

ICN Module – Introduction to ICN Training on Demand

RANDY TRITELL: Hi, I'm Randy Tritell, Director of the Office of International Affairs of the U.S. Federal Trade Commission and the chair of the ICN's Training on Demand Project, which some of you may know under its previous name, the Curriculum Project. I will briefly introduce this module, which will explain the purpose and format of the training materials that the project has produced. The goal of the Training on Demand Project is to develop a comprehensive curriculum of materials about competition law and its implementation. While there are many sources of this information, such as at conferences around the world, textbooks and others, our goal is to make this information readily available at your keyboard or mobile device wherever you may be and at no cost. The materials are designed primarily with the needs of new competition agency staff in mind. But we have made them available to anyone, including agencies, academics, practitioners, journalists or anyone with an interest in competition law and policy. So, feel free to spread the word. Our modules reflect the work of top competition officials, academics and practitioners from around the world. They cover substantive competition law, agency procedures and practical implementation. Thus far, the project has produced 13 full modules, as well as several shorter modules contributed by our non-governmental advisors about which you will hear more shortly. It is now my pleasure to turn the program over to the ICN Chair Andreas Mundt.

ANDREAS MUNDT: The ICN uses a variety of tools and work products. From the outset, we have recognized the importance of the ICN to address the differing needs for differing audiences. So, we include among our members agencies that are just starting to enforce competition law and we have members among us who are extremely mature and experienced and who have been applying competition law for more than a century. Also, the topics that we

address within the ICN work products cover a vast variety of questions. Some focus on procedural issues; others address substantive aspects. We hope that the ICN Training on Demand Project can bring all ICN members and interested stakeholders together. Our aim is to meet the needs of those who have joined us in this endeavor in the recent years. ICN Training on Demand draws not only the collective wisdom gathered by our working groups, but also the accumulated experience of our members and of our non-governmental advisors. I don't know anywhere else where you can find the collective experience of the world's most experienced antitrust enforcers and practitioners gathered in one place. Let me call the ICN website our competition law encyclopedia and we are adding to it every year. This is, I believe, the most practical way we can make our work available to ICN members. I hope that this is useful to you. Thank you.

RUSSELL DAMTOFT: The core of the ICN Training on Demand Project is a series of online modules organized by general subject matter, such as fundamental building blocks, horizontal agreements, unilateral conduct, mergers, advocacy and agency effectiveness. In many cases, they parallel the work of the ICN's working groups. Right now, we have 11 of those, and as Andreas noted, we plan to produce many more modules in the coming years. The initial round of modules included two modules by former FTC Commissioner Bill Kovacic. The first covered the nature and origins of competition law and policy and the second addressed some of the major issues that a country setting up a new competition regime would need to address.

BILL KOVACIC: What these developments did is to link together in North America what previously had been separate and insular geographic markets. It also permitted the development of much larger business enterprises than one had ever seen before. And I'm going to focus on eight major institutional choices. To summarize them quickly: which substantive

functions should the competition system perform; second, what connections should the public competition agency have to the political process; third, what's the appropriate form of governance within the competition agency; fourth, who should decide to prosecute cases.

RUSSELL DAMTOFT: Three other initial modules introduce important conceptual building blocks for competition law enforcement: market definition, market power and competitive effects.

RICHARD WHISH: Let us think about market definition by reference to a simple physical product. Let's imagine a bottle of mineral water. What we are essentially asking ourselves is whether customers would consider that there are substitutes for the bottle of mineral water. Would customers, for example, think that a bottle of fizzy orange juice was a substitute for mineral water? Might they think that a sports drink was a substitute for mineral water?

INVESTIGATOR: And this data shows that Cutting Edge does have a high market share. Now, obviously, that depends on how you define the market, but looking at the ICN film on market definition, it's quite possible the carburetor kits sold to consumers in Europe is a relevant market.

CAROL BOATE: Right. I think we should look at this complaint further. We need to remember, though, that National is a competitor of Cutting Edge and, so, they may have their own strategic reasons for making this complaint to us. And, for example, it's possible Cutting Edge are just more efficient or that their input costs are lower than National's. Also, we need to think about whether other competitors could enter this industry. Are there high barriers to entry or are there different ways of manufacturing these kits?

