

Unilateral Conduct Working Group 2015-2018 Work Plan

MISSION

The Unilateral Conduct Working Group was established at the fifth annual ICN conference in May 2006. Its primary objectives are to examine the challenges involved in analysing unilateral conduct of dominant firms and firms with substantial market power, facilitate greater understanding of the issues involved in analysing unilateral conduct, and promote convergence and sound enforcement of laws governing unilateral conduct.

ORGANISATION

For 2015-2018, the Working Group is co-chaired by the Turkish Competition Authority, the UK Competition and Markets Authority, and the U.S. Department of Justice. The Group is comprised of over 60 ICN members and is supported by a substantial number of NGAs from around the world. The Working Group holds periodic teleconferences with all members and NGAs.

LONG TERM GOALS

To achieve its mission, the Working Group strives to:

- Provide a forum for sharing experience and fostering consensus.
- Promote greater international convergence and increase understanding regarding differences in unilateral conduct standards.
- Help members improve the quality of their unilateral conduct enforcement.
- Encourage the use of economic analysis in unilateral conduct enforcement.
- Strengthen cooperation among competition agencies in their review of unilateral conduct cases.
- Deepen understanding of the strengths and weaknesses of remedial options in unilateral conduct cases.
- Promote implementation of Recommended Practices and greater understanding of barriers to implementation.

2015 - 2018 STRATEGIC PLANS

The Working Group proposes the following areas of future work, taking into account feedback from the Second Decade Project and considering factors suggested by the Steering Group and proposed in the ICN Chair's vision statement and the Roadmap for 2013-2015, *i.e.*, the audience for the Group's work product; a balance between implementing existing work product and creating new work product; the focus on core projects; a balance between work that is ripe for convergence efforts and comparative dialogue; projects that complement the institutional strengths and impact of ICN's mission; projects that encourage inclusiveness and broader member and NGA engagement; and initiatives that are well suited to ICN's practical, project-oriented nature.

1. Promote greater convergence and increase understanding regarding differences in unilateral conduct standards

- Continue drafting a Unilateral Conduct Workbook on the investigation and analysis of unilateral conduct based on the Working Group's reports on unilateral conduct, Recommended Practices on dominance, and reports on the objectives of unilateral conduct laws, the assessment of dominance, and state-created monopolies. The Working Group will identify analytical principles regarding types of conduct on which there is agreement, as well as remaining areas of disagreement.
- Develop Recommended Practices or other Guidance. Building on the comparative reports on unilateral conduct and on the Unilateral Conduct Workbook, draft consensus Recommended Practices. If that appears unfeasible, develop alternative forms of guidance. This work could cover a general framework for analysing unilateral conduct, the analysis of specific types of conduct, and the investigation of unilateral conduct, including incorporating procedural fairness and transparency. Given differences in Members' approaches to unilateral conduct analysis, the Working Group will explore the possibility of Recommended Practices with sensitivity to all Members' views.
- Continue work on the analysis of unilateral conduct through comparative reports. The Working Group may examine types of conduct that it has not previously covered in its reports, such as excessive pricing and price discrimination.
- Identify issues arising from past conduct work for further study. For example the Working Group may further explore the various tests for identifying

exclusionary conduct, foreclosure analysis, the role of recoupment in predatory pricing cases, and the role of intent in unilateral conduct cases.

2. Deepen understanding of the strengths and weaknesses of remedial options

- Consider work on remedies in unilateral conduct cases, which may include the types, effectiveness of, and experiences with remedies, in order to understand what agencies have learned about the use of various remedies in unilateral conduct cases. The Working Group might also survey Members regarding their experiences of remedies.

