



CPI TALKS: INTERNATIONAL COMPETITION NETWORK'S CARTEL WORKING GROUP MADRID, OCTOBER 2016



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AO: Thank you all for coming. We are joined today in CPI Talks by the organizing commissioners for the ICN Cartel Workshop: Marcus Bezzi from Australia's ACCC, Vladimir Kachalin from the Russian Competition Authority, Eduardo Prieto from the Spanish Competition Authority, and María Ortíz from the International Competition Network.

The first question for the readers and viewers who may not be familiar with the ICN's work: What is the purpose of the Cartel Workshop?

Marcus Bezzi: The Cartel Workshop is really an opportunity for agencies to get together and talk about our work, exchange our views and thinking on the issues we're each facing in our daily lives, share ideas about how to overcome problems that we might be facing, and to identify best practices, and talk about how we might achieve those best practices in our own agencies.

I think another thing that is very useful is to have conversations about problems we're not quite managing to overcome, and it's great to be able to share that sort of discussion with people who are doing the same job as yourself - I've found that from my own personal experience.

And I think finally what I would say is that it's great also to have NGA's here, because it gives them an insight into the issues that we're currently discussing and some of the solutions that we as agencies are putting forward. And it helps them to understand us a little bit better, and helps them also to contribute to some of the discussions on solutions and some of the ways of dealing with thing going forward.

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Vladimir Kachalin: I would like to echo Marcus in our country, and complement him to some extent, by saying that generally the ICN Cartel Working group is intended to facilitate discussion of cartel issues among competition authorities. The CWG have had quite a lot of these workshops, I think this one is the thirteenth. So twelve workshops in the past few years. Also, the CWG participates in all ICN conferences, and we have a quite extensive agenda there as well.

So this work is designed to enhance anti-cartel enforcement, and this actually names the workshop, and covers issues of special interests for both competition enforcement agencies and legal and scientific professionals working on competition issues - let me quote a few words from my actual speech here -

In fact, cartels continue to overcharge customers and create dead loss, with different estimates of this surcharge: so the OECD claims that this extra charge rises to roughly 15% to 17%, while some academic scholars, quite reputable academics like Connor & Lande, estimated from 31% to 49% - and there is an observable difference in the estimates. In fact, we do not have complete understanding of the cartelization problem, even at a superficial level where we can observe the cartel's activities from outside the cartel. And even these estimates show a lot of difference, so we don't know exactly what kind of problems they create. And given the disclosure rate of the cartels, which is not so high if I put it cautiously, we do not know so much about the inner strategy of cartels. What it really is that people take to create cartels; how cartels are disciplined; what are the kinds of punishment for cheating in the cartels. We have some insight on that, but more comprehensive knowledge is definitely lacking on that. And filling these gaps is one of the purposes of these workshops... It helps to understand how the existing methods of cartel deterrence can be improved and what new techniques and methods in anti-cartel enforcement can be introduced.

The selection of topics for the workshop was prompted by requests from both antitrust authorities and private practitioners to the themes covered within the anti-cartel workshop. These themes are related to the so-called ICN Second Debate Feedback, which was taken into account when designing this workshop agenda. The agenda includes the most acute and burning issues of anti-cartel enforcement, both private and public such as Investigation Strategies and Techniques; Leniency and Triggering Leniency Applications; Detection Tools for fighting bid-riggings; cartel leads and evidence gathering and use of indirect evidence. Substantial attention will be given to the combination of public and private enforcement, and this will include issues such as settlement, damage recoupment using a kind of class-action or similar mechanisms that would help to recoup damages for a big number of victims of cartelizations, for instance, people at a grocery store.

Some technical features, like building investigator units, procedural fairness & due process, relationship between agencies and prosecutors and the whole array of deterrence issues, like deterrence itself, remedies, sanctions, damage redress, fines calculations and compliance. Additionally to that - issues related to cartels and corruption and criminalization of cartels in the ministry system will be addressed as well.



You mention many things that the workshop will cover, but What is the 'hottest' topic right now, either for agencies or for companies?

Eduardo Prieto: I guess each of us has its own perspective. You should take into account that as agencies our work is focused on our territories, and therefore while we share many of the problems of cartel fight like investigations, detection or sanctioning, there are others that depend on the jurisdiction you are in.

For example- there is a difference between the EU jurisdiction where we have a network of NCAs able, for example, to share information about cases, or to coordinate at early stages vis-a-vis other jurisdictions (like Australia or Mexico for example) where difficult extra-territorial issues have to be faced in the context of leniency applications, for example. We are not so much concerned about that, because if we have a problem with a cartel that is operating in Portugal and France we have legal instruments to solve it internally. So from a National perspective, in the case of Spain we are very much focused on most of the topics that have been dealt with here, like cartel detection, dawn raids, leniency programs, how to set fines, and so on. These are the current questions raise by an administrative system.