AMELIA FLETCHER: The overarching aim of competition policy is, therefore, to protect this process of competition, albeit not necessarily individual competitors, but the process

of competition, and that is to the benefit of consumers and efficiency. Those benefits can include lower prices, but they can also include better quality or service, greater range or even more innovation in new products.

RUSSELL DAMTOFT: The unilateral conduct working group prepared two modules, one on the analysis of predatory pricing and one on discriminatory pricing.

SIMON ROBERTS: In other words, we're dealing with an allegation of predatory pricing. So, we've got protagonists which will be pushing more one side or the other side of the case.

ALLISON OLDALE: The team has opened an investigation into Domco's conduct, focusing on the possibility that it is engaging in predatory pricing. How should it structure the investigation?

ADRIAN MAJUMBAR: Now, we have to think about some initial questions that you can ask yourself at the start of an investigation. These questions help you assess whether or not the case is worth taking forward. They help you look to see if foreclosure is feasible.

RUSSELL DAMTOFT: The first of what we hope will include several modules on mergers uses a hypothetical case to introduce techniques used in merger investigations.

WILLIAM STALLINGS: Throughout this module, we will join a case team during various stages of its investigation of a hypothetical merger.

MICHAEL BURNETT: And I'd like to get your initial thoughts on this transaction and the issues that we might have to look at as part of an investigation or a preliminary investigation.

STEPHANIE WILKINS: Well, it appears that there is only one product overlap between the parties, and that is soy milk. JustSoy's Thrive product appears to have 69 percent of the soy

milk market and Fantasy Dairy's FantaSoy product has approximately 15 percent of the market. So, this would mean a combined share of 84 percent.

PATRICK DE GRABA: So, I think the important thing to worry about here, to ask about is whether there are other products other than soy milk that might constrain the possible exercise of market power on the part of the merged entity.

JAIME BARAHONA: When planning the investigation, it is important to determine what are the sources of the data. One of the sources are the merging parties. They have a lot of information relying on with respect to sales, quantities and pricing.

RUSSELL DAMTOFT: And a very impressive module on leniency in cartel investigations was prepared by the European Commission.

RICHARD WHISH: In the course of what follows, you will also be hearing from officials from a number of competition authorities around the world and you will also see some reenactments of a hypothetical cartel meeting.

BUSINESSMAN 1: I don't think any of us can afford to play that game any longer and I think it's time we go back and take a look at our previous arrangement.

BUSINESSMAN 2: Could you be more precise?

BUSINESSMAN 1: We all raise our prices globally. And in conjunction with that, we stop approaching one another's clients and stick to our own territory.

BUSINESSMAN 3: Is it illegal?

LAWYER: Yes, we might have a serious problem here. What you have described is a cartel, which is against competition laws.

RUSSELL DAMTOFT: The first of several planned modules on the practical techniques of competition law enforcement focused on planning and conducting investigations. Another module currently in production will focus on interviewing techniques.

MARKUS MEIER: The basic steps in conducting an investigation consist of the following: step number one, you want to develop a theory or theories of the case. It's often the case that a given complaint or possible violation may actually raise a number of antitrust theories and so you want to think about that right at the outset. Second, you want to identify possible sources of information. Because antitrust analysis is very heavily fact-based and fact-driven, you have got to go out there and find the facts that help you do the analysis necessary to determine whether there has, in fact, been a violation of the law.

RUSSELL DAMTOFT: Recognizing the importance of addressing governmental restraints on competition, a very important module shares some of the techniques of effective competition advocacy.

JOHN DAVIES: Although attention is most often directed at the investigation of individuals and firms for violations of competition law, it's important to recognize that restraints blessed by governments can be as, or more competitive, than private firm activity. This module focuses on more ambitious advocacy, where the agency is confronted with a particular current or proposed government restraint and it has to decide whether, and if so, how to proceed.

PHARMACIST: Remember, we all have community pharmacy contracts with the Department of Health so that patients can get their drugs free or have them reimbursed by the state. What about, maybe we could get the government to make regulations to say that you can only get a government contract if you're a certain minimum distance away from the nearest established pharmacy.

RUSSELL DAMTOFT: Many of the ICN's members are from developing countries, so two of our non-government advisors prepared a module on issues particular to developing country economies with help from the Mexican and South African agencies.

THULA KAIRA: The problem of attracting and sustaining political support for the implementation of competition law and policy.

