



Engaging economists in the ICN: Uniting under a common language

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The enforcement of unilateral conduct law is arguably the most challenging task of antitrust. Nowhere do the controversies run as deep as when determining whether a certain type of unilateral conduct is pro- or anticompetitive. Add to this the differences in legal standards and policy objectives, and achieving international convergence of unilateral conduct policy stands out as a herculean task.

The ICN Unilateral Conduct Working Group (UCWG) has nevertheless made important progress since its formation in 2006, as laid out in last month's CPI ICN column, "Climbing Mount Everest with the ICN Unilateral Conduct Working Group".¹ That column also suggested that by engaging more economists in the UCWG, the working group could help improve agency decision-making and promote convergence in the longer term. In this month's column, I provide an economist's viewpoint on how economists can contribute to, and benefit from, enhanced participation in the ICN in general, and in the UCWG in particular.

How economists can contribute to the ICN

This section uses the UCWG to illustrate how enhanced participation of member and NGA economists at the project level contributes to furthering the principle goals of the network: cooperation and convergence.

In the area of unilateral conduct, as in other areas of competition law enforcement, agencies are increasingly bringing cases that safeguard the competitive process and not cases that protect competitors. The tools for enforcement actions to protect the competitive process are more explicitly grounded in economic theory, using primarily the economics of exclusionary behavior developed by the Chicago and post-Chicago schools. Agency decision-makers, therefore, rely more on economists' input in deciding whether to bring a case than in previous times.

This increased reliance on economics begins at the stage of whether to open an investigation, and continues throughout the entire investigative process. Thus for case handlers to be able to incorporate the findings of economics and develop coherent theories of harm during the investigation, they increasingly seek substantial guidance from economists.

The UCWG, like other ICN working groups, is currently drafting a multi-chapter workbook, which will function as a practical manual for case handlers. Case

¹ Cynthia Lewis Lagdameo, "Climbing Mount Everest with the ICN Unilateral Conduct Working Group", <https://www.competitionpolicyinternational.com/assets/Uploads/ICN-11-27-2012-2.pdf>.

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handlers will stand to benefit greatly if the UCWG workbook clearly describes prevalent economic thinking and details what findings to look for that are consistent with anti-competitive exclusion. To achieve this, economists need to be involved at all stages of producing the workbook.

While nearly all ICN work products can benefit from economists' input, this input is particularly essential in the area of unilateral conduct, since the economics of vertical conduct (to which unilateral conduct normally belongs) are much less intuitive than the economics of horizontal conduct.² For example, tying can, in some circumstances, be a profitable means to an anti-competitive end, but not for the "intuitive" reason that tying diverts sales from the competitors' products to one's own - a fallacy disproved long ago by the Chicago-critique. Instead, anti-competitive tying works through much subtler mechanisms, for example, by being a commitment device. The relevance of these mechanisms however depends entirely on whether specific criteria are satisfied, as set out by economic theory.

In the longer term, greater participation by economists in the creation of ICN work product will likely translate into greater policy convergence. Economists have the advantage of all sharing the same analytical toolbox. So whereas legal standards and policy objectives differ, economists in different jurisdictions can often agree on what tools to use in their analyses. For example, the legal criteria for finding significant market power and dominance differ somewhat across jurisdictions, but economists' understanding of these concepts are more likely to be in agreement, since market power is rather clearly defined in economic theory (i.e. the ability to price profitably above marginal cost). Similarly, while in some jurisdictions the possibility of recoupment is a legal prerequisite for pricing to be predatory, and in others it is not, economists are nevertheless likely to agree that a coherent theory of harm requires a likelihood of higher consumer prices at some point (if higher prices were unlikely, why would the predator incur losses now, and who would be harmed?). What this shows is that the methods used in the economic analysis of unilateral conduct, such as predatory pricing, are likely to be more convergent than the legal analysis of the same conduct.

Economists can also contribute to convergence by participating in the overarching policy discussion. As new research is developed within the field of industrial organization, economists can inform the wider antitrust community of potential enforcement implications. This is especially relevant in the policy debate about

² Whereas horizontal arrangements (such as cartels) allow the combination of substitute goods, which provides incentives to worsen the product-offering, vertical arrangements (such as between a producer and a retail outlet) allow the combination of complement goods, which in fact provides incentives to improve the product-offering.

when effects may be presumed and when they must be established (i.e., the per se approach vs. the effects-based approach). Here, economists can inform decision-makers as to what the current state of economic theory and empirical evidence predicts, and identify the types of conduct where there is enough evidence pointing in one direction to warrant a per se approach.³

Typically, working groups have a handful of agency economists that may participate on calls and the development of work product, but more participation is needed. Another model that would allow economists to make these contributions to policy convergence, in a more structured setting, would be to create a dedicated working group for economists. Such a working group could then provide analytical input to the different ICN working groups.

How economists can benefit from participating in the ICN

The ICN holds great promise for antitrust economists, who tend to speak a more similar language across borders than lawyers, investigators, and case handlers, but who nonetheless have remained more in siloes than the other disciplines. The ICN can provide a cross border platform for economists to engage with one another, both for more experienced and less experienced economists.

For an economist who has just entered the field of unilateral conduct enforcement, for example, finding the right analytical framework for a particular case can be a nearly overwhelming task. The economics of vertical conduct are, as mentioned above, difficult to master in comparison to, for example, the economics of cartels. Without guidance from the relevant research literature, it is almost impossible to develop a coherent theory of harm. And even knowing what constitutes the relevant economic literature, the additional difficulty occurs that for every type of conduct there are a multitude of theoretical models that attempt to explain it – all with different policy implications.

The ICN could contribute by facilitating an exchange between new and more seasoned antitrust economists. Existing working groups or a dedicated economist group could, for example, replicate existing ICN methods to promote cooperation and convergence – such as a workshop for economists (much like the Merger Working Group held in 2012, or the economist panels at UCWG workshops on competitive effects), panel discussions at annual conferences, and/or a webinar

³ See the section Risk of Enforcement Errors, p.13-15, in the Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws, <http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf>.

series dedicated to economic issues. Topics could cover the basics of economic analysis, a more advanced seminar series, case studies, and “hot topics”.

Economists from smaller agencies, or agencies that only recently added economics-capacity to their unilateral conduct enforcement, particularly stand to benefit from such an exchange since they will likely have less experience gained from actual cases.

Case studies can be used both as a teaching tool for less experienced economists, as well as to stimulate a high level discussion of economic models. The exchange of ideas on hot topics – areas where new research results have particular relevance for enforcement, such as new methods established for dealing with two-sided markets, could be particularly beneficial for more experienced antitrust economists.

Through interaction in ICN working groups or tailored workshops or webinars, agency economists will get to know one another, much like their legal and investigative counterparts. This familiarity is likely to lead to enhanced cooperation, both for specific cases as well as for policy issues, as it has in other disciplines.

The ICN has benefitted from private sector participation in all areas of our work product, and while initial efforts should be made to reach out to agency economists, private sector economists also could contribute to discussions and debate.

Road ahead

In conclusion, the benefits from enhanced participation by agency economists accrue to the ICN, to member agencies, and to individual agency economists. By providing practicing antitrust economists with a platform to engage generally and on specific topics, the ICN facilitates the constructive relationships forged across competition agencies for other disciplines. By integrating economists more fully in the network’s activities, the ICN will quicken the pace and depth of convergence by making use of the more unified view of antitrust offered by economics.