

THE ROLE OF THE INTERNATIONAL COMPETITION NETWORK IN THE DIGITAL ERA

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Introduction

The International Competition Network (“ICN”) has become an important global actor and an imperative reference for competition authorities and competition law practitioners around the world. Throughout its 20 years of existence it has produced an impressive list of work products – created by consensus and in accordance with the needs and best practices of its membership – that have served as a compass to overcome the challenges of competition analysis caused by the changes that markets have experienced over the years. The role of the ICN in the digital era will not be different.

The first section of this essay describes the evolution of the ICN work products. The initial ICN products were created in a period of increasing internationalisation and globalisation of markets, thus their main focus was to promote convergence across merger regimes, and later to facilitate international cooperation in anti-cartel activity and unilateral conduct, among other topics. It also addresses – as an example of the importance of the ICN in helping less experienced agencies get up to speed – the benefits that COFECE and competition policy in Mexico have gained as a result of COFECE's participation in the ICN. The second section deals with the new challenges that the competition community faces in an era of increasing digitalisation of markets, discusses how the experiences of several jurisdictions are relevant contributions for the ICN's work in this area and argues that the ICN is an excellent forum to discuss and work towards addressing the pressing issues of the digital era on competition law enforcement and advocacy.

I. The international Competition Network throughout the years

Over 20 years ago, national and regional competition regimes were burgeoning around the world. Most of these regimes resulted from the increasing economic globalisation that gained impetus during the 1990s. Globalisation and the emergence of jurisdictions with competition law systems created challenges for companies operating internationally. Inconsistent or conflicting provisions and competition authorities' decisions became an important risk, particularly in relation to merger control.

This called for the creation of multilateral initiatives to help generate consensus and convergence towards accepted competition principles and best practices across the global competition community.¹

One of the multilateral institutions that emerged was the ICN. It was founded in October 2001 in New York by the competition authorities of 14 jurisdictions,² as a virtual network of competition agencies. It was also notably open to competition experts belonging to international organisations, practitioners of competition law, representatives from consumer and industry associations, and members of the academic community, collectively known in ICN jargon as “non-governmental advisers” or “NGA’s”.

As mentioned, in its early beginnings, the ICN focused on the global demands of a period marked by an increased internationalisation of markets, where companies operating worldwide faced many challenges, particularly with regard to merger control compliance in transnational transactions. Thus, the ICN created a Merger Working Group to facilitate ready access to merger control laws worldwide, the preparation of templates to facilitate comparisons between merger control regimes and to compile available information on the costs and burdens of multijurisdictional merger reviews. Perhaps the most visible and important projects undertaken then by the Merger Working Group pertained to the notification of proposed mergers and merger regulation. Guiding principles and recommended practices were developed focusing on the definition of a merger transaction, the nexus between the transaction and the reviewing jurisdiction, the definition of thresholds, timing of merger notifications, review periods, requirements for the initial notification, and review of merger control, amongst other things.³

In these early years, the ICN created working groups in charge of capacity building and advocacy. The main purpose of the former group was to share the expertise of well-established agencies with those that were still building up their capacity to implement a credible competition policy. To this end, the products focused on successful capacity building and competition policy implementation in developing transition economies. These included reports on the role of the judiciary in the implementation of competition policy, lessons learned from the experience of young competition agencies and findings related to technical assistance for newer competition agencies, amongst others.

The Advocacy Working Group developed work products that facilitated the promotion of newly adopted competition legislation and helped to create key messages that would foster a culture of competition within jurisdictions.⁴

¹ See Roebing, George, Ryan, Stephen A., Sjöblom, Dan. (Autumn 2003), ‘The International Competition Network (ICN) two years on: concrete results of a virtual network’, *Competition Policy Newsletter*, Number 3, 37-40.

² The 14 founding agencies were from the following jurisdictions: Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, the United Kingdom, the United States and Zambia; Roebing, George, Ryan, Stephen A., Sjöblom, Dan. (Autumn 2003), ‘The International Competition Network (ICN) two years on: concrete results of a virtual network’, *Competition Policy Newsletter*, Number 3, 37-40.

