



The ICN's 2015 Guidance Work Explained

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Introduction

In April 2015 the International Competition Network (ICN) held its fourteenth annual conference. With the over 500 attendees from more than 70 jurisdictions, expert panels covering the range of competition law and policy issues, and nearly 40 discussion-based breakout sessions, a familiar storyline emerged: the ICN continues to produce work of consequence.² Two documents stand out for their guidance-style format aimed at promoting convergence of competition agency investigative practices. The new ICN Guidance on Investigative Process and Practical Guide to International Enforcement Cooperation in Mergers join an established line of ICN agency guidance and recommendations that embody international best practices and inspire members to examine, benchmark, and update their own practices.

ICN Guidance on Investigative Process (2015)³

The Guidance is the result of one of the most ambitious competition agency-led efforts to articulate guidance on investigative practices that promote procedural fairness and effective enforcement. The ICN's recent project on Investigative Process recognized that how agencies run their investigations impacts their effectiveness and credibility: good investigative process leads to good enforcement outcomes. It explored how different investigative practices contribute to the effectiveness of agency decision-making and ensure protection of procedural rights. The project developed the new ICN Guidance on Investigative Process to help promote fair and informed competition enforcement. From 2012-14, the Project issued three reports on Investigative Tools, Agency Transparency Practices and Agency Confidentiality Practices, later using the comprehensive member input about their investigative practices for these reports to craft the Guidance.⁴

The Guidance addresses the availability and use of agency investigative tools, transparency and engagement with the parties during investigations, and the protection of confidential information. Part 1 covers the use of competition agency investigative tools and the legal requirements and agency safeguards that support the use of tools, such as internal review procedures, confidentiality protections, and attention to tailoring requests for information to the specific case. Part 2 covers transparency to the public about competition laws, and agency rules, procedures and decisions. Transparency reinforces the values of accountability, predictability, and fairness in enforcement. Part 3 calls for "a high level of transparency to parties under investigation." Examples of investigative transparency include notifying parties of the legal basis for an investigation, informing parties of the nature of the evidence gathered, and discussing the agency's theories of harm. Part 4 covers engagement and the value of interaction between agency and party during an investigation. This includes providing "meaningful opportunities" for parties to present evidence and respond to agency concerns, for example by offering meetings at key points during an investigation. Part 5 covers the protection of confidential information obtained during an investigation.⁵

ICN Practical Guide to International Enforcement Cooperation in Mergers (2015)⁶

International cooperation between agencies investigating global mergers is an increasingly important component to agency merger review. The new Practical Guide to International Enforcement Cooperation in Mergers is the result of a two year study of ICN member cooperation, involving a series of experience sharing teleseminars and an interim report on the state of merger enforcement cooperation.

The Practical Guide identifies core principles, tips and practices for agencies that choose to cooperate in their merger review, as well as parties that seek to facilitate such cooperation. It begins by articulating the benefits of cooperation, such as promoting consistent outcomes and investigative efficiency, and describing the nature of enforcement cooperation, for instance, that it is voluntary and case-specific. The Practical Guide next explores the basic tenets of effective communication during cooperation, the prospect of timing alignment for parallel reviews, and the extent of information sharing that may be possible. The Guide stresses the value of early contacts and regular updates on investigative timing and status. The text includes basic information on how to carry out cooperation, for example, by identifying key stages for discussions, describing the role and use of waivers to facilitate information sharing, and outlining the types of information typically discussed among cooperating agencies, subject to confidentiality obligations. The third section of the Practical Guide explores cooperation on substantive analysis and merger remedies. This covers discussion of investigative approaches, consideration of joint investigative tools such as joint interviews or requests for information, the assessment of evidence, and exchanges on agencies' substantive analyses. The design and implementation of remedies are recognized as critical stages for effective cooperation. The Guide includes tips on the discussion of all aspects of remedies that aim to increase the likelihood of non-conflicting outcomes. The Practical Guide draws on the experiences of member agencies with cooperation to complement and enhance earlier ICN statements on merger cooperation, notably a 2004 recommendation on interagency coordination during merger review.⁷

Context of the 2015 Achievements

The 2015 Guidance and Practical Guide are evidence of the ICN's continued commitment to pursue and produce consensus-based, best practice-style statements on important enforcement topics. Developing guidance through consensus is demanding work, often built upon existing comparative work and experience sharing discussions in the ICN and elsewhere. Working groups advance different topics on different timelines, and often explore new topics via comparative or informative work formats before consensus recommendations are considered. Guidance-minded work is consequential in that it aims to spark convergence by inspiring member agencies to self-assess their practices against the best practices from around the world and ultimately make changes to improve their antitrust regimes. A look back at the origins of the 2015 guidance work reveals a concerted effort via long-range planning

on the part of the ICN to live up to its mission statement to “formulate proposals for procedural and substantive convergence.”⁸