3. Promote Implementation of Work Product and Provide Training Opportunities

- Promote implementation of the Working Group's work product, particularly the Recommended Practices and Workbook, including through workshops and webinars and by coordinating with the Advocacy and Implementation Network.
- Continue to identify barriers to implementation and ways to overcome them, including seeking volunteers to translate work product into other languages.
- Encourage Members and NGAs to promote implementation when commenting on laws and guidelines and in speeches and articles.
- Conduct a series of training webinars. The Working Group will develop a curriculum drawing on the Working Group's work product and agencies' experience that addresses topics ranging from the assessment of dominance to the design of remedies. Consider collaborating with other Working Groups to develop an antitrust basics webinar series that includes unilateral conduct.
- Help develop modules on unilateral conduct for the ICN Training On Demand Project. The Working Group will provide its expertise and support to the ICN Training On Demand Project when it starts to produce training modules on the analysis of unilateral conduct.

4. Facilitate Discussion and Enhance Cooperation

- Continue to facilitate discussion of issues that arise in analysing unilateral conduct. The Working Group will aim to hold a regional or global workshop every other year according to the priorities and needs of members, and two or three teleseminars each year. The Working Group also will consider organizing workshops and/or plenary and breakout sessions tailored to the needs of less experienced agencies. The Working Group may hold additional conference calls to enable Members to delve into issues of mutual concern,

identify commonalities and differences in approaches, and better understand the relative advantages and drawbacks of different policies.

- Consider ways in which to enhance communication among Members, including a unilateral conduct blog, discussion forum, and/or quarterly newsletter, e.g., posting cases, articles, or other public information on the ICN blog or a dedicated page on the ICN website.
- Consider work on cooperation in unilateral conduct enforcement, which may include: the objectives of cooperation; the types of cases that may benefit from cooperation; cooperation tools; impediments to cooperation; confidentiality and privilege considerations; cooperation on remedies; how parties can facilitate cooperation; and what makes for effective cooperation.

5. Expand Participation by Members and NGAs

- Actively encourage Working Group Members and NGAs, and as appropriate ICN Members and NGAs from outside the Working Group, to participate in the group's work, workshops, teleseminars, and webinar training sessions through regular e-mails and other communications.
- Encourage greater participation by economists to further explore unilateral conduct from traditional economic and law and economics perspectives (error costs, optimal rules). Economic input would also be valuable to the Working Group's efforts to develop teleseminars, workshop programs, and training webinars. Economic input could also inform the development of the Workbook and foster consensus regarding the analysis of types of unilateral conduct.

Unilateral Conduct Working Group

Annual Plan

2015-2016 Projects

Pursuant to the Roadmap for 2013-2015 the Group will identify core projects, notably those focusing on enhancing international cooperation and greater convergence. While continuing to develop new written work products, the Group will also emphasise the importance of implementation efforts through its projects in 2015-2016. The Group recognises that its long-term goals will be best achieved through a focus on both new work products and implementation and training activities.

Pursuant to its Mission and Long-Term Work Plan, the UCWG will work on the following projects during the 2015-2016 ICN year:

A. Written Work Product

(1) Continue to develop a Unilateral Conduct Workbook

Since 2010 the Working Group has carried out work on drafting a “Workbook” on the analysis of unilateral conduct. The Workbook builds on the Group’s work, Recommended Practices on dominance, and reports on the objectives of unilateral conduct laws, assessment of dominance, and state-created monopolies. The Group will identify the principles regarding specific types of unilateral conduct on which there is agreement as well as remaining areas of disagreement. The Group has drafted chapters on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, Predatory Pricing, Exclusive Dealing/Single Branding and Tying. The group commenced the drafting of a chapter on Loyalty Rebates and Discounts in 2013-2014 which will be finalised in a future ICN year. In a two-year project spanning 2015-2017, the Working Group will develop a chapter on the Analytical Framework for Evaluating Unilateral Conduct. The purpose of this Workbook chapter is to pose and explore basic questions an agency must address in formulating its enforcement policies, and to provide a platform for understanding different jurisdictions’ approaches to unilateral conduct enforcement, including areas where there may be policy divergence.

