

Handbook of Transnational Governance

Institutions and Innovations

Edited by
Thomas Hale and David Held

polity

9

International Competition Network*Marie-Laure Djelic*

The International Competition Network (ICN) was officially set up in October 2001. The founding members were thirteen national anti-trust agencies and the European Union competition agency.¹ Membership was open from the beginning to all national, regional or multinational antitrust agencies and, in fact, the numbers rose fast. By the spring of 2002, there were already fifty members. Today, the ICN is close to having a global reach – ninety-six jurisdictions are represented that together account for more than 90 per cent of world Gross Domestic Product (GDP) (ICN 2009). From its early days, the ICN defined and positioned itself as a transnational ‘community of interest’ structured around issues of competition and antitrust. The founding document indicated that the ‘ICN w[ould] provide antitrust agencies from developed and developing countries a stronger and broader network for addressing practical competition enforcement and policy issues’ (ICN 2002).² As years have passed, it has become clear that the ICN is much more than an informal club of like-minded organizations and individuals sharing problems, information and solutions. The ICN is not only a platform for discussion around topics of common interest. It is also a ‘self-disciplining’ transnational community (Djelic and Quack 2003). Through time, the ICN has become an influential transnational governance forum (Djelic and Sahlin-Andersson 2006). As such, it produces collective rules and standards, monitors their diffusion and implementation and helps members as they familiarize themselves with those rules. The objective of the ICN, ultimately, is to reach ‘procedural and substantive convergence at the global level’ (ICN 2002).

¹The thirteen countries were Australia, Canada, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States and Zambia.

²Unless otherwise indicated, factual information on the ICN comes from the ICN website.

The ICN – A Fluid Network with Broad Reach

The ICN is a 'project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries' (ICN 2002). The focus of the ICN is competition – 'all competition all the time' (von Finckenstein 2003). As a network, the ICN has three main characteristics – it is virtual, inclusive and open.

The ICN is a virtual network – with no offices, legal status, employees or even budget. Members pay for themselves and cover the costs of their involvement with the ICN – for example, participation in yearly conferences or in working groups. The ICN does not have a geographic hub or a permanent secretariat. A Steering Group sets agendas and work plans, identifying priorities that then have to be approved by ICN members during the yearly conference. The Steering Group consists of fifteen members (recommended by former Steering Group members and confirmed by the membership at the conference) to which are added the representatives of the country organizing the annual conference. The agency chairing the Steering Group takes on, for a year, on a rotating basis, secretarial tasks and bears the costs associated with them. At the beginning, members of the Steering Group were representatives from those countries 'that [we]re committed to going forward with the mission of the ICN' (ICN 2002). All in all, in fact, the Steering Group has been and remains dominated by representatives from the more established antitrust agencies – with an overwhelming weight for developed countries.³ The work itself is done within ad hoc and temporary working groups that each focus on particular issues and meet rarely, instead relying on modern technology. Initially, three main working groups were set up. The Merger Review working group, coordinated by the US, was supposed to address the challenges of merger review in a multi-jurisdictional context. The Advocacy working group, coordinated by Mexico, was in charge of identifying the means to champion and advocate antitrust and competition, particularly in developing countries. The Capacity Building and Competition Policy Implementation working group, co-chaired by the EU and South Africa, was working on the rationalization and systematization of technical assistance to help countries stabilize, entrench and implement competition regimes. Today, the first two working groups are still active; the Merger group is still

³In 2008, the list of countries represented in the Steering Group was quite telling and not very different from the list of founding members: US (two representatives), UK, Mexico, Japan, Canada, Russia, Brazil, Australia, Korea, Germany, Turkey, the Netherlands, France, EU, South Africa, Italy, Switzerland.

chaired by the US and the Advocacy group is co-chaired by the UK and Russia. The third initial working group was wound down and essentially replaced, in 2009, by the Agency Effectiveness working group (co-chaired by Brazil and Turkey). Two more working groups have been added since 2002 – Cartel (co-chaired by the EU and Hungary) and Unilateral Conduct (co-chaired by the US and Germany). Here again, the weight of large and developed countries is unmistakable.

The ICN is an inclusive network, based on voluntary membership. Any national or multinational competition authority can easily become a member without having to fit any particular criteria. The website shows very clearly that there is no barrier to membership for national, regional or multinational agencies that are involved in competition policy in the broad sense of the term. The speed at which membership has increased is another sign of this ease. The ICN has gone from 14 founding members in 2001 to 107 members (competition agencies) from 96 jurisdictions in 2009 (ICN 2009).

