



# Designing The ICN

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The May issue of this publication carried an article entitled “(Nearly) a century of ICN.”<sup>2</sup> On the issue of design, the authors state:

*Through both foresight and necessity, ICN was founded as a virtual, specialized network based on inclusiveness and consensus. It was conceived as the only international forum dedicated exclusively to competition policy and law. With membership open to all competition agencies – not only those of like mind and experience – working hand-in-hand with non-governmental advisors, private sector experts, interested academics and experts from multilateral organizations engaged in the field, the ICN has proved unique in its capacity to engage all relevant actors on all issues of competition law and policy. Moreover, its novel, virtual nature has prompted ICN members and project participants to engage more directly and frequently with one another in comparison to other international fora that rely on permanent secretariats and established infrastructures.<sup>17</sup> The network’s virtual nature also has allowed ICN to adjust its organization flexibly around projects of interest to its participants, over time. Finally, though it lacks rule making functions, the ICN’s consensus-based, soft-law approach to developing understanding and convergence has, in fact, complemented and enhanced these attributes to prove one of its strongest features. There is an inextricable link between the ICN’s non-binding nature and the scope, content, and value of its work. To achieve consensus, ICN actors engage with one another to understand similarities and differences in approaches in an effort to build common understanding as to the best approaches to competition policy and enforcement issues.<sup>18</sup> This process helps to promote dialog and the exchange of experience and learning among all ICN participants. Thus, even before identifying certain approaches as best practice, the consensus process serves to disseminate know-how and experience, providing valuable learning and support to newer agencies.*

*As described by former ICN Chair David Lewis, at its foundation, the ICN’s soft-law approach is founded on persuasion through shared experience rather than coercion.<sup>19</sup> ICN members are free to use and implement its work product within their own legal contexts as they see fit. The lack of binding implementation obligations has a beneficial byproduct in terms of work product development. Discussions can focus on the identification of optimal practices without defensiveness from participating members about their non-compliance. Without the threat of binding rule-making authority, members have been open to and accepting of aspirational, forward-looking best practice approaches that may not reflect their own practices.*

These observations made me cast my mind back to the beginnings of the ICN in 2001. At that time, I was Commissioner of Competition for Canada and very involved in the design and set up of the ICN and eventually became chair of the Steering Group of the ICN for its first two years. I thought it might be interesting to share some of my recollections regarding its creation.

## **How the ICN Was Created**

As I recall, competition was the flavor of the day. Many countries established competition regimes for the first time. The World Bank fostered these efforts by making the establishment of a competition regime a condition for obtaining World Bank credit. There was a strong movement to bring competition and investment into the WTO but that exercise failed with the Seattle summit. There were also major divergences of opinion in the analysis between the U.S. and the EU on

multinational mergers such as the McDonnell Douglas and Boeing merger. All this led to the establishment by the U.S. Department of Justice of the International Competition Policy Advisory Committee that recommended:

United States explore the scope for collaborations among interested governments and international organizations to create a new venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The Advisory Committee calls this the "Global Competition Initiative.

It explained its rationale simply as:

The logic behind this Advisory Committee's idea for a competition initiative stems in part from a recognition that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law.

This idea was discussed at a meeting at Ditchley Park, organized by the IBA. Leading competition experts from both the public and private sectors explored the feasibility of such an undertaking and collectively felt the time was ripe for such an initiative. At the 10<sup>th</sup> anniversary of EU merger review in Brussels, the EU and U.S. FTC and DOJ agreed to launch efforts to create such a new organization with the informal blessing of all major competition agencies who were attending the event. Ultimately the result was the creation of the ICN by top antitrust officials from 14 jurisdictions – Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia.

A steering group of agencies endorsing the concept was set up and, since Canada enthusiastically endorsed the idea, the Canadian Agency became the *de facto* secretariat and held the pen. I became interim Chair of the Steering Group.

Many persons were involved in the creation of the ICN. The leading drivers that I recall were Alex Schaub and Mario Monti from the EU, Tim Muris, Bill Kovacic, and Charles James from the U.S., Allan Fels from Australia, Ulf Boege from Germany, Fernando Sanchez Ugarte from Mexico, and Giuseppe Tesouro from Italy. Non-agency persons playing a major role were Jim Rill, Merit Janow, Cal Goldman and Bill Rowley. Jim Rill also created a consultation group of his own with members from around the globe who provided thoughtful input and reviewed early drafts.