³ See Idem; The ICN Merger Working Group webpage provides a comprehensive list of work products at: <https://www.internationalcompetitionnetwork.org/working-groups/merger/>

⁴ The ICN Advocacy Working Group webpage provides a comprehensive list of work products at : <https://www.internationalcompetitionnetwork.org/working-groups/advocacy/>

In the following years, in addition to mergers, advocacy and capacity building, the ICN approach expanded to cover other themes such as anticompetitive practices. The ICN created a Cartel Working Group to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conducts. Over time, this group has produced numerous reports, manuals, information sharing mechanisms and, most notably, leniency waiver templates.⁵ In particular, the leniency waiver templates have facilitated international cooperation in cartel investigations, allowing communication between agencies and the potential coordination of procedural aspects between the competition authorities involved in the particular case.

Later on, the ICN turned its attention towards single firm abuse of dominance conducts by creating the Unilateral Conduct Working Group, in order to examine the challenges involved in analysing the unilateral conduct of dominant firms and of firms with substantial market power. This was to facilitate a greater understanding of the issues involved in analysing unilateral conducts, and promote greater convergence and sound enforcement of laws governing these conducts. One of the outstanding results of this work is the document for recommended practices to assess substantial market power.

Even though the ICN approached several topics pertaining to institutional capacity from the beginning,⁶ one of its more recent working groups focuses on Agency Effectiveness. This group was created in 2007 to identify key elements of a well-functioning competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures. It provides a forum for sharing agency operational experience and practices, encourages agencies to evaluate their effectiveness and improve the quality of agency operation and procedures, and develop operational guidance for an effective agency. It has already produced guiding principles for procedural fairness and recommended practices for the investigative process.⁷

As mentioned, the ICN started as a group of agencies from 14 jurisdictions. By the end of 2021 the geographical representation of the ICN members covered 140 members from 131 jurisdictions. Clearly, the ICN has experienced exponential growth and expansion. During the two decades of its existence, the ICN has produced an impressive list of reports, manuals, guiding principles, recommended practices and templates. Despite being criticised during its early years for the non-binding nature of these products, its “soft-law” approach has proven to be one of its strengths: jurisdictions can adapt the knowledge conveyed to their specific needs since the principles are well-founded and general in nature. However, national competition laws do not always allow for the exact and/or full adoption of these products. For example, the ICN anti-cartel enforcement manual is an important guide for effective cartel investigations, however, for COFECE, the usefulness of its section on international

⁵ The ICN Cartel Working Group webpage provides a comprehensive list of work products at: <https://www.internationalcompetitionnetwork.org/working-groups/cartel/>

⁶ The Capacity Building and Competition Policy Implementation Group was in place between 2003 and 2007.

⁷ The ICN Agency Effectiveness Working Group webpage provides a comprehensive list of work products at: <https://www.internationalcompetitionnetwork.org/working-groups/agency-effectiveness/>

cooperation is constrained by the limits imposed on exchange of information by our national laws relating to confidentiality.

Moreover, the success of the ICN relies not only upon factors such as its flexibility, its consensus based approach and the voluntary and non-binding nature of its work products. It is more relevant that the ICN has created significant work products and documents to meet the needs of its membership, facing the challenges posed by the evolution of markets and their contexts.

In the Mexican case, for example, the ICN's products have substantially contributed to enhancing the effectiveness of competition policy. Many improvements to the Mexican competition regime have sought to converge with the ICN guiding principles, recommended practices and other work products, such as manuals, reports and templates. Examples of this include:

- The Immunity and Penalty Reduction Program introduced into the competition law in 2006 was designed to follow the ICN anti-cartel enforcement manual.⁸ Moreover, the good practices included in the manual were used as input for designing the programme's guidelines⁹ and have also recently used in the Draft Regulatory Provisions of the program that were publicly consulted upon in 2019. In addition, COFECE's Market Intelligence Unit, which resides in the Investigative Authority, frequently follows the applicable good practices established in the manual's chapter on searches, raids and inspections.
- International cooperation related to immunity applications prompted COFECE's request for waivers. The ICN leniency waiver template has been regularly used by COFECE's Investigative Authority when cooperating in international cartel investigations with immunity applicants.¹⁰
- For mergers, the ICN confidentiality waiver model has served as a guide when parties allow COFECE to exchange confidential information with staff from other competition authorities.¹¹ Moreover, the practical guide to international enforcement cooperation in mergers has also been helpful in making clear for COFECE when to cooperate with other agencies and which types of information can be exchanged, both with waivers and without them.¹²
- The planning and design of COFECE's advocacy strategy was heavily influenced by ICN work products, such as the practical tool for explaining the benefits of competition to businesses, which provides good practices for approaching and communicating with the business