From that point of view, one of the features of this cartel workshop, of which we are especially proud of, is that many of the problems that we have in the Spanish administrative system are also faced in other jurisdictions with similar legal background, namely Latin American. In the case of Ibero-american jurisdictions we share similar legal traditions and this brings about problems which are common to all of us when dealing with cartel proceedings. So having this in mind, we thought it will be useful to share experiences and learn from each other, taken advantage of our legal similarities. That is why we decided to set up two BOS in Spanish, one on dawn raids and its procedural challenges and the other on fine setting: criteria for calculation.

MB: Can I add, that one of the things that I think is a great tradition within our sub-group, is that we try to rotate the workshop around the big geographic areas of the world, so we have it in Asia, then we have it in the Americas, then we have it in Europe or Africa. And that really is to recognize the fact that, if it's in Europe, then there are a lot more European agencies that can come - Actually, ironically we've got a lot more Latin American agencies in Madrid than we did last year, when it was in Colombia. I am not sure why, I've asked some people why and I've heard various theories. But in Colombia we also had quite a few Africans and Asians there. The previous workshop was in Taiwan, and we had a lot Asian people there, but we also had a lot of Africans, and the Africans had come because the previous workshop had been in Cape Town and a lot of them had experienced the benefits of the workshop, and then decided to go to Taipei, even though it's a long way particularly from southern Africa to Taipei.

So it's a really good feature of the workshop that we move it around and allow regional agencies to have more of the focus one year, then the next year there will be a different regional focus. Next year for example we have the workshop in Ottawa in Canada. Hopefully there'll be more of an opportunity for American agencies, Latin American and North American



agencies to get together. Though we also expect that many agencies in Asia, Africa or Europe who have experienced the benefits of the workshop will come again to the next workshop in Ottawa.

VK: Maybe coming back to your question on the Hot Topics.

The Investigation cycle for cartel cases includes the following major stages - There's detection, proof and deterrence - and all of them are in fact Hot.

MB: Just on the detection side - Leniency has been an incredibly powerful tool. Now, it doesn't work very well in some jurisdictions, so it's always a hot topic as to what agencies need to do to change their leniency policies to make them work well. It is always a hot issue for agencies.

The other Hot Issue is what do you do when you don't have leniency. How do you find out about cartels? That's been an issue of interest to many agencies for a long time and you'll see it referenced in the program in a number of ways.

I think the other big topic frankly is Digital Evidence Gathering. People are all talking about DGE and the challenges of DGE... and also the advantages of it as well. My view is that there are significant advantages for agencies, massive amounts of data that you can get a hold of and analyse. Obviously there are challenges as well, but this continues to be a very Hot Topic

The ICN in general is the perfect place to share experiences about techniques, how different agencies do different things. But when it comes to specific cases, is it also the right place? Do you discuss specific examples in your jurisdiction to guide other agencies, or does the collaboration only go so far?

VK: I would say that this is a good place not for discussing specific Cases, because it's quite sensitive, but it's the perfect place for discussing specific techniques and specific issues of anti-cartel enforcement.

Generally, discussion of specific cases is something hard to do because of national confidentiality legislations. So if you have a pending case and you obtained the information from a company, whether voluntary or compulsory, this information is protected by the national confidentiality legislation and you cannot disclose it to anyone, including a foreign competition authority, with quite limited exceptions of some national treaties, like the one between Australia and New Zealand (Marcus can elaborate a little bit more on that) or the European Competition Network. Generally competition agencies are in such a position that they cannot exchange information related to particular cases. However, they can exchange here their approaches, their estimates of probabilities of cartelization in particular markets, and given this, the ICN Cartel Working Group has undertaken a project that is currently being led by the Japan Fair Trade Commission called the Framework for Information Exchange, and in fact it's quite easy but very effective tool to help contact persons in competition agencies of all the world, to link together via the contact details provided within the framework and actually it's kind of a database. So they can exchange opinions on cartelization issues both within their



regions and globally. And this is a very helpful thing I think.

MB: It is, I agree, although I take a slightly different view. I know there are some agencies that are taking advantage of the workshop to have some discussions on specific cases that they're working on - not in the sessions, but in the sidelines - and this is also a very significant advantage for us.

In the end, for many it concerns the same problems and with the same actors...

MB: Sometimes with the same cases - they are parallel investigations. So there are some discussions happening in the sidelines about what's going on in those cases. And what Vladimir says is absolutely right, about the limits on sharing confidential information obtained from parties, but it is possible for agencies to share their own confidential information without limitation. And all of the other things you mentioned, Vladimir, that you can share, are incredibly useful to share and can be very productive. Actually at the ACCC we always take up the opportunity to meet with other agencies working on the same cases we're working on when we come to these workshops. Now, not every agency does that but I know we do, and it's another advantage of the workshop, those in-person meetings.