B. Implementation & Training

The Working Group will promote implementation of its work, particularly the Recommended Practices on Predatory Pricing and Workbook chapters, including by coordination with the Advocacy and Implementation Network Support Program. A number of agencies report using the Group’s work product to help analyse cases or as a reference,

and several others use them for training or to benchmark their practices against those of other agencies as described in the reports. The Working Group will seek to identify impediments to implementation, and members and NGAs will be encouraged to promote implementation in comments on laws and guidelines and in speeches and articles.

(1) Unilateral Conduct Workshop

In Istanbul in November 2015, the Working Group will host a global workshop on the topics of (1) the Analytical Framework for Assessing Unilateral Conduct Cases and (2) Developing Reliable Evidence in Unilateral Conduct Cases.

(2) In-depth Discussions of Unilateral Conduct Issues

The Working Group will hold three teleseminars on issues of mutual interest that arise in analysing unilateral conduct. Pursuant to the long-term strategic goals of the Working Group, the discussions will aim to increase understanding of differences in unilateral conduct standards and their advantages and drawbacks.

(3) Training

The Working Group will also organise a series of presentations in connection to its monthly Member & NGA conference calls which will enable members to share experiences of recent unilateral conduct cases from their jurisdictions. This project is pursuant to the long-term strategic goals of the Working Group to promote greater convergence and increase understanding regarding differences in unilateral conduct standards, facilitate discussion and enhance cooperation, and expand participation by Members and NGAs.

The Working Group will coordinate with the ICN Training On Demand Working Group in defining appropriate topics for new ICN Training On Demand modules, pursuant to the long-term strategic goals of the Working Group. In the event that new modules are identified for 2015-2016 the Working Group will assist the ICN Training On Demand Working Group in the planning and production of these.

(4) Enhance Communication among Members

The Group will continue to use the ICN blog to inform members of relevant cases, articles, or other public information and consider additional ways in which to enhance communication among Members. In particular, the Working Group will seek ways to make written information available to members related to the cases presented during the teleseminar series on recent unilateral conduct cases, with the long-term aim of starting an online case log of unilateral conduct cases to facilitate informal cooperation between member agencies.



The Group will also make particular efforts to enhance inclusiveness and engage with members from new and developing country agencies. Efforts will be made to help officials from these agencies participate more fully in member calls and teleseminars. The Working Group will continue to host member calls at Asia-Pacific friendly times and will explore hosting member calls or teleseminars in languages other than English.

These projects are pursuant to the long-term strategic goals of the Working Group to facilitate discussion and enhance cooperation, and expand participation by members and NGAs.

C. Evaluation

Given the diversity of projects the Group considers project specific evaluation techniques. The success of the written work product as well as the training materials can be measured according to impact on policy or practice as well as the use of the work products and materials for training, teaching or other purposes. Success of the webinars can be measured according to participation and the use of the recordings that are posted online. The evaluation of past work products will be presented in the Group's Implementation & Activity report.

D. Resources

Depending on the projects selected, the following resources will be allocated:

Written Work Product: For each project, one co-chair taking the lead, two to four drafting teams with geographic and agency/NGA mix, and one coordinator/editor.

Teleseminars: Each co-chair will be responsible for planning and promoting one teleseminar.

Workshop: Hosted by TCA, co-chairs assisting where appropriate with coordination.

Schedule of Calls and Milestones

June	Finalising of the work plan
June - July	Working Group prepares and discusses exploratory note for the workbook chapter
July - August	Teleseminar #1 (topic to be determined)
July – August	Working Group prepares outline and solicits feedback for what chapter will cover
August – October	Drafting teams prepare first discussion document for section of the chapter
October – December	Drafting teams prepare second discussion document for second section of the chapter
November	Teleseminar #2 (topic to be determined)
November	Workshop in Istanbul
December -February	Drafting teams to prepare report or discussion document summarizing work on chapter to present at ICN Annual Conference
February	Teleseminar #3 (topic to be determined)
Early March	Finalise work product and discuss future work and annual conference program
Mid-March	Complete future work proposal and annual conference program.
Monthly	Member & NGA conference call Teleseminar series on unilateral conduct cases

Annex A

Written Work Product

Recommended Practices

Based on previous reports on the same topics, in 2007-2008 the Working Group developed Recommended Practices to assist agencies with the assessment of dominance/substantial market power and the application of unilateral conduct rules to state-created monopolies. The Recommended Practices were adopted at the 7th annual conference in 2008. The Recommended Practices are available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>

(dominance/substantial market power); and

<http://www.internationalcompetitionnetwork.org/uploads/library/doc318.pdf> (state-created monopolies).