⁸ ICN Anti-Cartel Enforcement Manual: <https://www.internationalcompetitionnetwork.org/working-groups/cartel/investigation-enforcement/>

⁹ GUIA-003/2015: Guía del Programa de Inmunidad y Reducción de Sanciones at: https://cofece.mx/wp-content/uploads/2017/11/guia_programa_inmunidad.pdf

¹⁰ ICN Leniency waiver templates and explanatory note (2014) at: <https://www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template/>

¹¹ ICN Model Confidentiality Waiver for Mergers at: <https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/>

¹² ICN Practical Guide to International Enforcement Cooperation in Mergers at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf

community.¹³ Moreover, the recommended practices on competition assessment are a tool used regularly by the Commission when conducting such assessments on national and local proposed and existing regulation.

- Furthermore, ICN guiding principles and good practices for market studies have served as a guide when conducting market studies. A recent example of this was its use in the Study on Competition in the Federal Passenger Transportation Market in Mexico.¹⁴

As mentioned, the ICN has been addressing and working on each of the issues that demanded immediate attention over the years. Today the most pressing issue that calls for the attention of agencies around the world has to do with the rapid digitalisation of markets. The next section describes some of the challenges that digital markets pose to competition authorities and how the ICN can facilitate the approach to these markets.

II. The role of the ICN in the digital era

Since its creation, the ICN has positioned itself as a key forum for both competition authorities and practitioners to share experiences and knowledge, enabling international cooperation and the identification of elements for consensus and convergence in matters of competition enforcement.

Today, the ICN and international cooperation are more important than ever, as national and international markets face an accelerated transformation which may be traced to an ever-growing digitalisation of human, commercial and economic activities. For this obvious reason, the focus of the ICN will turn to the analysis of digital markets.

Digital markets are characterised by swift change and innovation, which often result in dynamic efficiencies a positive trait of competitive markets. In many ways, digitalisation is transforming traditional markets, by providing more information and facilitating access to it, allowing customers to compare prices, as well as the quality of goods and services. Moreover, digital platforms are creating new markets, providing new ways for acquiring goods and services, in many cases, reducing transaction costs and lowering prices, and creating a collaborative economy.

However, several aspects specific to digitalised markets present new challenges for the competition community. For example, digital platforms increasingly dominate key industries, taking advantage of network externalities and economies of scale in the use of consumer data. This consumer data or “Big Data” improves understanding of customers and therefore helps to create a variety of innovative services to better satisfy their needs. Nonetheless, its accumulation, together with anticompetitive

¹³ ICN Recommended Practices for Competition Assessment at: <https://www.internationalcompetitionnetwork.org/working-groups/advocacy/comp-assessment/>. The ICN Explaining the Benefits of Competition to Businesses at: <https://www.internationalcompetitionnetwork.org/portfolio/explaining-the-benefits-of-competition-to-business/>. COFECE. (2015). *Working Together for a Competition Culture*, Mexico: COFECE : https://www.cofece.mx/cofece/ingles/attachments/article/38/Working_together_for_a_competition_culture.pdf

¹⁴ ICN Market Studies Work webpage at: <https://www.internationalcompetitionnetwork.org/working-groups/advocacy/market-studies/>. COFECE. (2019). Estudio de competencia en el autotransporte federal de pasajeros at: <https://www.cofece.mx/estudios-economicos-estudio-de-competencia-en-el-autotransporte-federal-de-pasajeros/>

behavior, may result in leverage or abuse of market power, entry barriers, lock-in effects, foreclosure and even “killer acquisitions”.

In addition, digitalisation and growing computational capacity through more sophisticated algorithms have made it easier to generate, collect and process large amounts of information. However, these algorithms are also serving as tools to make strategic commercial decisions, such as price determination, even without clear human intervention.

