

## **Unilateral Conduct Working Group 2017-2020 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 2017-2018, the Working Group will be co-chaired by the Australian Competition and Consumer Commission, the Italian Competition Authority, and the U.S. Department of Justice. The Italian Competition Authority replaced the UK Competition and Markets Authority as a co-chair after the 2017 Annual Meeting. 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 of examining and facilitating understanding of issues related to unilateral conduct and vertical restraints, the Working Group strives to:

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

## 2017 - 2020 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, *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.

The Steering Group suggested in 2016 that the Working Group run a special project on vertical restraints and online platforms, and in 2017 it was determined that this field of competition policy would become part of the Working Group Strategic Plan 2017-2020.

### **1. Promote greater convergence and increase understanding regarding 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.
- 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. Promote greater understanding regarding standards for assessing vertical restraints**

- Consider issues in the treatment of vertical restraints by ICN members, with a view to promoting increased understanding where differences in standards arise, and, where possible, convergence.  
This programme of work will include development of a series of papers,

based on hypothetical vertical restraint scenarios, examining the effect on competition and potential resulting efficiencies, following the recommendations developed by the Working Group in a report<sup>1</sup> (approved by the Steering Group) which was the result of a consultation process with the UCWG members. These papers will include an examination of the common/ divergent approaches used in the assessment of the vertical restraints scenarios in various jurisdictions.

### **3. 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.
- Future work may include a study of remedies in cases involving vertical restraints. This may include types of remedies, their effectiveness, and experiences with remedies generally, in order to understand what ICN Members have learned about the use of various remedies in these cases. This programme of work may include a short survey of Members regarding their experiences with remedies.

### **4. 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 the chapter on Analytical Framework), 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

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<sup>1</sup> The report is available at: <https://icn2017.concorrancia.pt/downloads/materials/UCWG-vertical-restraints-outcomes-of-consultation-process-report-f.pdf>

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.

## **5. Facilitate discussion and enhance cooperation**

- Continue to facilitate discussion of issues that arise in analysing unilateral conduct. The Working Group will hold a Workshop in Rome, Italy in November 2017 and the South African Competition Commission has expressed interest in hosting a UCWG workshop in 2018. Two or three teleseminars will be held each year and 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 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 enforcement in these areas, 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.

## **6. 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 continued 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

#### 2017-2018 Projects

Pursuant to its Mission and Long-Term Work Plan, the UCWG will work on the following projects during the 2017-2018 ICN year:

#### A. Written Work Product

##### (1) Develop the Vertical Restraints Project

In 2016, the UCWG developed the *Vertical Restraints – Options for Future Work Issues Paper* which provided a basis for consultation with UCWG members and non-governmental advisers on options and priorities for future work by the UCWG in the area of vertical restraints. The issues paper was supplemented by an interactive webinar exploring key issues arising with Members and NGAs (April 2017). These activities formed the basis of a report and recommendation<sup>2</sup> by the Working Group to the Steering Group on the program of work to be undertaken in 2017/18 and potentially in future years.

The vertical restraints program envisages the development of a series of papers, based on hypothetical vertical restraint scenarios (such as the across platform parity clauses) examining the effect on competition and potential resulting efficiencies. These papers will include an examination of the common/ divergent approaches used in the assessment of the vertical restraints scenarios in various jurisdictions. . The idea is to allow ICN members and NGAs to share their approach starting from the same hypothetical scenario, with a view to highlighting commonalities and divergent factors in the assessment of the vertical restraints scenarios. These papers will be developed by the project leaders with input from ICN members and NGAs.

This project is being led by the ACCC and a small group of ICN member agencies.

