

Unilateral Conduct Working Group

2022-25 Working Group structure and 3 year 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 2022-2023, the Working Group will be co-chaired by the Japan Fair Trade Commission, the French Autorité de la concurrence, and the Spanish National Markets and Competition Authority which replaced the Directorate General for Competition (European Commission) in May 2022. DG Competition will continue to coordinate the work on the paper “Dominance in Digital Era – Market shares and Barriers to Entry and Expansion in Digital Markets” (see below Project 2) (with the support of the French Autorité de la concurrence, as Co-Chair). The Group is comprised of over 100 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, 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 and relevant enforcement tools.
- 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.
- Improve understanding of the relationship between sustainability and competition in the context of abuse of dominance cases.



- Promote the implementation of the Recommended Practices and assess possible problems related to its implementation.

2022 – 2025 STRATEGIC PLANS

The Working Group proposes the following areas of future work, taking into account feedback from the Third Decade Initiative and considering factors suggested by the Steering Group and the audience for the Group's work product. The future work aims to achieve a balance between implementing existing work products and creating new ones as well as to achieve a balance between work that is ripe for convergence efforts and comparative dialogue. It also focuses on core projects that complement the institutional strengths and impact of the ICN's mission as well as on projects that encourage inclusiveness and broader member and NGA engagement as well as initiatives that are well suited to ICN's practical, project-oriented nature.

1. Promote greater convergence and increase understanding regarding the assessment of dominance in digital markets

- Continue the multi-year project "Assessment of Dominance in Digital Era" which seeks to collect and consolidate the experience of competition agencies in assessing dominance/substantial market power in digital markets and deepen the common knowledge on this topic. Project deliverables may include a concise paper containing, for example, practical tips to assist competition agencies in addressing the challenges of enforcing unilateral conduct laws in the digital era. Moreover, the UCWG extended its multi-year project on "Dominance in the Digital Era" to explore the main issues and challenges connected with analysis of theories of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets, compiling a report on the conducted survey on the above mentioned issues as its deliverable.

2. Promote greater convergence and increase understanding regarding unilateral conduct standards and enforcement tools

- Continue work on the analysis of unilateral conduct through comparative reports or advancing with new chapters in the Work Book. The Working Group may consider examining specific aspects of antitrust enforcement in the area of unilateral conduct that is of common interest or explore the assessment of unilateral conduct in specific markets or sectors.
- The UCWG wishes to also focus on enforcement tools that could be particularly valuable in abuse of dominance cases, such as urgency enforcement tools, including interim measures. The work conducted by the UCWG would enhance the understanding of existing national/regional legal frameworks, help identifying the benefits, challenges and risks of such tools, guide competition agencies that

already benefit from these tools, and possibly inform those who might wish to add such tools to their competition law framework.

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.
- Continue to understand difficulties encountered with the implementation of its work product and to find ways to overcome them, including by 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 of interest.
- Help develop modules on unilateral conduct for the ICN Training On Demand Project. The Working Group stands ready to provide its expertise and support to the ICN Training on Demand Project when appropriate.

4. Facilitate discussion and enhance cooperation

- Continue to facilitate discussion of issues that arise in analysing unilateral conduct. The Working Group plans to hold a Workshop in Tokyo in March 2023. On average, two or three teleseminars/webinars will be held each year.
- Consider, in view of policy convergence, 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. One webinar will be specifically dedicated to the topic of cooperation between competition agencies in the enforcement of unilateral conduct cases.
- Explore, in view of rising interest in sustainability, how competition interacts with sustainability in unilateral conduct cases.

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 continued participation by economists to further explore unilateral conduct from traditional economics and law perspectives (error costs, optimal rules).

Unilateral Conduct Working Group

Annual Plan

Projects summary

2022 – 2023 Projects

Pursuant to '**Working Group structure and 3 year plan**' the UCWG Working Group will work on the following projects during the 2022-2023 ICN year.