DAVID LEWIS ...a very strong past of state ownership of key enterprises...

FRANCIS KARIUKI: We have prioritized the sectors which have the greatest impact to these poor people.

CARLOS RAGAZZO: It's almost impossible for you to have good advocacy efforts if you're not a good enforcement agency.

RAHAT HASSAN: ...three aspects that a competition agency must bear in mind. It has to be fearless, it has to be firm and it has to be fair...

KUSHA HARAKHSINGH: ...challenges stemming from the fact of our small size, from the fact of our dispersed national entities...

AMADOU DIENG: ...beaucoup de personnel, beaucoup de...les enquêtes...

EDUARDO MOTTA: ...(inaudible) and we found that basically one-third of the expenditure of the average Mexican is in sectors that lack competition.

RUSSELL DAMTOFT: Our non-governmental advisors and member agencies also have a lot of experience to share. Some of them have agreed to produce short modules for the ICN. While these don't speak for the ICN, they're a helpful contribution to the understanding of these issues.

Paul Nihoul of the University of Louvain contributed one on the analysis of resale price maintenance.

PAUL NIHOUL: Take a manufacturer, for instance. A manufacturer, if he's selling a branded good, may want to sustain the brand by charging relatively high prices.

RUSSELL DAMTOFT: Sandra Colino Marco of the Chinese University of Hong Kong gave us one on territorial exclusivity.

SANDRA MARCO: Territorial exclusivities are restrictions that can be included in distribution agreements which are both concluded between a supplier of goods or services and independent distributors of those goods or services.

RUSSELL DAMTOFT: Gilbert Muzata of the South African Competition Commission prepared a presentation on the economics of dominance.

GILBERT MUZATA: Let's think of a basic market where you've got demand, on the one side, which is willingness to pay...

RUSSELL DAMTOFT: Other short form presentations include market inquiries and confidentiality, and we have more in the works on merger remedies and proof of an agreement. The modules cross-reference relevant ICN work product, in some cases with links directly from the module. Each module has its own webpage and links can also be found there. Once we began this project, we realized that many agencies, academics and law firms have prepared their own videos on these topics. We've compiled an electronic library with links of those. While these are not ICN products, they may be helpful resources. One of the challenges we have had to address is that we speak different languages and we don't all have access to sufficient bandwidth to make the modules play optimally. To address that, we've set up several ways to view the modules. The webpage for each module has links to each of them. First, you can watch the module directly from the Internet. Most of the modules were prepared using interactive software that lets you move through at your own pace. You can go back if you need to and they also



directly link to relevant ICN work product. Some of the modules include a quiz and they work interactively over the Internet. But this requires pretty good Internet connections and not everyone has that. So, a second option is to download the module to your own computer and play it later. Third, we've uploaded the modules to YouTube and they play easily from there. However, from YouTube, you lose the ability to navigate or to link to other content. The ICN prepares a thumb drive with all modules loaded on to them and distributes these at many international meetings. Grab one when they're passed out. There's no perfect answer to the language problem, but we've tried a few things to make things easier. We've prepared an English language transcript of each module which is available on the website. Thanks to the good work of COFECE in Mexico, we're also putting Spanish transcripts on the website and we hope to add other languages. We're also beginning to add subtitled versions of the YouTube videos. So far, these are available in Spanish, but we hope to add more languages soon. That brings us to the final point, which is how agencies use the modules. Agencies tell us they use them in a lot of ways. The most important, and the reason we started the project is to provide a training resource for agency staffs. Also, some agencies use them to inform stakeholders, students, and the media. Let's hear about Mexico's experience according to COFECE's investigative authority, Carlos Mena.

CARLOS MENA: The Mexican authority, COFECE, uses the ICN curriculum as part of training for new investigators at all levels. We schedule times for our new hires to view the modules and consider it a valuable part of their introduction to competition enforcement.

RANDY TRITELL: I hope you have found this introduction useful and that you and your colleagues will be able to make good use of these materials. We are in a constant learning process regarding the development of this project, so we would very much value your feedback

on all aspects of your experience, including the content and usefulness of the modules that you watch, the format in which the material is presented and the accessibility of the modules. Thank you for joining us for this introduction and I hope you find that this project makes a meaningful contribution to your understanding of competition law and policy and to your work.