### **The ICN's Design and Operation: Finding the Balance**

Over a year was spent on the design of the ICN. The principal goal was to avoid the obstacles or difficulties encountered in other international bodies.

By and large the Steering Group followed the advice of ICPAC. The ICN would be an informal group of experts from both the public and private sectors. It would require no government funding or ratification. It would advise and try to persuade, but not direct nor demand.

To settle on a name, it was decided that Global Competition Initiative sounded too much like a government driven program, Global Competition Forum was chosen. We also wanted to highlight that it was the coming together of many minds, not just a forum to present views. So eventually it became the International Competition Network.

As a model for the constituting document, we used the Memorandum of Understanding of the International Marketing Supervision Network (known since as the International Consumer Protection and Enforcement Network). However, we greatly changed the role of non-government

advisors. It was decided that non-government advisors should have the same role as agencies in the elaboration of work products of the ICN. They would be welcomed and were needed given the all-encompassing nature of competition. This was a marked deviation from other bodies, like the OECD for instance, where the business advisory group makes presentations but has no say in the conceptualization and drafting of recommendations.

Given the experience with the OECD, UNCTAD, and WTO, we specifically decided there would be no secretariat which inevitably drives the agenda and produces the main work product. Rather, the work product would be produced by working groups led by a specific agency but containing agency personnel and non-governmental advisors from around the world working virtually together to produce agreed upon best practices. By necessity there needed to be a coordination point and by default Canada's Competition Bureau assumed that role, but merely in terms of logistics and conveyance of communication. This informal secretariat had no say in the creation of the work product.

To emphasize the non-binding nature of the ICN we called the work product 'best practices', not recommendations. Whether they are followed or not depends on their persuasive logic and the given requirements of a country. But they are in effect the gold standard. Leading experts both private and public advise that this is the best practice. Any government that legislates on competition and deviates from such best practice must thus be prepared to justify and explain its rationale. On the other hand, any enactment of such practices can be defended by pointing out that it reflects the views of the best minds on competition world-wide.

As a central collection point for the coming together of all the experts and approval of best practices, annual meetings are held by one of the competition agencies. The cost of attending is borne by attendees, the cost of staging the event by the host agency. To make such meetings manageable each agency was assigned a number of personnel they could bring to the meeting as well as the number of non-government advisors. Thus, the numbers would be limited while assuring that those who had most to contribute and who participated most actively in the working groups could attend.

A key point for annual conferences was the fact that attending agency personnel would vote on any issue as experts, not as country representatives. This was not stated but became clear at the first annual conference in Naples, where merger review best practices ("recommended practices" in ICN parlance) were up for approval. One delegate objected because the best practices (with which he agreed) were not reflected in his domestic law. When assured publicly that his view was sought as an expert not as a government representative, he visibly relaxed and voted in favor. This public exchange did not go unnoticed and many delegates were visibly relieved. It also made agreement on best practices much easier and prevented a single agency from holding up proceedings or having endless drafting sessions to attempt to achieve consensus. It also allowed the ICN to produce work products from three groups in one year and have them approved at the Naples Conference, which was close to lightning speed compared to other international organizations.

We also worried greatly about the composition of the Steering Group and how we could ensure that the agencies with the greatest expertise and most to contribute would remain in charge. While we ensured that agencies from all countries would be represented in all stages of development, we wanted to avoid situations like UNCTAD where the group of 77 played an inordinate role. The solution we came upon was that the Steering Group each year would set up its slate for the next year. It would try to assure sufficient changeover and regional and developmental variety, but also that core competencies and contributions would be recognized. In effect, the Steering Group would each year replicate itself with some but not wholesale changes. Obviously, agencies could ask to be on the Steering Group and host agencies for the annual conference would automatically be on it, but ultimately the existing Steering Group would decide.

## Conclusions

I am delighted to see how the ICN has grown and expanded and has become the preeminent body in competition policy. Most of this is due to the incredible foresight ICPAC displayed when it suggested the creation of a Global Competition Initiative. Much, however, is also due to the careful design of the organization and careful avoidance of the organizational features of other bodies that hamper their effectiveness.

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<sup>2</sup> M. Coppola, E. Kraus, C. Lewis Lagdameo, P. O'Brien & R. Tritell, "(Nearly) A Century with the ICN," Competition Policy International, May 12, 2020, available at <https://www.competitionpolicyinternational.com/nearly-a-century-with-the-icn/>.