

ICN CARTELS WORKING GROUP

DRAFT WORK PLAN 2005-2006¹

The ICN cartels working group is composed of two sub-groups, on the general framework and principles for the fight against cartels, and on enforcement techniques.

1. General Framework Sub-group

Aim Of The Subgroup

The General Framework subgroup addresses the legal and conceptual challenges of the shared commitment to fighting international cartels. The focus of the subgroup is the scope of anti-cartel behavior, the support for anti-cartel enforcement, and the basic elements of effective institutional frameworks used to detect, investigate, and punish hard core cartel conduct.

Review Of Work During 2004 – 2005

The Subgroup prepared a joint report addressing three building blocks of an effective anti-cartel regime:

- a clear definition and prohibition of cartel conduct;
- an enforcement agency institutional structure that is well-suited to detect, investigate, and punish cartel conduct; and
- penalties that effectively deter cartel conduct.

Proposed Projects for 2005 – 2006

Evaluate response to the report entitled “Building Blocks for Effective Anti-Cartel Regimes” for possible follow-up editing or expansion; including identification of common elements of effective regimes.

Obstruction Of Cartel Investigations – This project will examine the effects caused by obstruction of cartel investigations and the institutional framework an agency needs to address the harm to its anti-cartel enforcement posed by obstruction. The project will address the investigation and prosecution of document destruction or concealment, false statements to investigators, and false testimony. (Project Leader: US Department of Justice)

International Cooperation/Exchange Of Information – This project, envisaged as lasting more than one year, will assess the current forms of cooperation and coordination among agencies in cartel investigations and the issues involved in information exchange. As a first stage, this exercise could include a review of cooperation mechanisms contained in existing statutes, agreements, and treaties. As a subsequent stage after the

¹ Note that years start and end with ICN Annual Conferences.

2006 conference, the project may also analyze and comment on potential ways to enhance cooperation in anti-cartel enforcement that currently exists, in practice, due to different approaches and interpretation to the legal framework, in particular with regard to the issues involved in the protection of confidential information. (Project Leader: European Commission, DG Competition)

Interaction Of Public And Private Enforcement – This project will seek to develop and compile information on the extent to which private enforcement currently exists, assess its role in deterring cartel conduct, the extent to which it may complement or conflict with public enforcement, and its effect on leniency programs. (Project Leader: German Bundeskartellamt)

2. Enforcement Techniques Sub-group²

Aim of the sub-group

The Enforcement Techniques Sub-group 2 aims to improve the effectiveness of anti-cartel enforcement by identifying and sharing specific investigative techniques and advancing the educative and information sharing agenda of the International Cartel Workshops.

Review Of Work During 2004 – 2005

Over the last year, Sub-group 2 undertook the following projects:

- Cartel Workshop hosted by the Australian Competition and Consumer Commission in Sydney, Australia in November, 2004
- Anti-Cartel Enforcement Manual, including the Introduction and chapters on Searches/ Raids/Inspections and on Drafting and Implementing an Effective Leniency Program (further chapters will be added to the Manual);
- Anti-Cartel Enforcement Template to be used to catalogue information about the anti-cartel enforcement regimes of ICN member agencies. The Template canvases a range of topics, including the process for filing a complaint, decision-making, sanctioning cartel conduct, investigative tools, leniency, rights of defendants and confidentiality.

Proposed Projects for 2005 – 2006

Cartel Workshop:

- Determine Agenda for 2005 Cartel Workshop (will include 1 day dedicated to

² This Workplan is intended to be a “living” document that will evolve over time to reflect the changing needs and priorities of the Members of Sub-group 2. The Workplan should be read in conjunction with the Workplan for Sub-group 1. Sub-group 2 will coordinate its work with Sub-group 1 as much as possible to ensure that there is no overlap and duplication.

- Electronic Evidence Gathering)
- Coordinate preparations for 2005 Cartel Workshop with Host, Korean Fair Trade Commission (see overview, “ICN Cartel Workshop in Seoul, Korea” attached as Appendix)
- Act as a focus group and feedback mechanism to Workshop hosts for non-standard agenda items.
- Identify future hosts of Cartel Workshops
- Determine Agenda for 2006 Cartel Workshop

Anti-Cartel Enforcement Manual:

- If necessary, revise existing chapters (Searches, Raids and Inspections and Leniency) to take into account any feedback from ICN Members at the Annual Conference in Bonn
- Develop “Good Practices” for Leniency Programs (Australian Competition and Consumer Commission will lead)
- Draft Chapter on Electronic Evidence Gathering (Netherlands Competition Authority NMA will lead)