The ICN, finally, is an open network. While membership in the full sense of the term is restricted to competition agencies, the ICN keeps a number of doors open to other parties interested in or connected to issues of competition and antitrust. In principle, the ICN wants to ‘maximize cooperation with non-governmental antitrust experts from the relevant international, industry, consumer, legal, economic and academic communities’ (Ugarte 2002). In practice, this means that member agencies and in particular members of the Steering Group can invite nongovernmental experts to the annual ICN conferences. Working group members can also call upon some of those experts to help them in their tasks. The list of nongovernmental advisors that were invited to the First Conference in Naples, in 2002, is telling. Out of forty-eight experts, five were from international fora (e.g. the United Nations Conference on Trade and Development (UNCTAD), Organisation for Economic Co-operation and Development (OECD), World Bank, World Trade Organization (WTO)). Only two could be said to represent a ‘consumer’ constituency. There were three representatives of industry and nine from the academic community. All the rest were private lawyers and, more precisely, partners from large Anglo-Saxon law firms. The overrepresentation of large Anglo-Saxon law firms unmistakably creates a bias in the ‘openness’ of the network, and it certainly is not without consequences for the ICN’s development.

The ICN – From a Network Intent on Spreading a Culture ...

At its creation, the ICN was an initiative to foster dialogue amongst antitrust officials and beyond, with a view to bringing about common

understandings and a common culture. The ICN was a looser alternative, championed by American agencies, to a European initiative within the WTO that had been calling for a strict and binding transnational competition frame (Djelic 2005). The objective behind the ICN had been to create, deepen and spread, worldwide, a 'culture' of antitrust and competition – which, as key actors recognized, was part of a 'broader mosaic' and came together with a culture of 'markets' (Kolasky 2002: 3–5). A forum for dialogue, exchange and collaborative work would generate a common culture around competition policy. It would also build up in time a dense social space and, hopefully, a real 'community of interest' (Von Finckenstein 2002).

The idea behind the ICN was to create an inclusive and tight network of insiders and to combine and articulate it with a number of weaker external networks reaching out to important constituencies within society. Such a combination would be likely to increase the scale and scope of the double effort at transnational culture-building and transnational culture-spreading. That one of the three original working groups focused on 'advocacy' says enough about the centrality of that double project. The Advocacy working group defined its mission in the following way: 'Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition' (AWG 2002).

The Advocacy working group (AWG) began with a systematic comparison of the situation of member agencies and with an exploration of their embeddedness in unique national institutional contexts. The AWG sent a questionnaire to each ICN member to build up the empirical base for such a comparison and exploration. The first report it presented, during the 2002 Naples conference, underscored different perceptions of the importance of advocacy in each member agency as well as variation in the types of obstacles and challenges that member agencies face in their competition advocacy activities. As a consequence of this analysis, the AWG gave itself the mission of 'recommending best practices to ICN members and providing them with information to support their advocacy tasks', with a consideration for the variability of national institutional conditions and local politics (AWG 2002).

Toward a Transnational Community of Governance

The ICN does not define itself as a regulatory actor in the way, for example, its members are regulatory actors in their respective

jurisdictions. Still, its role and impact since 2001 show an ambition that goes well beyond dialogue, information and exchange. The ICN has made it clear that it wants to have a real impact on national competition regimes. More precisely, the ICN wants to drive progressive homogenization not only of formal rules, but also of practices and understandings. As David Lewis, Chairman of the ICN Steering Group, said in his introductory remarks to the 2009 Zurich conference, 'we [the ICN] are clearly in the business of making "soft law" and this is what we must continue' (Lewis 2009). 'Soft law', he made clear, is qualitatively different from 'hard law' – and not just a 'less blinding, pale version' of it (see also Mörth 2006). The ICN does not follow a logic of constraint or coercion. 'Soft law', Lewis continues, 'is rooted in consensus rather than majority; in persuasion through shared experience rather than coercion; in understanding and celebrating differences rather than suppressing them' (Lewis 2009).

