

INTERNATIONAL COMPETITION NETWORK

Unilateral Conduct Working Group



ICN Unilateral Conduct Workshop
Breakout Session 4 Guide
Experience Sharing & The Road Ahead

December 2-3, 2010
Brussels

Breakout Session 4: Experience Sharing & The Road Ahead

Overview

This breakout session will be held on Friday, Dec. 3 from 2:30 to 3:30 p.m. The purpose of the session is to discuss experience and share practical advice for investigating unilateral conduct cases. This topic also will be the subject of the panel following the conclusion of the breakout session. Another objective is to solicit feedback on familiarity with and use of work products, including the ICN Recommended Practices on assessing dominance / substantial market power, and suggestions for improving how the Working Group operates. We also welcome ideas for future work for the group as well as increased member involvement.

Moderator & Resource Persons

In each breakout room there will be team of four ICN members and NGAs in charge of leading the breakout sessions. The main task of the moderator and resource persons is to engage the participants into the discussion, to facilitate the process, to instigate and stimulate participants to intervene and reflect. The moderator also should ensure that each breakout sessions is run according to the timing set in the moderator guide.

	Room C	Room D	Room E	Room F	Room G	Room H
Moderator	Ali Demiroz (Turkey)	Wojciech Dorabialski (Poland)	Maksim Ovchinnikov (Russia)	Francisco de Paula Roig Guerrero (Spain)	Guy Goldberg (Israel)	Kate Markhvida (Canada)
Moderator	Valerie Stephen (Switzerland)	Ernst Ferdinandusse (EC)	Jan Lohrberg (Germany)	Andrew Heimert (US)	Cynthia Lagdameo (US)	Andreas Wessels (South Africa)
Resource Person	Josef Drexler (Germany)	Nameen Al-Lami (Jordan)	Alessandra Reis (Brazil)	Elisa Mariscal (Mexico)	Ryohei Yoshinari (Japan)	Pablo Marquez (Colombia)
Resource Person	Ermal Nazifi (Albania)	Mazhit Yessenbaev (Kazakhstan)	Harish Chandra Gupta (India)	Hi Lin Tan (Singapore)	Fatma Saadallah (Egypt)	Haiyan Wang (Ireland)

Structure of Session

Part 1: Experience Sharing (25 minutes)

Part 2: Feedback on Use of Work Product (10-15 minutes)

Part 3: Future Work (10-15 minutes)

Part 4: Workshop Evaluation (5 minutes)

Part 1 -- Experience Sharing (25 minutes)

This part of the session is to discuss experience and share practical advice for investigating unilateral conduct cases. It may be useful for the moderators and/or resource persons to start the discussion by sharing any difficulties and practical issues they have come across in dealing with unilateral conduct cases. This topic also will be the subject of the panel following the conclusion of the breakout session – so less time should be spent on the first two questions. Moderators also should encourage NGAs to share their thoughts from a business, legal, or academic perspective.

Discussion Questions

- What are some of the challenges new agencies have faced bringing unilateral conduct cases for the first time? Moderators could then ask if others have had similar experiences?
- How have agencies overcome these challenges? Any advice others in the room might have to offer? What can the ICN do?
- Would anyone like to share a recent development in UC analysis in their jurisdictions – it could be an agency statement, a change in practice or an aspect of a notable or novel case (e.g., we credited a new efficiency justification in a major case).
- Are there trends in unilateral conduct that have impacted how your agency approaches UC cases or how your agency interacts with parties?
- What is your perception of convergence in UC analysis? Are we moving closer together? What are the gaps or greatest area of divergence? Are there areas the ICN should focus on in terms of international dialogue? What challenges remain for convergence?
- On the merger side, many jurisdictions have guidelines. However, few agencies have guidelines dealing with unilateral conduct. What kind of guidance should agencies give the business community?
- Has anyone cooperated or coordinated with other jurisdictions on unilateral conduct enforcement -- perhaps on parallel investigations or cross border conduct that harms their consumers? Have conflicts arisen? Does anyone think it would be useful for the ICN to work in this area?