VK: Just going back to the call you made during the opening session that people should Network, and that helps bring a lot together. And after having met each other at the workshop, especially after having met at several workshops, they do familiarize with each other.

MB: And this is a very practical thing. If you've got to know someone from another agency and all of a sudden you have some issue - I had this six weeks ago, where we wanted to get some evidence that was in another jurisdiction and there was no formal method we could use to get the evidence. So we made a phone call to people who we'd got to know through the workshops to the other jurisdiction, we talked through the various possibilities, they gave us an idea we hadn't thought of, we used that idea and we've now got the evidence that we needed. Now, that agency was confident that nothing was done that was inconsistent with the law or the spirit of the law in their jurisdiction, but we got the evidence we needed from their jurisdiction to pursue our investigation. And it's from these personal connections, that would otherwise have made it very difficult to do that transaction.

VK: This is actually the merit of the ICN in general, because it is an informal organization of very formal persons and very formal institutions. So when the diplomatic channels and agency-to-agency channels are not sufficient people can just call - to the extent feasible under their national confidentiality law.

MB: We are of course very conscious of the limits on us in terms of what we can disclose, the confidential information that we can disclose, but there's an awful lot that you can disclose without coming anywhere near those limits actually.



VK: And actually both sides, both the requested and the requesting side are aware of those confidentiality limits, so the requesting side generally would not ask the questions that would put the requested site in this kind of awkward situation.

One topic becoming very popular in some jurisdictions - Criminal sanctions. Many jurisdictions and agencies are adopting this measure. My question is: Is this new sanction tool something that agencies are actually planning to enforce, or simply the mere fact of having this in the law is enough of a deterrent to bring more leniency applicants? Is this for real, or is it more for effect?

María Ortíz: First of all, the Spanish Competition Authority is very happy and proud of hosting the ICN meetings. It's a great opportunity to meet the ICN people here in Madrid as the meeting point and to fully participate in this workshop. I'm sure this is good for the enforcement of competition law, but also for markets and citizens.

Concerning your question on criminal sanctions, it will depend on the jurisdiction you are considering. At the moment, there are different systems, either criminal or administrative or a combination of both. Nevertheless, I think there is a broad opinion in the ICN that in any system there have to be tools to make individuals to internalize the risk of anticompetitive behavior. In some jurisdictions there are criminal sanctions for that, in others like the Spanish jurisdiction for instance, we have administrative sanctions for individuals to make individuals take into account the risk of antitrust; so there are different ways for the same objective. In Spain since 1989 our competition law envisages administrative sanctions (fines) to individuals, but it was used in very few occasions in the past. Just one year ago our Supreme Court has called the attention on this tool to reinforce deterrence. So, I think that even if a jurisdiction doesn't have criminal sanctions, there are other tools with which you can attain similar objectives. And there are also other deterrence tools like, for instance, the disqualification of firms to participate in public tenders which can have an important negative effect on the results of the company. Anyway, so considering that we have in hand different tools this ICN workshop is a good opportunity to exchange what the different jurisdictions are doing at the moment and explore how we, within the framework of our own jurisdictions, can improve our sanctioning systems to deter antitrust infringements, which in the end I think is the key objective of any antitrust agency- Deterrence.

MB: Deterrence is the one goal and overriding goal of everything we do. Just specifically from an Australian point of view this is something that's very relevant to us, because we introduced criminal sanctions in 2009 and we had our first case this year. We have been very conscious of the need to be able to demonstrate that we are serious and it's not just something that's on the statute books.

We have put a lot of resources into investigating cases to a criminal standard, and we're very proud in the first case that's been begun by our prosecutor, that the defendant has pleaded guilty, because that demonstrates that we've developed the capacity to conduct an investigation to the very high standards that apply to criminal prosecutions. We've got a pipeline of cases -around a dozen cases- that we hope will be following on from this first one. Now, criminal investigations can take a long time in Australia, I think they take a long time in



many other jurisdictions as well. But we're confident that we'll have a number of cases each year going forward, and we think that's really important. Unless you have cases and the regulated community can see that there are cases being run, then criminal sanctions will not be an effective deterrent.

VK: VK: I can only echo Marcus on that, and I think that the major reason for criminalization is to improve deterrence. However, while getting engaged in all of that, we need to find a proper balance between deterrence of cartels and individual rights. And to ensure the proper balance indeed, the standard of proof should be very high, because eventually a person may go to jail for cartelization, and he is an individual, a citizen of the country, and his individual and human rights are protected by law. So there should be a very strong argument to always keep this protection.