The notion of a 'community of governance' fits quite well the contemporary history of the ICN (Djelic and Quack 2003; Djelic and Sahlin-Andersson 2006). In such a scenario, there is no differentiation between rule-makers and purported rule-followers. The community – in the wide sense of the term – of those who are likely to be concerned by a particular set of rules take it upon themselves to define and agree upon those rules. The logic or mode by which rules are made in this scenario is one of negotiation but with the ultimate objective of reaching a situation of 'communion'. The link between rule-making and rule-following is the mechanism of socialization, with associated processes, in particular, of 'naming and shaming' (Boli 2006). The impact of this type of mechanism may be gradual. But, in the long term, it may be better suited than external constraint or coercion to bringing about effective homogenization and coordination of standards and practices.

While the ICN community tends to be inclusive, and at first sight rather democratic, the process of negotiation is nevertheless likely to reflect imbalances in terms of resources, clout, power and influence. In the case of the ICN, it has been shown that negotiations have been and will be biased in favour of developed countries and regions with a longer tradition of antitrust. This was visible from the start and has led – including within the ranks of the ICN – to some powerful reactions. Already at the first annual conference in 2002 in Naples, the Chairman of the Italian Competition Authority, Giuseppe Tesauro, strongly warned of this problem in his opening speech as main organizer of the conference:

So far it was indeed necessary for the Steering Committee to act rapidly and with no frills. Now, I personally consider that it may be useful to ponder on some modification and improvement concerning

the number of members of the Steering Committee, its composition and its working methods in order to achieve a better balance between the biggest and the smallest economic and political entities. It must be clear that all members of the competition family are the actors of the initiative and that they all play an equal role. (Tesauro 2002)

These types of warnings, though, have ultimately had limited impact and, as we showed above, the Steering Group has remained to this day clearly dominated by developed countries. Leading members of the ICN Steering Group are defending themselves and protesting that 'of course, consistently sound antitrust enforcement policy cannot be defined and decreed for others by the US and Canada - not that you would presume to do such a thing' (Kolasky 2002: 3). Naturally, the imbalance of power in the structure and functioning of the ICN makes this 'neutrality' a discourse more than a reality. Power relations are very much at work but they play out in the guise of hegemonic processes (Foucault 1994) that are more subtle and more complex to identify and counter.

The ICN, and in particular members of the Steering Group, are well aware of and dedicated to their transnational governance agenda. They seek two forms of impact that have elsewhere been called 'trickle-down' and 'trickle-up' trajectories (Djelic and Quack 2003). Regarding the first, members of the Steering Group hope that ICN work will come to reflect upon national competition regimes in a direct way, through the involvement of representatives from member agencies. The idea is not that members comply with recommended practices right from the outset. Rather, the hope is that they will 'consider them as aspirational goals in the context of evolving national competition frameworks' (Von Finckenstein 2003: 13). Members are, in other words, under no obligation to ensure that domestic laws reflect ICN guidelines and recommendations. Each agency will decide whether and how to implement the recommendations - adapting its strategies to local politics and constraints (Fingleton 2009b: 21). Still, members of the ICN Steering Group expect, on a practical level, that 'as best practice proposals are acted upon by members, a natural peer influence will come to bear on other jurisdictions to do the same' (Von Finckenstein 2002: 4).

The ICN Steering Group hopes that such trickle-down trajectory will combine with a trickle-up one. By opening the network of insiders to representatives of relevant and important constituencies, the Steering Group hopes to build bridges toward those constituencies. Nongovernmental experts are co-opted and involved in the work of the ICN at many different stages, with the idea that they will then become important agents in the fight for competition and antitrust in their respective constituencies. Once a number of local

constituencies – or parts thereof – become champions of competition and antitrust, they can push those ideas back up to the governmental level and thus reinforce the impact and influence of competition authorities.

Since its beginnings in 2001, the ICN has proven to be much more than a simple ‘community of interest’, fostering dialogue and exchange. It clearly is also a ‘community of governance’ – and belongs as such to the dense web of contemporary transnational governance activity (Djelic and Sahlin-Andersson 2006; Djelic and Quack 2010). Members of the Steering Group are conscious of – and claim in fact – such a broadening of their ambitions. The ICN is not an arena for policymaking or for working together on any particular antitrust case. The type of influence the ICN is hoping for is rather quite parallel to mechanisms of diffusion associated with and attributed to ‘epistemic communities’ (Haas 1989). The ICN is hoping to bring closer together a loosely coupled ‘epistemic community’ or ‘community of interest’. It aims at closing the ranks of that community both by deepening its common culture and by helping to strengthen its local or national position and power. This should translate in time into greater convergence and a degree of homogenization of practices and policy application locally.

