

Introductory Address to ICN Conference – June 2009

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The ICN has grown well beyond the stage where, in the course of a brief introductory speech, its past activities can be summarised and where the contents of the annual conference can be anticipated. You all have the agenda of the conference before you and you will have hopefully worked through the formidable pack of documents so you know what to expect. The schedule of ICN activities is displayed on the screen behind me. You could marvel at what this virtual organisation, this network, devoid of any of the resources of a characteristic multi-lateral organisation, is achieving.

All of this obviously requires tremendous effort and so I would like to open this conference by paying tribute to all of those, and there are many, who have made this possible. This includes our hosts as well as those who have hosted the various other conferences and workshops held during the year, it includes those who have led the working groups and who have participated in the working groups – the report prepared by the KFTC, which so ably chairs the Membership Working Group demonstrates the breadth of membership involvement. It also includes the NGAs who make an increasingly valuable contribution to our work. Above all, it includes the secretariat team from the Canadian Competition Bureau who, voluntarily and in addition to all of their normal Bureau duties, undertake the

secretariat tasks that propel this hard driving organisation and ensure that it remains on track. They really are the unsung heroes of the ICN and, on behalf of the membership, I would like to extend my heartfelt gratitude to them for the quantity and quality of their effort. I would also like to take this opportunity to thank and acknowledge Sheridan Scott, who is with us today, and who so ably and graciously led the current Steering Group for most of its period of office.

Our membership currently stands at ... authorities from ... jurisdictions. Remarkably our membership continues to grow from its very high base. In the past year Greenland, Vietnam, Moldova, Mauritius, Kosovo and Caricom have joined the ICN. I would like to welcome them. We look forward to working with them. The KFTC, JFTC and the two US agencies have already had a brief session with some of the newer and less active agencies to better inform them of the work of the ICN. We intend repeating this session in greater depth soon after the conference, a session that, given the breadth of our work, other agencies, especially those who want to play a more active role in the ICN, may wish to participate in as well.

So rather than attempt to summarise our work output, I want to use this opportunity to reflect on the path down which the ICN is headed. Principally I want to ask: is the ICN effective? This is a question that any institution has to consistently ask and answer if it is to thrive.

The ICN is the product of a number of diverse initiatives and imperatives. But when representatives of some 14 agencies gathered in England in 2001, largely at the initiative of anti-trust lawyers in the private bar, I think that it

is fair to say that uppermost in their concerns was the co-incidence of increasing cross border mergers and the proliferation of national anti-trust authorities and the obvious implications that this had for the substance and efficiency of merger review.

This concern, although serious and warranting our persistent close attention, has long been supplemented by other concerns, arguably more pressing to anti-trust enforcers. However the initial concern to expedite the regulation of cross border mergers established a *modus operandi* within the ICN that is most clearly reflected in the overriding concern with agreeing recommended practices and with judging the organisation by the extent to which these agreed practices have been implemented. While this is an approach that remains valid and important, it lend itself most easily to dealing with the relatively straightforward, technical questions raised by merger notifications and procedures. It is at, at once, too ambitious and too narrow an approach to deal with the more complex and controversial questions that increasingly characterise ICN work.

It is too ambitious because the transmission belt from ICN recommendation to national legislation is bound to be extremely slow and imperfect and so, by this criterion, the organisation will always be judged to be falling short of its own targets and expectations. In any event, 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.

And it is too narrow because if we have chosen to adopt an organisational form and character distinct from that of an organisation responsible for devising binding rules, then we should not judge ourselves by precisely the same norms and standards of those organisations. We have to judge ourselves by a more qualitative and nuanced set of norms: are we developing a deeper understanding of each other's key drivers and practices? Are we providing a framework where the better resourced and more experienced agencies are able to transmit the learnings from their successes and failures to the newer agencies? Are we providing room for the full participation and voice of these newer agencies? Is the ICN a voice for competition on the international stage and in the various national policy debates?

A glance at our range of activities will tell you that we are extending our work into areas that do not easily lend themselves to textual consensus and harmonised implementation. For example, our expanding work on agency effectiveness and market studies will be difficult to measure by adherence to recommended practices or degree of convergence. We have also entered the minefield of unilateral conduct, and this has predictably proved to be such an area, one where debate and controversy is endless, not simply for the sake of argument, but because we are dealing with a dynamic environment and with diverse national circumstances and policy orientations. In unilateral conduct we are also dealing with very large companies that, multinational though they may be, inevitably fly one or other national flag, are somebody's national champion. They will seek the protection of their flag, just as others will seek to protect their own would-

be champions and this undoubtedly impacts on the way that enforcement actions are conceived and received.

However we are clearly in the business of making 'soft law' and this is what we must continue to do. But 'soft law' is not just a less binding, pale version of 'hard' law. It is different. It is rooted in consensus, rather than majority; in persuasion through shared experience, rather than coercion; in understanding and celebrating differences, rather than suppressing them. But 'soft' should not mean 'fuzzy'. In particular we have to be able to measure our effectiveness. Our vice chair responsible for outreach, Bill Kovacic, has undertaken to conduct a review of ICN work and practices and I have no doubt that, under Bill's leadership, we will devise a set of criteria for measuring the effectiveness of the ICN that are at once more attainable and broader than those that we have implicitly used to date.

I want to identify two broad tests to which we should submit ourselves. The first is outward looking, while the second has a more inward looking character.

The first is related, but not limited to, the current financial crisis and economic recession. We must ask ourselves whether we are sufficiently flexible to assist our member agencies in responding to radical changes in the social and economic environment in which we work, starkly typified by the global economic crisis. We have to ask ourselves whether the ICN is playing a sufficiently active role on the international stage in informing responses to the crisis. I think that we could do much more here. When, for example, I look at the agenda of yesterday's IDRC conference, I am

confirmed in my view that we have to broaden our concerns if we are to remain relevant. In order to do this we should re-visit our inflexible founding mantra of 'all competition, all of the time'.