The challenges faced today have posed several questions to the international competition community. Some of the most frequently asked include:

1. How well equipped are competition authorities to address the digital markets of the twenty-first century?;
2. Are current competition analytical and methodological tools (such as market definition and the assessment of market power) adequate?;
3. Is market definition for platforms so different from that of traditional one-sided markets?;
4. How are markets defined and market power determined in markets with products priced at (apparently) zero?;
5. Should thresholds or other criteria for compulsory merger notification be modified and if so how?;
6. What other considerations should competition authorities take into account when positioning theories of harm (for example, data and privacy considerations)?; and
7. How must sector regulation be designed to truly harness the advantages that digital markets may bring about for consumers?

In this sense, the ICN plays a salient role in the digital age. The ICN can foster analysis and discussion about the aforementioned questions and promote best international practices for the analysis of digital markets.

During the past months, we have seen a tendency by some jurisdictions at the forefront of the topic to enact, or design and propose, regulation for certain digital platforms, those that could be considered as gatekeepers' in certain markets. These include the 10th amendment to the German Competition Law, passed on January of this year, focused on regulating firms with “paramount significance for competition across markets” with measures such as prohibitions on self-preferencing practices and on strategic use of data, as well as fostering data portability and interoperability.¹⁵ By the same token, last December 2020, the European Commission proposed the Digital Markets Act (DMA),¹⁶ which aims to be an *ex ante* regulation for incumbents considered gatekeepers, with potential transparency

¹⁵ Bundeskartellamt (2021). Amendment of the German Act against Restraints of Competition at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

¹⁶ European Commission (2020). Digital Markets Act at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>

obligations, aggregated data for business users, self-preferencing prohibitions, among others. Also in December 2020, the Digital Markets Taskforce of the United Kingdom, proposed regulation for firms with “strategic market status” focused on a mandatory Code of Conduct.¹⁷ The development and discussions regarding these proposals enrich the experience on digital markets worldwide.

Also, high profile cases using traditional antitrust tools have also arisen in recent years. Examples include the Facebook vs Bundeskartellamt case,¹⁸ confirmed by Federal Tribunals in Germany, a case where the German Competition Authority considered that the imposition of untransparent terms and conditions on users data constituted abuse of dominance; as well as other cases around the world, like the Federal Trade Commission’s antitrust lawsuit against Facebook for possibly abusing its excessive market power to eliminate threats to its dominance in the United States’ personal social networking market;¹⁹ the United States’ Department of Justice’s antitrust lawsuit against Google’s monopolisation of the digital advertising market and search engines by signing exclusive agreements with Apple and setting Google as the default search engine on Android;²⁰ and the European Commission’s investigation to assess Amazon's use of sensitive data from independent retailers who sell on its marketplace.²¹

All of these will serve as references to be included in ICN work products as similar efforts for legal modifications and enforcement cases will increasingly emerge in other jurisdictions. With the help of the ICN, less experienced agencies will be able to use the outcome of cases of the aforementioned competition agencies as a starting point when dealing with digital markets.

In COFECE’s case, for example, these experiences have been useful in creating a digital taskforce that will develop a strategy to approach Mexican digital markets. Inspired on other agencies experiences, in March 2020 we published COFECE’s Digital Strategy,²² a document with the next steps facing the challenges of the digital economy. In August of same year, we created the Digital Markets General Directorate, a specialised unit for the analysis of the development of the digital economy and its repercussions on the processes of competition.

As mentioned, one of the key purposes of the ICN is to share the expertise of well-established agencies (who have issued decisions or advocacy documents related to traditional and digital markets) with those that are still building up their capacity to conduct competition analysis, but who will surely be

¹⁷ CMA (2020). A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce at: https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf

¹⁸ Bundeskartellamt (2019). Bundeskartellamt prohibits Facebook from combining user data from different sources at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

¹⁹ According to the FTC, Facebook control prices or exclude competition; significantly reduce the quality of its offering to users without losing a significant number of users; exclude competition by driving actual or potential competitors out of business, keeps high switching costs among others. FTC (2021). Facebook, Inc., FTC v. at:

https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf

²⁰ Justice Department Sues Monopolist Google For Violating Antitrust Laws at:

<https://www.justice.gov/opa/press-release/file/1328941/download>

²¹ CE (2019). Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon at:

https://ec.europa.eu/commission/presscorner/detail/es/IP_19_4291

²² https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf

confronted with the challenges posed by the digitalisation era. However, in this new digital context, it is fair to say that such matters are new for all competition agencies. Therefore, some younger jurisdictions have had experiences with digital markets that may also be useful to others.