Information Sources:

- If necessary, revise Anti-Cartel Enforcement Template to take into account any feedback from initial respondents and ICN Members at Annual Conference in Bonn
- Coordinate responses to the Anti-Cartel Enforcement Template by all ICN Members
- Create a system to allow email postings of key anti-cartel developments in ICN member countries, for example, announcements of new policy initiatives, legislative amendments and case developments

Future Projects

Anti-Cartel Enforcement Manual:

- Chapter on Practical Aspects of International Cooperation in international cartel enforcement building on work of SG1
- Chapter on Practical Aspects of Obstruction in cartel enforcement building on work of SG1
- Chapter on Detection/Investigative Powers other than Searches/Raids/Inspections and Leniency

2005-2006 WORK PLAN: APPENDIX

ICN Cartel Workshop in Seoul, Korea

At last year's ICN Annual Conference, the Cartel Working Group's Sub-group 2 on Enforcement Techniques took on a steering role for the ICN's annual Cartel Workshop. An annual ICN Cartel Workshop institutionalized workshop initiatives undertaken by cartel enforcement agencies more than five years earlier. Officials first gathered in Washington, D.C. at an 'enforcers-only' workshop, to share their expertise and experience in investigating and prosecuting cartels. That initial workshop led to four subsequent Workshops in Brighton, U.K.; Ottawa, Canada; Rio de Janeiro, Brazil; and Brussels, Belgium.

The first ICN Cartel Workshop in November, 2004, was hosted by the Australian Competition and Consumer Commission. In excess of 100 representatives from more than 30 competition enforcement authorities around the world attended the Workshop.

Following this Workshop, Sub-group 2 developed a format for future Cartel Workshops with a view to enhancing the coherence and quality of the annual workshops and to ensure that workshops respond to the needs of ICN members. The format sets out the timing, duration, approach to substantive sessions, general principles and a model schedule for Cartel Workshops.

In terms of the timing, Cartel Workshops will continue to be held in the autumn.

Workshops will include at least 1 day focused on a specific cartel enforcement issue and substantive sessions will:

- include both plenary and concurrent breakout sessions;
- complement, as much as possible, the projects of the Cartel Working Group;
- have a practical, enforcement orientation; and
- include topics of interest and assistance to both experienced and less-experienced agencies.

General principles include the following:

- attendance at workshops will be limited to ICN member agencies unless others are specifically invited by Sub-group 2;
- the substantive workshop program will reflect the views and interests of multiple jurisdictions with different levels of experience;
- an emphasis will be placed on workshop interaction and dialogue; and
- host agencies, in particular, will be encouraged to seek sources of funding to

enable participation by those agencies that might otherwise be unable to attend due to resource constraints.

This year, the ICN Cartel Conference will be hosted by the Korean Fair Trade Commission and will take place in Seoul, Korea from November 8-10, 2005.

While a formal agenda for this conference will not be finalized until after the Annual Conference in Bonn, the Sub-group has agreed on some of the issues that will be discussed.

One of Sub-group 2's main projects over the next year is to prepare a Chapter on Electronic Evidence Gathering for the Anti-Cartel Enforcement Manual. This initiative is an important supplement to the Sub-group's work in 2004-2005 on searches, raids and inspections. A significant portion of the next Cartel Workshop will, therefore, be dedicated to this topic.

The Netherlands Competition Authority is taking the lead on this project. It is anticipated that discussion at the Workshop will cover such issues as the meaning of digital evidence, training of staff, procedures, practical legal considerations, means of and approaches to collecting data, searching data and building the case.

Another topic that will be discussed is obstruction. This is a timely topic for consideration by competition authorities. Convictions over the past two years in respect of obstruction offences associated with cartel investigations by the Antitrust Division of the U.S. Department of Justice and the Canadian Competition Bureau are good examples. This topic will be of interest to both the anti-cartel enforcement community and the private sector in the wake of ongoing developments, including in respect of the U.S. DOJ's recent efforts to extradite the former chief executive of Morgan Crucible from the U.K. to face charges in the U.S. relating to, among other things, obstruction of justice.

Building on the work of Cartel Working Group Sub-group 1: General Framework, there will also be discussion about effective sanctions, the more practical aspects of determining the appropriate sanction and methods for assessment. In addition, there will be discussion about effective institutions and more particularly, the training of personnel to handle cartel investigations.

These are only some of the topics that will be discussed at the next Cartel Workshop. Sub-group 2 plans to finalize the agenda in the early summer with a view to publishing the agenda on the ICN website shortly thereafter.