

# ICN discusses international anti-cartel enforcement

The International Competition Network ("ICN") held its 12<sup>th</sup> Annual Cartel Workshop at Cartagena de Indias, Colombia, from 19 to 21 October 2015.

**The seminar, which was attended by more than 120 participants (including competition authority representatives, "NCA" members of the ICN, Non-Governmental Advisers ("NGAs") nominated by competition authorities, and OECD representatives), addressed recent topics of interest including cooperation between antitrust authorities in sanctioning international cartels and in fostering convergence in the application of competition law.**

## Key issues

- Competition authorities are facilitating informal contacts between their civil servants beyond the standard procedures.
- Competition authorities discuss methods for cross-referencing documents obtained in dawn raids in each jurisdiction.
- Renewed efforts from competition authorities to launch investigations at their own initiative.
- The International Chamber of Commerce proposed introducing a "One-stop shop Marker System" for leniency applications in international cartels.

## Ongoing greater formal and informal cooperation between NCAs

The ICN Workshop sessions were held within a framework of growing information-sharing between competition authorities in pursuing international anti-cartel enforcement, as recommended in the *"Recommendation of the OECD Council concerning International Cooperation on Competition Investigations and Proceedings"* of 16 September 2014.

The exchange of information is at the discretion of each competition authority based on its evaluation of the nature of the matter, the interests at stake and the people involved. The competition authorities are, however, also fully aware that they may only have recourse to cooperate on investigations from other countries if this cooperation is considered essential to quash the unlawful conduct.

It is clear from the Workshop discussions that, leaving aside the matter of the institutionalisation of cooperation, the truly important aspect is the informal contact between civil servants of the various competition authorities including contact beyond the standard procedures. The ICN project, called "Framework for the promotion of the sharing of non confidential information", is especially important in this regard. The idea of this project is that each competition authority should name a coordination officer who is available to interact with colleagues from the other competition authorities and provide any information requested, within any limits set by the home authority.

## Consultation between NCAs regarding investigation methods expertise

Another matter of great interest amongst Workshop participants concerned consultation between NCAs regarding cartel investigation procedures. From these discussions, it became clear that: (i) all authorities now have highly specialised inspection teams to conduct digital searches for evidence of contact between competitors who are implementing cartels;

(ii) the NCAs have perfected sophisticated search means by accessing data stored not only on personal computers, but also on data clouds and, in the jurisdictions where it is feasible, personal devices, and also by accessing the social network profiles of managers of the companies involved in cartels (to search for evidence of meetings, etc.).

From this point of view the Workshop also offered an opportunity for competition authorities to discuss methods for cross-referencing documents obtained in dawn raids in each jurisdiction to enable the use of these documents against international cartel members in different jurisdictions as well.

### Means of fostering convergence in the application of anti-cartel laws

A significant part of the discussion concerned the implementation in practice of leniency provisions in the various jurisdictions.

The discussion concerned, among other things, the degree of efficiency of this instrument in the various national regulatory frameworks, as well as the effects that the broad implementation of leniency provisions is having in some of the more mature jurisdictions with regard to the use of private enforcement and the investigative capabilities of competition authorities. Until now, competition authorities have not been particularly motivated to develop other means of commencing investigations and this undermined the deterrent effect and effectiveness of their actions. Renewed efforts from competition authorities to launch investigations at their own initiative are needed.

With a view to streamlining the process for international cartel participants to file leniency applications, the Workshop participants discussed the proposal advanced by the International Chamber of Commerce to introduce a single marker mechanism. This project involves allowing an applicant to reserve a place, by using a marker<sup>1</sup> for filing a leniency application in a single jurisdiction. This marker would then be effective in all other jurisdictions where the cartel operates without having to request a marker in each jurisdiction. This would greatly reduce the burden upon companies applying for leniency, who could obtain the benefits of the marker in jurisdictions other than where the application was filed.

The ICC proposal was received with great interest from the ICN and OECD and will be formally presented in the coming weeks.

#### Contact



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<sup>1</sup> A marker system is the practice of reserving a place for a leniency applicant for a defined period of time whilst it conducts further internal investigation and attempts to perfect its application for leniency. The leniency applicant's position is reserved for an agreed amount of time in the queue, usually on the condition that it provides further information or evidence within this time period. Therefore, the leniency applicant receives a marker, which provides certainty and clarity for potential leniency applicants and encourages a race to contact the competition agency.

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