So, in general I would agree that criminalization is something that we should be very cautious about. And as far as the Russian perspective is concerned: well, we do have criminal penalties for people directly involved in the organization of cartels, and moreover to people who urge other members to enter the cartel. So if this is proven a person may either go to jail or at least get a criminal record, even if he is released by a judge from serving a real term of sentence, he'll have a criminal record.

On the other hand, we have a provision in the Russian competition law, the one on coordinated or concerted activities that are a little bit easier to prove than a cartel. It's something that can be proven on behavioral analysis, economic analysis, and so on, and the sanction for it is less than the sanction for cartelizations. So the agency has already introduced some warning or some fine, but if it has sufficient deterrent effect - so it's a kind of Cease and Desist order, but quite a mild one. So then, we would not proceed to a real cartel investigation if they really withdraw from the cartel and compete fairly, and if we have significant and sufficient proof that they have begun to behave properly. But if not we'll proceed to the serious investigation, and if a person is proven guilty he'll receive a sentence or at least a criminal record, because we have a criminal law that applies to it.

EP: I just wanted to make something clear; as Marcus says the important thing is Deterrence. We are not talking about criminal law. We are applying now sanctions to individuals, but it's not a criminal issue, it's an administrative sanction. So the issue is fines on Individuals in addition to fines to Companies, not Criminal vs. Administrative.

It seems like individuals are being more and more pressured by the criminal than the administrative label.

EP: That's the point. The deterrence effect is much higher if you send somebody to jail, but also the possibility of sending somebody to jail is also much more difficult than imposing an administrative sanction. In our case our sanctions are very low actually. We have a maximum of 60,000 euros, and that is not a problem for company managers in most cases. So the thing is not the amount of the fine, but being involved in a proceeding, receiving, as Individual, a statement of objections and having a personal problem because you've been caught in a cartel case - either as collaborator, leader, inductor, or whatever. That makes executives and



managers much more concerned about what they are doing, and when they see in the newspaper that somebody has been fined 30,000 euros - which is quite a low fine -, they may start to think twice about the consequences of their actions as individuals.

VK: In my country we also have such punishment for managers recognized as guilty in cartelization as disqualification - they are disqualified from taking managerial positions and business-forming for five years or so, so this is usually the end of their professional career - they have to go out and serve as a street cleaner.

MB: We find that often people we investigate are also very worried about disqualification. We can impose quite large fines, either criminally or civilly, but they can be more concerned about disqualification. I was involved in a meeting with an individual earlier this year who was much happier to pay a larger fine than to be disqualified from managing a business.

I think the point is, as agencies we need a range of tools to provide effective deterrence.

I was going to ask if there is a particular message to corporations, but I guess the message is to individuals.

Marcus: Well, corporations act through individuals.

What do you expect from this workshop, and what would you like to take home?

EP: We are very happy to host it. We want to contribute to the ICN because we think that these international workshops are of tremendous value to all of us as agencies. It serves as a forum to exchange, to learn, and to show others what you have learned and I think this is something very useful. Every sector has its annual conferences - car makers, doctors, etc.- to share their knowledge and to know each other. So from the Spanish perspective, we want to show the international community that we are very much committed to fight against cartels. For the last ten years we have been working very hard in this area and we would like the next ten years to be as successful as the last ones. For that we need to be in touch with other agencies in order to have the state of the art instruments and knowledge to be able to do it. Besides, we are recipients of that knowledge and we want to give it back to others too.

MB: I have two very concrete goals. First, to be able to identify two or three practical improvements I can take back to my agency. If I can do that, from my point of view this workshop will be a success. And the other thing I would like to do is to get to know a larger network of colleagues. That is why I issued the challenge during my opening statement for everyone to meet at least seven new people that they don't know. For me that's very important: building that network of competition enforcers who are focused on cartels. That's very important. The intangible benefits of that become tangible and concrete quite quickly in my experience.

VK: My goal is very similar to that of Marcus' from my agency's perspective: I just want to see



how much in line what we are doing is with what other people are doing worldwide, and this intangible asset and exchange of techniques is very important. We are learning a lot from these events, and moreover we also have a strong capacity for cartel disclosure in Russia and we have several international cases so I can elaborate more if time permits.

But from the CWG perspective, I would say that we assign the agenda of this workshop based on the requests from the CWG membership, as well as topics indicated by officials and government advisors in the ICN segment. So this workshop was designed based on the bottom-to-top principle, not top-to-bottom.

MB: That's another feature of the workshop that we're very proud of. We always get feedback at the end of each workshop about how it might be improved and that is always incorporated, together with the other sources of feedback from members, into the development of the program. So to the extent that you can look at the program and ask yourself 'what are the key issues'? - That program reflects the key issues. It reflects the collective thinking of the agencies within the subgroup.

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