Based on the report and Workbook chapter on the same topic, in 2013-2014 the Working Group developed Recommended Practices to assist agencies with the assessment of Predatory Pricing Conduct. The Recommended Practices were adopted at the 2014 Annual Conference. The Recommended Practices are available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc966.pdf>.

Unilateral Conduct Workbook

The Working Group is currently drafting a *Unilateral Conduct Workbook*. It has prepared chapters on the Objectives of Unilateral Conduct Laws, Assessing Dominance/Substantial Market Power, Predatory Pricing, Exclusive Dealing and Tying. The group commenced the drafting of a chapter on Loyalty Rebates and Discounts in 2013-2014 which will be finalised in a future ICN year.

- Objectives of Unilateral Conduct Laws (Chapter 1). This Chapter, presented at the 2012 Annual Conference, serves as an introduction to the Workbook, and describes the relationship between objectives of Unilateral Conduct laws and standards of intervention applied by competition authorities in various jurisdictions. The Chapter is available at: <http://icn-rio.org/files/docs/unilat/icn%20ucwg%20objectives%20chapter%204-2%20to%20sg.pdf>.
- Assessing Dominance/Substantial Market Power (Chapter 3). This Chapter, presented at the 2011 Annual Conference, discusses the steps agencies can take to define relevant markets and assess dominance, the data that might be useful, and how to obtain them. The Chapter is available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf>.

- **Predatory Pricing (Chapter 4).** This Chapter, presented at the 2012 Annual Conference, seeks to complement the 2008 Predatory Pricing Report by providing practical guidance on conducting a predatory pricing investigation, including the use of price-cost tests, the data that might be useful and how information and evidence that an authority has collected may be interpreted. The Chapter is available at: <http://icnrio.org/files/docs/unilat/icn%20ucwg%20predatory%20pricing%20chapter%204-2-to%20sg.pdf>.
- **Exclusive Dealing (Chapter 5).** This Chapter, presented at the 2013 Annual Conference, seeks to complement the 2008 Single Branding/Exclusive Dealing Report by providing guidance on conducting an exclusive dealing investigation, including the nature of exclusive dealing arrangements, assessment of anti-competitive effects, and justifications and defences. The Chapter is available at: http://icnwarsaw2013.org/docs/icn_exclusive_dealing.pdf.
- **Tying (Chapter 6).** This Chapter, presented at the 2015 Annual Conference, seeks to complement the 2008 Tying and Bundling Report by providing guidance on conducting a tying investigation, including the evaluative criteria for assessing tying arrangements, assessment of competitive effects, and justifications and defences.

Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies

In its first year (2006-2007) the Working Group surveyed members and NGAs and produced a report on unilateral conduct that includes chapters on the Objectives of Unilateral Conduct Laws, the Assessment of Dominance/Substantial Market Power, and State-Created Monopolies. The report, based on the answers of 35 jurisdictions and 14 NGAs, identifies increased agreement in many important areas, as well as areas of difference. The report is available at:

<http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral.aspx>.

Conduct Reports

In 2007-2008, the Working Group began the second phase of its work, on the analysis of specific types of unilateral conduct. Through questionnaires it gathered information on agencies' approaches to assessing the conduct and the criteria that agencies use to distinguish between pro-competitive and anticompetitive conduct. The Working Group has examined: predatory pricing and single branding/exclusive dealing (2007-2008); tying and bundled discounting and loyalty discounts and rebates (2008-2009); and refusal to deal with a rival (2009-2010).