Project 1. - Analysis of Theories of Harm and Design of Remedies Concerning Unilateral Conduct with Dominance/Substantial Market Power in Digital Markets

Project 2. - Paper “Dominance in Digital Era – Market shares and Barriers to Entry and Expansion in Digital Markets”

Project 3. - The use of urgency enforcement tools in the context of abuse of dominance proceedings

Project 4. - Webinars

Project 5. - Implementation

Project 6. - Workshop

Project 1. - Analysis of Theories of Harm and Design of Remedies Concerning Unilateral Conduct with Dominance/Substantial Market Power in Digital Markets

The UCWG will continue compiling the report on the survey concerning the project on “Analysis of Theories of Harm and Design of Remedies Concerning Unilateral Conduct with Dominance/Substantial Market Power in Digital Markets.” The report aims to outline challenges that the ICN member agencies face when analysing theories of harm and designing remedies in actual unilateral conduct cases in digital markets and to know how the agencies are dealing with such challenges.

The report on the survey will be presented at the 2023 ICN UCWG Workshop in Tokyo, Japan. A need for establishing a paper on the topics may be discussed in the 2022-2023 ICN year depending on the results of the survey.

This work will be coordinated by the JFTC.

Project 2. - Paper “Dominance in Digital Era – Market shares and Barriers to Entry and Expansion in Digital Markets”.

In 2022 to 2023, the Working Group will continue finalising the draft paper on “Market Shares and Barriers to Entry and Expansion in Digital Markets”, which was started in the context of the multi-annual project on “Dominance in the Digital Era”. The draft paper looks at how market shares are assessed in digital markets, and in particular, how the characteristics of digital markets, such as zero-pricing and multi-homing, affect the assessment. The paper then explores barriers to entry and expansion due to e.g. network effects and switching costs. The paper also contains useful hints on relevant evidence for agencies to collect.

This work will be coordinated by DG COMP until the finalisation of the paper (with the support of the French Autorité de la concurrence, as Co-Chair).

Project 3. - The use of urgency enforcement tools in the context of abuse of dominance proceedings.

The UCWG will focus its attention on urgency enforcement tools, including interim measures that may be used by competition agencies in the context of abuse of dominance proceedings. Such tools aim at ensuring, in a relatively short timeframe and where certain conditions are fulfilled, that effective competition is maintained and damage is averted, while proceedings on the merits are on-going. Many jurisdictions worldwide have the power to implement these types of tools and have acquired significant experience in this respect, in every sector of the economy. The use of such tools in the context of the digital economy has also recently drawn the attention of the competition community. Within the ICN, this key topic has so far only been discussed to a limited extent, for instance in the context of the UCWG plenaries of the 2020 and 2021 annual conferences¹. A BOS was dedicated to this issue during the 2022 annual conference in Berlin².

In the wake of the BOS organized in Berlin, the UCWG will circulate a questionnaire to the ICN UCWG member agencies and NGAs with the purpose of gathering information on national/regional legal frameworks and identifying the benefits, challenges and risks of such tools. On the basis of the responses received, the ultimate goal would be to prepare a practical document (for example in the form of a toolkit or

¹ In addition, the ICN framework on Competition Agency Procedures (CAP) of certain jurisdictions also mentions urgency enforcement tools such as interim measures.

² In 2020 the OECD has incidentally discussed relevant aspects to interim measures in the Roundtables on “Abuse of dominance in digital markets”, and “The role of competition policy in promoting economic recovery”. In June 2022, Working Party No.3 (WP3) will hold a Roundtable on “Interim Measures in Antitrust Investigations”.

recommended practices) aimed at guiding competition agencies that already benefit from these tools, and possibly informing those who might wish to add this tool to their competition law framework.

This project will be coordinated by the French Autorité de la concurrence and implemented during the 2022-2023 ICN year, with the possibility of finalising the work in the following year, if necessary.

Project 4. - Webinars

The Working Group will hold at least two webinars on issues of mutual interest that arise in analysing unilateral conduct. The discussions will aim to increase understanding of differences in standards and enforcement tools in relation to unilateral conduct and their advantages and drawbacks, and to promote implementation of UCWG work products. Webinar topics are to be discussed with the Working Group.

Topics to be addressed in 2022-2023 shall include the ones listed below, subject to further suggestions that may be made in the course of the 2022/2023 ICN year by UCWG members:

- “Abuse of dominance in the Pharmaceutical sector”. The sanitary crisis prompted many agencies to include this sector as an enforcement priority in their strategic plans. Following prior webinars on abuse of dominance in regulated sectors (April 2022) and excessive pricing in the pharmaceutical sector (January 2021), and given the abuse of dominance in the production and commercialisation of drugs detected in several jurisdictions in last years, the Working Group will organize this webinar covering any type of abuse in the Pharmaceutical sector, but focussing on exclusionary conducts.