June/July 2017	Identification of focus topics for hypotheticals and preparation of outlines for each
August/November 2017	Prepare detailed hypothetical for use in UCWG workshop sessions based on agreed outlines
November 2017	Consideration at UCWG workshop of hypothetical scenario and common/ divergent approaches used in the assessment of the vertical restraints scenarios in various jurisdictions
December 2017/February	Compare and contrast the assessment of the vertical

<sup>2</sup> The report is available at: <https://icn2017.concorrancia.pt/downloads/materials/UCWG-vertical-restraints-outcomes-of-consultation-process-report-f.pdf>

2018	restraint scenarios in different jurisdictions (capturing the workshop discussions) and document this in the materials
March 2018	Present finalised hypotheticals at 2018 Annual Meeting

## (2) Webinars

The Working Group will hold three webinars on issues of mutual interest that arise in analysing unilateral conduct. The discussions will aim to increase understanding of differences in standards in relation to unilateral conduct and their advantages and drawbacks. Webinar topics may include a discussion of: vertical restraints, exploitative practices, digital markets and platforms.

This work will be led by the three Co-Chairs.

June/August 2017	Preparation for first webinar.
September 2017	First webinar held.
October/November 2017	Preparation for second webinar.
December 2017	Second webinar held.
January/February 2018	Preparation for second webinar.
March 2018	Third webinar held.

## (3) Scoping work for future projects

**B.** In 2017 the Working Group will invite members to provide suggestions on content for future Chapters of the Workbook. Regard will also be given to the topics identified in the ICN Second Decade survey and in recent working group discussions at the ICN Annual Meeting.

## (4) Workshop

The Working Group will convene a Workshop in November 2017 in Rome, Italy. The Workshop will provide a discussion on hot topics in unilateral conducts by means of hypothetical cases [including hypothetical scenarios developed under the Vertical Restraints Project]. Hot topics will be introduced in the plenaries, and discussed with application to hypothetical cases in the breakout sessions. Preparations for the Workshop will be coordinated by the Co-Chairs. Steps for planning the Workshop will include selecting and arranging a venue; creating an agenda for the Workshop; coordinating and organising presentations from a variety of agencies; managing registration, etc. The projected timeline for this project is from June 2017 to November 2017.

This project is led by the Italian Competition Authority.

May/June 2017	Preparation of Workshop Agenda
September 2017	Finalisation of Workshop Agenda
November 2017	Workshop held
December 2017	Review of Workshop

## **(5) Implementation & Training**

The Working Group will promote implementation of its work, particularly the Recommended Practices on Predatory Pricing and Workbook Chapter on Analytical Framework, 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.

### **a. In-depth discussions of unilateral conduct issues and vertical restraints**

The Working Group will hold 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 standards in relation to unilateral conduct and their advantages and drawbacks.

### **b. Training**

The Working Group will also organise a series of presentations in connection with its regular 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 standards in relation to unilateral conduct and vertical restraints and online platforms, 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 2017-2018, the Working Group will assist the ICN Training On Demand Working Group in the planning and production of these.

### **c. Enhance communication among Members**

The Working Group will schedule regular communications between members and 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.

#### **(6) Evaluation**

Given the diversity of projects the Group considers project-specific evaluation techniques are appropriate. 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.

## 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 7<sup>th</sup> 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, Tying and the Analytic Framework for Evaluating Unilateral Conduct.

- 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>.
- Analytical Framework (Chapter 2): This workbook chapter poses and explores basic questions an agency must address in formulating its enforcement policies, focusing on two key questions in unilateral conduct enforcement: ‘what is dominance?’ and ‘what makes conduct exclusionary?’; the Chapter is available at:

<https://icn2017.concorrenca.pt/downloads/materials/UCWG-Analytical-Framework-Chapter.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](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 a number of 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), Refusal to deal in regulated industries (March 2015), two-sided markets and unilateral conduct (October 2015), remedies in refusal to deal case (March 2016), 'What is Dominance?' (March 2016), Efficiencies in Unilateral Conduct Cases (October 2016) and Vertical Restraints (April 2017). Recordings of many of these 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 December 2010 workshop 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 and Refusal to Deal in Turkey in November 2015. Materials and webcasts from the workshops are posted on the ICN website at

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