A pioneering example of the above, from a less developed agency, is COFECE's advocacy effort of 2015, where we recommended that the new business model of transport network companies (or "TNCs", for example, Uber, Cabify, and Easy Taxi) be allowed to operate in local markets, without undue restrictions on competition. After this recommendation, thirteen Mexican states modified their legal framework, or issued new regulations, to recognise and allow the operation of TNCs, potentially avoiding rules inhibiting or outright prohibiting them.²³ The Commission was one of the first jurisdictions to advocate this type of issues (i.e. how new digital markets can create important competitive pressure on traditional markets and its incumbents) and its efforts were later replicated by other countries.

More recently, in 2019 the ICN Unilateral Conduct Working Group organised its first ever workshop dealing entirely with digital markets.²⁴ Given the importance and the rise of the digital platform usage worldwide, this workshop was of extreme relevance to ICN members in discussing issues surrounding the assessment of unilateral conducts in the context of these technologies. This workshop fostered a lively and dynamic discussion on market definition, the market power of digital platforms and on tying in digital markets. Participants discussed hypothetical cases which allowed them to conduct practical competition analysis in markets related to technologies that might be part of our daily lives, such as those connecting potential dating partners and apps for smart-wears. This workshop was hosted by COFECE and is an example of initial approaches by the ICN with the digital economy.

Another example of the ICN's work in digital markets is the report on recent advocacy experiences. This outlines how the members' advocacy strategies and approaches have changed in consideration of the digital economy. Findings are expected to allow further development of guiding principles, best practices or recommendations on advocacy in digital markets.²⁵

Annual conferences have also served to showcase the ICN's efforts to advance the issue. In recent years, their plenaries and breakout sessions have had a marked tendency towards digital topics. For example, in 2016 the Competition Commission of Singapore presented the findings of a special project that sought to better understand advocacy experiences in disruptive innovation. Later in 2019, the Superintendence of Industry and Commerce of Colombia presented a report on competition policy and creative industries with a digital economy approach to develop innovative solutions. As of 2020, the ICN virtual conference organised by the competition agencies of the United States included

²³ OPN-0082015 at: <https://www.cofece.mx/CFCResoluciones/docs/Mercados%20Regulados/V6/16/2042252.pdf>

²⁴ 2019 UCWG Workshop Mexico City webpage at: <https://www.cofece.mx/uc-workshop2019/>

²⁵ ICN AWG. (2019). Advocacy Working Group Report on ICN Member's Recent Experiences (2015-2018) in Conducting Competition Advocacy in Digital Markets at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG_AdvDigitalMktsReport2019.pdf

plenaries on big data and cartelisation, digital mergers, digital strategies of competition agencies and advocacy in the digital age.

Thus, future products, workshops and annual conferences are likely to have a greater emphasis on the challenges that agencies already face, and will continue to face, when conducting competition analysis in the digital era. Examples of this are the Steering Group's on going special project on the "Intersection Between Competition, Consumer Protection and Privacy", the Unilateral Conduct Working Group performing a multi-year project on "Assessing dominance in the digital age"; the Merger Working Group's series of webinars on digital mergers; the Cartel Working Group's project on "Big Data and Cartels", and the Agency Effectiveness Working Group's organisational design products, with a focus on knowledge management in a digital era. The 2021 virtual program of the annual conference organised by the Hungarian competition authority foresees sessions on anti-cartel enforcement and abuse of dominance in the digital era, as well as on digitalisation and agency effectiveness.

In conclusion, the ICN will continue to serve as a fundamental forum for the discussion of emerging issues related to competition in digital markets – like the assessment of dominant platforms, access to data, interdisciplinary cooperation among competition authorities and other regulators, to mention just a few. COFECE, like most ICN members, is keen and willing to contribute to (and learn from) the ICN's role in the digital era.