This was always a restrictive principle on which to base ourselves because it was a tactical consideration rooted in caution and in a lack of familiarity with one another, of a fear that one nation would begin interfering with the internal economic policies of another. It is not a positive, expansive and forward looking statement of our mission and vision. Competition law, as a US Supreme Court justice once famously reminded us, is the Magna Carta, the fundamental law, of the market system. As such, it cannot be confined to an island where its relationship with every other branch of economic and social policy – particularly with trade and industrial policy - is studiously ignored. And if anybody seriously believed that this was ever possible, then the financial and economic storm that has battered us all since the latter half of 2007 and the policy responses to these events should have put paid to any such illusions. With industrial policy ascendant and protectionism in the air, can we afford to remain aloof? Must we not rather engage with the concerns of policy makers to ensure that their interventions – many of them necessary – respect and preserve that which is dynamic and creative and democratic in a market system? There can be little doubt that the unusual effectiveness of the European Commission's competition directorate rests in significant part on its authority over national state aid, thus effectively empowering it to deal with both competition law and policy and the critical instruments of industrial policy. We cannot all aspire to this level of institutionalised authority over industrial policy, but we can use the forum of the ICN to discuss the appropriate interface of our work with

industrial and trade policy and with the social and developmental needs of our citizens. This is the least that we can do.

We are clearly already embarking on this journey. The work of the vice chair for international co-ordination, Eduardo Perez Motto with the support of Bruno Laserre, in developing relations with agencies like the World Bank and the various regional development finance institutions will, if carried to its logical conclusion, inevitably involve us in taking a view on a wide range of national policies and practices ranging from trade policy to procurement practices, from support for national champions to bail outs of distressed firms. The work of the vice chair for advocacy and implementation, Kazuhiko Takeshima, with the support of Philip Collins, will, if carried to its logical conclusion, presuppose that we publicly articulate the case for markets in the on-going development of responses to the massive market failures that have characterised the world's present economic predicament.

We are going to have to inject this work into the mainstream of the ICN. But in order to do so we are going to need to put aside the purist competition law cloak in which we have shrouded ourselves if we are to ensure the continued centrality of competition on national and global policy agendas.

The second set of questions that we must pose is more inward looking. Like any multinational body we are made up of member agencies with distinctive histories and diverse resource bases. In circumstances like this we must continually ask ourselves whether the weaker, the newer, the less well resourced are given voice, are given the opportunity to participate and

to be heard in the councils of the organisation. Here I think that we are doing quite well. And it's no accident. From the first days of the ICN a number of young agencies from the developing world and the emerging market economies demanded a very active role in its work. They have chaired working groups, they have submitted papers to and participated in debates in working groups, they have hosted conferences and workshops and they have hosted and participated in our successful tele-seminars. I use 'demanded' advisedly because had we waited for an invitation to play an active role in the ICN, I don't doubt that we would have suffered the marginalisation that characterises so many international institutions and that has so impaired their legitimacy and effectiveness. By the quantity and quality of our contribution we have won the respect and regard of our counterpart agencies in the developed world who have responded by treating us as equal members of the ICN. Certainly more can be done but there is no doubt that we are fully fledged members of the ICN.

This must be maintained and here I want to address myself directly to the newer agencies. Should the level of our involvement recede we will be marginalised and the ICN and the newer agencies and, dare I say it, the more experienced agencies themselves, will be the weaker for it. We must overcome our resource constraints by drawing in more layers of our agencies into this work and by a carefully selected prioritisation of where to place our energies.

None of this is to be taken lightly. Critical agencies like the IMF and the World Bank have begun to acknowledge the damage done to their credibility by the application of the unwritten rule that effectively circulates

institutional power between Europe and the USA. We know how critical initiatives like the Doha development round have been torpedoed in large part because many of the members of the WTO do not believe that their voices are heard and that their concerns are adequately appreciated. And it is important because increasingly networks like the ICN are emerging in diverse fields as critical complements to the formal brick and mortar multinational agencies scattered around New York, Washington and Geneva. Freed from the business of negotiating binding treaties and the deadly hand of narrow political considerations, we are able to find each other through frank and robust discussion directed at solving common problems. Our network is part of what one scholar - now a senior member of the US State Department – has dubbed the ‘new world order’, we are part of a new mode of international governance characterised by networks of professionals whose professionalism enables them to rise above their own narrow national interests. We must treat this responsibility with the seriousness and the courage that it demands.

I want in conclusion to say – and partly because this is my last ICN meeting as the representative of an agency - that one of the great qualities of the ICN is that it is never entirely about institutions meeting. I know that when I – and I suspect that this is true of most of us - engage with the US FTC it is not only a 100 year old, all-powerful agency of the richest country in the world with whom I engage but it is also Bill or Randy, flesh and blood like the rest of us, just as when I engage with Barbara Lee, it is not a small, island economy that I see, but rather someone steeped in competition law and policy and whose particular experience can help representatives of even the most sophisticated agencies understand the complexities of their

world a little better. These are relationships built, not on reading a paper drafted by a faceless secretariat, but rather by working directly with colleagues and building the trust and respect that joint work gives rise to. They are the sort of relationships that enable one to have the intense disagreements necessary to drive progress but that are immediately set aside when the next problem has to be confronted. This is what I have found to be most enjoyable and, especially in the international arena, unusual about the ICN. We have become a dense network, not merely of competition agencies, but of deeply committed individuals.

I have no doubt that this will be a successful conference and that once again it will be all of you that will ensure its success. Once again my gratitude to the hosts for providing the splendid forum in which we meet and to all of you for ensuring its success.