The seeds for the 2015 achievements were sown in 2010-11 as part of network-wide strategic discussion to keep ICN work relevant and address the needs of the day. In 2011, ICN Chair John Fingleton presented the results of a year-long effort to produce “The ICN’s Vision for its Second Decade.”⁹ This initiative was the most comprehensive effort to seek input across the ICN’s entire membership. It identified four high level goals including the desire to formulate proposals for convergence, specifically concluding that “[i]n the next decade, the ICN will continue to seek opportunities for new Recommended Practices.”¹⁰

At the 2011 annual conference, the ICN Steering Group approved new initiatives for work on enforcement cooperation and agency investigative process. In these two topics the Steering Group identified issues of emerging importance and international debate – case cooperation and procedural fairness during investigations – with potential impact across all areas of competition enforcement. After development of specific work proposals in consultations with the working groups, in 2012 cooperation work was added to the ICN’s cartel and merger working groups’ work plans and a new project on investigative process and procedural fairness began in the agency effectiveness working group to study the issues across all enforcement areas. Both topics advanced in the respective working groups with member and non-governmental advisor input, experience sharing calls, workshops discussions, and interim reports, culminating in the drafting of agency guidance during 2014-15. Once the ICN issues guidance, it turns its attention to encouraging and helping members put it into practice. Both topics now become part of the ICN’s inventory for member implementation initiatives, to be included in workshops, conferences, member outreach, and potentially advanced and explained in additional written materials and translations. The ICN’s strategic planning process and commitment to explore topics of importance in the name of convergence are directly linked to the 2015 achievements of the Guidance and Practical Guide.

The ICN has long proclaimed the “results-oriented agenda and structure”¹¹ of its network. However, as a voluntary, virtual network, the ICN can face challenges attracting member and non-governmental advisor attention and resources to its work, selecting topics of relevance across a wide diversity of agency needs, building consensus around common principles, and ultimately, articulating specific agency guidance and recommendations. That this happens at all is a notable achievement. The ICN’s 2015 achievements were results of a working process that values listening to member needs, responding to important issues of the day, and cultivating consensus views around aspirational principles. ICN’s Second Decade goal of meaningful work through consensus statements of agency guidance is flourishing with results such as the ICN Guidance on Investigative Practice and the Practical Guide to International Enforcement Cooperation in Mergers. Continuing to pursue work of similar format and impact will serve the ICN well.

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- ¹ Paul O'Brien is Counsel for International Antitrust in the Office of International Affairs of the U.S. Federal Trade Commission. The views expressed are the author's alone.
- ² See FTC Press Release, *International Competition Network Adopts Guidance on Investigative Process to Enhance Procedural Fairness in Competition Cases and Cooperation in International Merger Enforcement*, May 1, 2015, available at: <https://www.ftc.gov/news-events/press-releases/2015/05/international-competition-network-adopts-guidance-investigative>.
- ³ **ICN Guidance on Investigative Process (2015)**, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.
- ⁴ These reports are available on the ICN's Agency Effectiveness Working Group's webpage at: <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>.
- ⁵ For more information on the importance of procedural fairness in competition investigations and the ICN Guidance, see Paul O'Brien, Krisztian Katona, and Randolph Tritell, *Procedural Fairness in Competition Investigations: U.S. FTC Practice and Recent Guidance from the International Competition Network*, CPI Antitrust Chronicle, July 2015 (1), also available at: <https://www.ftc.gov/policy/international/international-competition/key-speeches-presentations>.
- ⁶ **ICN Practical Guide to International Enforcement Cooperation in Mergers (2015)**, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.
- ⁷ ICN [Recommended Practices for Merger Notification and Review Procedures, RP X Interagency Coordination](#) (2005), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.
- ⁸ Two ICN documents approved in 2014 also deserve mention as recent examples of recommendation and guidance work: the ICN Recommended Practices on Competition Assessment articulate principles and practices competition agencies use to persuade policymakers to consider the competitive impact of legislation and regulations, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc978.pdf>; and the ICN Recommended Practices for Predatory Pricing Analysis Pursuant to Unilateral Conduct Laws, the first set of recommendations on a specific area of unilateral conduct, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc966.pdf>. Guidance style work is alive and well in the ICN.
- ⁹ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>.
- ¹⁰ *Id.*, at 7. The Vision also cited a "strong desire for the ICN to continue to pursue convergence, with Recommended Practices being the work products cited most often by members when asked to describe the ICN's main achievements."
- ¹¹ See ICN Operational Framework (2012), at 1, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc784.pdf>.