- ***Predatory Pricing and Exclusive Dealing/Single Branding.*** The group developed papers that summarise agency practice with respect to predatory pricing in 25 jurisdictions and with respect to exclusive dealing/single branding in 33 jurisdictions.

The reports are available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf>

(predatory pricing);

<http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf>

(exclusive dealing).

- ***Tying and Bundled Discounting, and Single Product Loyalty and Rebates.*** The Group prepared papers that summarise agency practice with respect to tying and bundled discounting in 35 jurisdictions and with respect to loyalty discounts and rebates in 34 jurisdictions. The reports are available at:
<http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf> (tying and bundled discounting);
<http://www.internationalcompetitionnetwork.org/uploads/library/doc357.pdf> (loyalty discounts and rebates).
- ***Refusal to Deal with a Rival.*** The Group developed a paper that summarises agency practice in 43 jurisdictions with respect to refusals to deal, including margin squeeze and denial of access to essential facilities. The report is available at
<http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf>.

TRAINING & IMPLEMENTATION

Teleseminars

The Working Group has organised sixteen teleseminars for members and NGAs to enhance understanding in areas of unilateral conduct law and policy. Teleseminars are particularly appropriate for areas in which there is not yet a consensus to support Recommended Practices. Teleseminars have covered excessive pricing (November 2009), remedies in unilateral conduct cases (March 2010), unilateral conduct in the pharmaceutical industry (November 2010), differential pricing (March 2011), price-cost tests in unilateral conduct cases (July 2011), abuse of dominance in the energy sector – a European perspective (November 2011), objectives of unilateral conduct laws (March 2012), legal and economic assessment of exclusive dealing (July 2012), enforcement cooperation in unilateral conduct cases (November 2012), the role of intent in unilateral conduct cases (February 2013), unilateral conduct by state-owned enterprises (July 2013), the assessment of loyalty rebates and discounts (December 2013), commitments (March 2013), assessment of dominance in fast-moving markets (September 2013), categorisation and the assessment of non-price abuses (December 2014) and Refusal to deal in regulated industries (March 2015).

Recordings of the teleseminars are available on the ICN website at

<http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral/works-hops-teleseminars.aspx>.

Workshops



Building on the successes of the March 2009 workshop in Washington DC on implementing the Recommended Practices and evaluating unilateral conduct, and the 2010 workshop in December 2010 in Brussels, the Working Group organised regional workshops on the topic of Exclusive Dealing in Singapore in July 2012 and in Stockholm in September 2013. Materials and webcasts from the workshops are posted on the ICN website at <http://www.internationalcompetitionnetwork.org/workinggroups/current/unilateral/workshops-teleseminars.aspx>.

Annex B

UCWG Workbook draft outline, drafted March 2011

INTRODUCTION

The UCWG

Number of National Competition Law Regimes that have Unilateral Conduct Provisions

Work of other international bodies in the area of UC

Objectives of Workbook

SECTION I: GENERAL PRINCIPLES AND ANALYSIS

CHAPTER 1: THE OBJECTIVES AND PRINCIPLES OF UNILATERAL CONDUCT LAWS

- I. *Ensuring an Effective Competitive Process; Protecting competition, not competitors*
- II. *Promoting Consumer Welfare*
- III. *Maximizing Efficiency*
- IV. *Other Objectives*
 - A. Ensuring Economic Freedom
 - B. Ensuring a Level Playing Field for Small and Medium Size Enterprises
 - C. Promoting Fairness and Equality
 - D. Promoting Consumer Choice
 - E. Achieving Market Integration
 - F. Facilitating Privatization and Market Liberalization
 - G. Promoting Competitiveness in International Markets
- V. *Principles of Designing Liability Standards*
 - A. The Difficulty of Distinguishing between Competitive and Exclusionary Conduct
 - B. Balancing Underdeterrence and Overdeterrence
 - C. Creating Administrable Liability Standards

CHAPTER 2: THE ANALYTICAL FRAMEWORK FOR EVALUATING UNILATERAL CONDUCT

- I. *The Monopoly-Power/Dominance Requirement (including recommended practice)*
- II. *The Anticompetitive-Conduct Requirement*
- III. *Presumptions & Safe Harbors*
- IV. *The Role of Intent*
- V. *Justifications & Defenses*

