initially published in 2008. The checklist provides a list of elements that should be considered when designing or revising a system of leniency. The report on setting fines addresses four preliminary issues, including:

- objectives and philosophy behind the imposition of fines;
- legal basis for imposing fines;
- role of the competition agency in setting fines; and
- position of fines in the arsenal of sanctions on cartels.

The report also discusses the basis for fine calculations, along with aggravating and mitigating elements.

Additionally, the Cartel Awareness and Outreach portal provides the world's largest collection of cartel awareness and outreach materials. The compilation provides a vast array of substantive information relating to the awareness of the prevention, reporting and prosecution of anti-cartel conduct. The collection continues to grow and additional agency submissions are regularly submitted. Included in the Cartel Awareness and Outreach portal, the Working Group provides a categorisation breakdown for materials relating to cartel awareness. Materials are divided into the following categories for ease of reference: materials that explain cartels and cartel enforcement policies; materials promoting leniency programmes; materials related to public procurement; materials aimed at businesses, SMEs and compliance programmes; and videos and other media. Outreach and awareness materials are provided by individual jurisdictions to form a discussion series of diverse presentations. A small sampling of presentations from this series includes: the Federal Antimonopoly Service of the Russian Federation's Practice on Suppression of Bid Rigging; Brazil's Leniency Programme Awareness Tools; and Cartel Criminalisation as Cultural Change: a report from findings of a survey of the Australian public. Like many of the Working Group's initiatives, this is an evolving effort with input and submissions continuously added by member agencies.

Promoting convergence of standards and procedures

Information-sharing among members is critical to the Working Group's efforts to promote convergence of standards and procedures. As investigations and cases continue to grow in international scope, spanning across multiple jurisdictions, communication is key for the effectiveness of global anti-cartel enforcement. In this regard, the Working Group is currently working to compile a catalogue on investigative

powers for newer agencies and continues to promote the sharing of non-confidential information between jurisdictions.

The Working Group has also established a vast resource of cartel enforcement templates for various jurisdictions. The templates are provided and maintained by ICN members. The exhaustive list of available jurisdictions is accessible via the Anti-Cartel Templates page on the Working Group's website. Members have provided information on relevant legislation, the implementation of rules and regulations and information regarding relevant cases. Specific topics covered in these templates also include the process for filing a complaint, decision-making, sanctioning cartel conduct, investigative tools, leniency, rights of defendants and confidentiality. Along with jurisdiction-specific information, the Working Group provides global templates for authorities to utilise in securing procedural and substantive waivers of confidentiality in cartel investigations. These templates are conveniently located on the Working Group's website and each is accompanied by an explanatory note that clarifies certain guidance on the proper understanding and use of the templates.

Facilitating relationship building through the ICN member network

Perhaps the most valuable role the Working Group plays, however, is the wide-ranging network of individuals and member agencies it brings together. The Working Group hosts annual ICN Cartel Workshops that bring together authorities from countries around the world. These workshops provide a unique opportunity for the global sharing of best practice and experience on leniency programmes, analytical tools for detecting cartels, and information-sharing in cartel investigations. In addition to serving as a unique learning opportunity, these workshops enable individual jurisdictions to receive recognition by other enforcers for work or research done in a specific area of cartel enforcement over the course of a year. The 2017 workshop was held in Canada in October. The theme for this workshop was Combating Cartels in Public Procurement and sessions were offered in the following areas: detection, investigation and deterrence; debarment from public procurement processes; cartel prevention and detection training for public procurement officials; and screening of public procurement data.

The Working Group is also consistently looking for other ways to strengthen relationships and promote increased information-sharing among global enforcers. In this regard, the Japan Fair Trade Commission (JFTC) recently made a proposal to enhance the Working Group's goal of facilitating greater sharing of non-confidential information through the establishment of an 'ICN Framework for Promotion of Sharing of Non-Confidential Information for Cartel Enforcement'. The proposal envisions seamless lines of communication to enhance cooperation in global cartel enforcement among member agencies. Specifically, the proposal invites ICN members to complete an information form and to register liaison officers to serve as initial contact points for international coordination. The member agencies are also asked to provide basic information on their respective regimes. Requests for information can then be exchanged among registered member agencies, acknowledging that an agency would only share information to the extent permitted under its own legislative mandate. This proposal envisions facilitating both formal and informal information requests between authorities.

As a starting point for the JFTC's more detailed proposal, the Working Group already makes available charts summarising information-sharing mechanisms in each jurisdiction. The charts provide helpful information such as the relevant point of contact at an agency and the formal and informal mechanisms the agency has in place to alert other competition agencies to matters under investigation.

The road ahead

The efforts of the ICN Working Group have increased cooperation and coordination by enforcement authorities globally and, as a result, have dramatically heightened the detection of cartel offenders. Among its greatest impacts, the Working Group has contributed to what is now routine coordination among authorities at the outset of joint investigations. Indeed, as evidenced by nearly every recent global antitrust investigation, dawn raids are routinely taking place in close coordination between multiple enforcement agencies.

Going forward, the Working Group is committed to continuing to enhance the sharing of the most effective enforcement techniques and tools. Because global enforcement requires the inclusion of newer and

smaller agencies, ensuring that these agencies have access to the experiential knowledge of more mature agencies is critical to effective global enforcement. The Working Group welcomes all agencies to become members and to learn from each other. Therefore, the Working Group is committed to continuing to expand its membership in the organisation and to increasing involvement from non-government agencies.

The Working Group's proposed annual plan for 2017-2018 consists of eight proposed projects stemming from the two subgroups within the Working Group. The Legal Framework subgroup has proposed the following projects:

- key elements for efficient and effective leniency programmes and their application;
- webinars and call series on parental liability;
- webinars and call series on international cooperation to fight against cartels;
- webinars and call series on ex-officio investigations; and
- continuation of the Asia-friendly calls.

The Enforcement Techniques subgroup has proposed the following projects:

- a new chapter in the Anti-Cartel Enforcement Manual on private enforcement;
- the 2017 ICN Cartel Workshop (Canada); and
- implementation of the ICN framework for the promotion of the sharing of non-confidential information (ICN liaison) and completion of the anti-cartel enforcement template updates.

These eight projects provide a broad foundation to give guidance going forward and are among the more ambitious of those the Working Group has tackled to date.

Through these and future efforts, the Working Group will continue to play a critical role in addressing the challenges in global coordination that lie ahead. In particular, the Working Group will find itself at the epicentre of the growing demand for coordination among authorities at the level of charging decisions and punishment, where authorities will have to grapple with overlapping mandates and overcome their competing sovereign interests in punishing cartel offenders. This next level of coordination will present new and unique challenges for the Working Group.

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