Part 2 -- Feedback on Use of Existing Work Product (10-15 minutes)

The Working Group has produced the documents listed below: Moderators/Resource Persons should ask delegates if they have used the group's work product and, if so, how.

- Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies;
- Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies;
- Reports on 1) Predatory Pricing, 2) Exclusive Dealing/Single Branding, 3) Tying and Bundled Discounting, 4) Loyalty Discounts and Rebates, and 5) Refusal to Deal with a Rival and Margin Squeeze.

Discussion Questions

- Feedback from delegates who have attended the last workshop suggests that members are using the Group's work products to analyze cases, for training, and to benchmark their approaches to analyzing conduct with those of other jurisdictions. How have you used UCWG work product?
- Do you have suggestions for improving future work? Does anyone have suggestions for how we could have improved our reports from prior years?
- Has anyone changed their laws, guides or procedures to conform to the Recommended Practices? Have you encountered barriers to implementation? How were they overcome (or not)?
- How can the working group promote implementation?

Part 3 -- Discussion of Future Work (10-15 minutes)

Solicit input on the Group's short and long term plans (attached) and how the working group might incorporate feedback received from ICN members on the direction of the ICN in its second decade.

UCWG projects for this ICN year include:

- *Workbook*. The Working Group is drafting two chapters, dealing with defining the relevant market and assessing dominance, of a workbook on the analysis of unilateral conduct, similar to the April 2006 Merger Guidelines Workbook. The workbook is based on the Group's conduct work, recommended practices on dominance, and reports on the objectives of unilateral conduct laws, assessment of dominance, and state-created monopolies.

- *Teleseminars.* The Group also is continuing its teleseminar series to delve into discrete issues of mutual concern, bring out different approaches, and try to isolate points of departure and relative pros and cons. We held our first webinar this ICN year in November on unilateral conduct in the pharmaceutical sector. (recording available on the ICN website).

For next year, we are looking for input on the additional chapters to develop in a workbook and whether we should continue our reports on types of conduct and, if so, what conduct to address. The moderator also should solicit feedback on the teleseminar series and ideas for teleseminar topics.

With respect to second decade feedback, we have been asked to consider ways to enhance communications with members, promote greater member participation in the working group and within our work product, and to continue to aim for convergence and to continue experience sharing through workshops and webinars.

Discussion Questions

- Could ask for a show of hands of delegates that have dialed in to one of our webinars (excessive pricing, remedies, and pharmaceutical) and, of those, if any joined the on-line webinar. What did people like or dislike about the teleseminars, either in content or format? How can teleseminars be improved?
- What subjects would be of most interest for future teleseminars? Are there particular experts from whom you would like to hear?
- Should the group continue our conduct work next year? If so, what topics should the Group address? (Excessive pricing? Price discrimination? Other conduct?)
- Could ask for a show of hands of those that are aware the ICN has a blog. How can the UCWG make better use of the blog?
- What substantive areas should the Workbook cover? What chapters should the group address next year?
- Based on a general analytical framework, is there sufficient consensus to begin to attempt to develop Recommended Practices. Which types of conduct would be most appropriate for Recommended Practices?
- The working group generally has monthly member-only calls and every other month or so calls with members and NGAs. Do you have suggestions for improving how the Working Group operates and how to encourage member involvement – in the working group, on the calls, responding to surveys, including a diverse range of views in work product.

- What are your views regarding increased involvement. How about judges? Would you consider it useful to liaise/harmonize our efforts more with other international organizations such as UNCTAD or OECD?

Part 4 -- Workshop Evaluation (5 minutes)

We welcome feedback on the structure and content of the workshop. Please leave about 5 minutes at the end of the session for delegates to complete a workshop evaluation form. Copies of the form will be available at the workshop.

In concluding the session, Moderators should ask delegates to think about how they will use the analytical tools and techniques learned at the workshop and/or share it with others in their agency.