CHAPTER 3: THE MONOPOLY POWER/DOMINANCE REQUIREMENT

- I. *The Definition of Dominance and Market Power*
 - A. Dominance
 - 1. Structural and Behavioral Approaches to Finding Dominance
- II. *Analytical Framework*
 - A. Defining a relevant market
 - B. Relevant Product Market
 - 1. Demand-side substitutability
 - 2. Supply-side substitutability
 - 3. Differentiated products
 - C. Relevant Geographic Market
- III. *The Role of Market Shares*
 - A. Obtaining Relevant Data
 - B. Calculating Market Shares in the Relevant Market
 - C. Market-Share Based Presumptions and Safe Harbors
 - 1. Market Share-Based Thresholds that Create a Presumption of Dominance
 - 2. Market Share-based Thresholds Used to Create Safe Harbors
 - 3. Multiple Tiers of Safe Harbors and Presumptions

CHAPTER 4: DETERMINING THE EXISTENCE OF MONOPOLY POWER/DOMINANCE

- IV. *Expansion and entry analysis*
 - A. Assessing Potential Entry or Expansion
 - 1. Structural Barriers to Entry or Expansion (Market Structure and Performance)
 - 2. Strategic Barriers to Entry or Expansion
 - 3. Regulatory Barriers to Entry
 - B. Obtaining Evidence of Barriers to Entry or Expansion
 - 1. Use of Historical Evidence
 - 2. Assessing the Evidence
- V. The Effect of Buyer Power on the Assessment of Dominance
 - A. The Sources of Buyer Power
 - B. Factors to Be Considered in Assessing Buyer Power
 - C. The Effects of Countervailing Buyer Power
 - D. Limitations of the Concept
- VI. Direct Evidence of Dominance

SECTION II: EXCLUSIONARY ABUSES

CHAPTER 5: PRICE PREDATION

- I. *Relevant Conduct*
- II. *Evaluative Criteria*
 - A. Appropriate Measure of Cost
 - B. Competitive Effects/Recoupment
 - C. Justifications/Defences
- III. *Predatory Buying/Bidding*

CHAPTER 6: REFUSALS TO DEAL WITH RIVALS

- I. *Relevant Conduct*
- II. *Evaluative Criteria*
- III. *Constructive Refusals to Deal*
- IV. *Essential Facilities*
- V. *Margin Squeeze*

CHAPTER 7: EXCLUSIVE DEALING AND LOYALTY DISCOUNTS

- I. *Exclusive Dealing*
 - A. Relevant Conduct
 - B. Evaluative Criteria
- II. *Loyalty Discounts*
 - A. Relevant Conduct
 - B. Evaluative Criteria

CHAPTER 8: TYING AND BUNDLED DISCOUNTS

- I. *Tying*
 - A. Relevant Conduct
 - 1. Technical versus contractual tying
 - 2. Separate products
 - B. Evaluative Criteria
- II. *Bundled Discounts*
 - A. Relevant Conduct
 - B. Evaluative Criteria

SECTION III: EXPLOITATIVE ABUSES

CHAPTER 9: PRICE DISCRIMINATION

- I. *Relevant Conduct*

II. *Evaluative Criteria*

CHAPTER 10: EXCESSIVE PRICING

I. *Relevant Conduct*

II. *Evaluative Criteria*

SECTION IV: REMEDIES AND OTHER ISSUES

CHAPTER 11: REMEDIES

I. *Preliminary Remark: Different Types of Enforcement (Judicial vs. Administrative)*

II. *Goals of Remedies*

III. *Considerations in Crafting Remedies*

IV. *Equitable Remedies*

A. Conduct Remedies

B. Prohibitory Provisions

C. Affirmative-Obligation Remedies

V. *Structural Remedies*

VI. *Monetary Remedies*

A. Fines

B. Private Monetary Remedies