At the same time, though, it seems that members of the ICN have come to realize through the years the limits of this ambition and the complexities of transnational ‘soft’ governance. As Lewis recently acknowledged, ‘the evidence is that “best practices”, even in relatively uncontroversial areas, usually have to be tailored to national circumstances and so implementation will always be uneven at best’ (Lewis 2009). The ICN, hence, while still claiming a broad governance ambition has had to revise somewhat its ultimate objectives. The Steering Group appears to have come to the realization that ‘convergence is not possible’ and is now talking about ‘informed divergence’ instead, as a less ambitious, more realist but also more complex goal (Fingleton 2009a: 6). ‘Informed divergence’ implies identifying the ‘nature and sources of divergence and to understand and respect the divergent underlying rationale’ in each national jurisdiction (Fingleton 2009b: 27).

References

- AWG (2002). ‘Advocacy and Competition Policy’. Report prepared by the Advocacy Working Group for the First ICN Conference, Naples. Available at www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf.

- Boli, J. (2006). 'The Rationalization of Virtue and Virtuosity in World Society'. *Transnational Governance*, ed. M. L. Djelic and K. Sahlin-Andersson. Cambridge: Cambridge University Press.
- Djelic, M. L. (2005). 'From Local Legislation to Global Structuring Frame: The Story of Antitrust'. *Global Social Policy* 5: 55–76.
- Djelic, M. L., and S. Quack (2003). 'Globalization as a Double Process of Institutional Change and Institution Building'. *Globalization and Institutions: Redefining the Rules of the Economic Game*, ed. M. L. Djelic and S. Quack. Cheltenham: Edward Elgar.
- Djelic, M. L., and S. Quack, eds. (2010). *Transnational Communities: Shaping Global Economic Governance*. Cambridge: Cambridge University Press.
- Djelic, M. L., and K. Sahlin-Andersson (2006). 'A World of Governance: The Rise of Transnational Regulation'. *Transnational Governance*, ed. M. L. Djelic and K. Sahlin-Andersson. Cambridge: Cambridge University Press.
- Fingleton, J. (2009a). 'Closing Speech to International Competition Network Conference, Zurich'. Available at www.oft.gov.uk/shared_of/speeches/2009/spe0909.pdf.
- Fingleton, J. (2009b). 'Competition Agencies and Global Markets: The Challenges Ahead'. www.oft.gov.uk/shared_of/speeches/2009/spe0909paper.pdf.
- Foucault, M. (1994). *The Order of Things*. New York: Random House.
- Haas, P. (1989) 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control'. *International Organization* 43(3): 377–403.
- ICN (2002). 'Memorandum on the Establishment and Operation of the International Competition Network'. Available at www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf.
- ICN (2009). 'International Competition Network Moves Forward with a New Chair and New Challenges'. Available at www.internationalcompetitionnetwork.org/uploads/2009%20news/newsrelease-icnconference-final.pdf.
- Kolasky, W. (2002). 'International Convergence Efforts: A US Perspective'. Address by the Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, before the International Dimensions of Competition Law Conference, Toronto, 22 March 22. Available at www.justice.gov/atr/public/speeches/10885.pdf.
- Lewis, D. (2009). 'Introductory Address to ICN Conference, Zurich'. Available at www.internationalcompetitionnetwork.org/news-and-events/newsroom-2009/intro-address.aspx.
- Mörth, U. (2006). 'Soft Regulation and Global Democracy'. *Transnational Governance*, ed. M. L. Djelic and K. Sahlin-Andersson. Cambridge: Cambridge University Press.
- Tesauro, G. (2002). Opening Speech at the International Competition Network First Annual Conference, Naples, 28 September.
- Ugarte, F. S. (2002). 'International Competition Network'. Speech in Cape Town, South Africa, 18 March.

von Finckenstein, K. (2002). 'Introductory Remarks' at the First ICN Conference, Naples, 28-29 September. Available at [www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02433e.pdf/\\$file/ct02433e.pdf](http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02433e.pdf/$file/ct02433e.pdf).

von Finckenstein, K (2003). 'Recent Developments in the International Competition Network'. An address to the Forum in International Competition Law, New York, 6 February.