This webinar will be organized by the Spanish CNMC.

- “Cooperation between competition authorities on unilateral conduct: policy and cases”. In line with the work of the ICN Special Project Group on International Enforcement Cooperation, this webinar will allow for a take stock of cooperation issues between competition authorities in the context of unilateral conduct.

This webinar will be organized by the French Autorité de la concurrence.

- “The use of urgency enforcement tools in the context of abuse of dominance proceedings”. A webinar might be organised during the 2022/2023 ICN year either to introduce Project 3 described above and lead by the French Autorité de la concurrence (before circulating the dedicated questionnaire), or later on

in the process to encourage UCWG members, including NGAs, to actively participate in the Project by submitting contributions.

October / November	Preparation for the Webinar on Pharma
December / January 2023	Webinar on Pharma
Spring 2023	Webinar on Cooperation

Project 5. - Implementation

The Working Group will promote implementation of its work-products, particularly the Recommended Practices on Dominance and will utilise the webinar series as the main forum.

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

Project 6. - Workshop

It is planned that the UCWG Workshop will be hosted by the JFTC in March 2023. It will take place in Tokyo, Japan.

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

- **PAST ACTIVITIES ON PROJECTS**

Dominance in Digital Era

Following the publication of the “Report on the Results of the ICN Survey on Dominance/Substantial Market Power in Digital Markets” in July 2020 and dedicated webinars on market shares and on barriers to entry and expansion, in April/May 2021, the UCWG formed drafting teams with volunteering experts from the UCWG’s wide network of agencies, to establish a draft paper focusing on the two key topics. The draft paper was consulted with all the UCWG’s member agencies and NGAs twice during 2021, where first comments were collected.

Analysis of Theories of Harm and Design of Remedies Concerning Unilateral Conduct with Dominance/Substantial Market Power in Digital Markets

The UCWG extended its multi-year project on “Dominance in the Digital Era” to explore the main issues and challenges connected with analysis of theories of harm and design of remedies concerning unilateral conduct with dominance/substantial market power in digital markets.

The UCWG circulated a questionnaire for a survey on the above mentioned topics to the ICN member agencies and NGAs in November 2021. The survey aims to identify challenges that the ICN member agencies face when analysing theories of harm and designing remedies in actual unilateral conduct cases in digital markets and to know how the agencies are dealing with such challenges. After receiving responses from the UCWG member agencies and NGAs in February 2022, the UCWG started drafting the report of the survey.

2022 Unilateral Conduct Workshop

CCI of India hosted the ninth ICN Unilateral Conduct Workshop in virtual format on 22-23 March 2022. Over 200 delegates participated in the Workshop. The event focused on the following themes: Types of abusive unilateral conduct in digital markets – “traditional” and “novel issues”.

The agenda of the workshop can be found here:

https://www.cci.gov.in/sites/default/files/whats_newdocument/ICN-UCWG-Workshop-2022_1.pdf

Webinars

The UCWG held one webinar on “Abuse of dominant position in regulated sectors and recently liberalized markets”, in April 2022.

Unilateral Conduct Working Group	Remarks /Updates
<p>Dominance in Digital Era</p> <p><i>Following dedicated webinars, a draft paper on market shares and barriers to entry and expansion in digital markets was established, which was already consulted twice with all the UCWG member agencies and NGAs.</i></p>	<p><i>The project continues in the 2022-2023 ICN year, in view of further finalising the paper on market shares and barriers to entry and expansion in digital markets.</i></p>
<p>Analysis of Theories of Harm and Design of Remedies Concerning Unilateral Conduct with Dominance/Substantial Market Power in Digital Markets</p> <p><i>The UCWG circulated a questionnaire for the survey on the topics to the ICN member agencies and NGAs in November 2021.</i></p>	<p><i>The project continues in the 2022-2023 ICN year in view of summarizing results of the conducted survey.</i></p>
<p>Webinar on:</p> <ul style="list-style-type: none"> • Abuse of dominant position in regulated sectors and recently liberalized markets 	<p><i>The webinar drew the attention of the UCWG with over 100 specialists connected. It will be followed in the 2022-2023 ICN year by a webinar specifically devoted to abuses in the Pharmaceutical sector.</i></p>