International Competition Network holds annual conference in Sydney

The International Competition Network (ICN) held its 14th annual conference in Sydney, Australia between 28 April and 1 May 2015. The conference was hosted by the Australian Competition and Consumer Commission (ACCC). More than 70 jurisdictions were represented, and the attendees included businesses, professionals, international organisations and academics as well as many national competition authorities.

The ICN bills itself as a specialized but informal venue for competition authorities to create and maintain relationships and to collaborate on addressing practical competition concerns. It engages in two main activities – running workshops and conferences, and producing advice, studies and best practices. By these activities it seeks to advocate for sound competition policy, to improve global competition enforcement, to facilitate cooperation and convergence, and to reduce the risk of sub-optimal enforcement and inconsistent outcomes.

In his welcome message to the conference, Andreas Mundt, the chairman of the ICN Steering Group and the President of the German Bundeskartellamt, emphasised the relevance of the digital economy to competition law enforcement, noting that it "poses questions as to whether our tools are sufficient and adequate to cope with current and emerging issues in merger control and antitrust".

The ICN adopted a number of recent work products at the conference, including the following:

- Guidance document on investigative process

This document was produced as part of the Agency Effectiveness Working Group’s multi-year project on investigative process, which is co-led by the competition authorities of the USA and the EU (the FTC and the European Commission’s DG Competition, respectively). The project addresses all aspects of the conduct of investigations, including procedure and enforcement tools.
available to and used by competition authorities, as well as procedural fairness principles. Previous reports have been issued on the subject of investigative tools and transparency practices (2013) and confidentiality practices (2014). This new guidance document addresses all of these issues and also addresses agency-party engagement. Its purpose is to promote fair and informed enforcement.

• **Anti-Cartel Enforcement Manual – cooperation with procurement agencies**

  A new chapter for the anti-cartel enforcement manual was produced in 2014-2015 by the Cartel Working Group, which draws together best practice on building and maintaining constructive relationships with public procurement bodies, to facilitate efficiency and competition in the public procurement sphere. The drafting team was led by FAS Russia, and included representatives from Brazilian, Canadian, Italian, Swedish, Zambian and Colombian competition authorities.

• **Practical guide to international cooperation in merger control**

  Facilitating international cooperation on global merger control enforcement is one of the most important elements of the ICN’s work. This guide provides both principles and best practices for collaboration with other competition authorities, within the scope of the authorities’ powers under their constituting legislation. It also contains guidance for third parties seeking to facilitate cooperation between competition authorities. The guide is intended as a framework for cooperation rather than a rigid set of rules. In light of its adoption at the Sydney conference, it will begin to be used on a trial basis by competition authorities, and will be the subject of further discussion at a workshop of the Merger Working Group to be held in Brussels in September 2015.

• **Chapter on tying and bundling**

  The Unilateral Conduct Working Group continued its project to produce a workbook on unilateral conduct with a new chapter containing an analysis of tying and bundling practices. The chapter contains suggestions and guidance on the conduct of investigations in this area. Previous chapters drafted by this Working Group addressed market dominance, predatory pricing and exclusive dealing.

In addition to adopting work products, the conference addressed a number of new and emerging issues. Rod Sims, the Chairman of the ACCC and the host of the conference, echoed Andreas Mundt in emphasising the importance of adapting to innovations in the digital economy. He noted that it was particularly important in the context of international cooperation between competition authorities, given the inherently cross-border nature of digital and online businesses. The ACCC presented a report on the issue of restraint of competition in online trade, while panel discussions were held on online across-platform parity agreements and online geographic price discrimination. This focus mirrors the European Commission’s efforts to promote the Digital Single Market in the European Union in 2015.¹

Another focus of the conference was competition advocacy and the creation and nurturing of competition culture. Competition advocacy is seeking to dismantle and prevent anti-competitive government regulation. The heads

¹ See last week’s EU Competition & Regulatory Newsletter: [http://www.slaughterandmay.com/media/2499049/eu-competition-and-regulatory-newsletter-08-may-14-may-2015.pdf](http://www.slaughterandmay.com/media/2499049/eu-competition-and-regulatory-newsletter-08-may-14-may-2015.pdf)
of the French, Mexican and Singaporean competition authorities considered “credible advocacy” in the Advocacy Working Group’s Plenary Meeting, while the World Bank and the OECD also weighed in on other panel discussions on the topic. The Advocacy Working Group also finalised its Competition Culture Report in 2014-2015, and submitted it to the conference. It contains guidance on approaching a wide range of decision-makers, stakeholders and industry actors, and is hoped to be of particular use to new and developing competition agencies.

Finally, five competition authorities became members of the ICN – those of Georgia, Ethiopia, Zambia, Trinidad and Tobago and Qatar. This brings the total number of ICN member competition authorities to 132, and the total number of jurisdictions represented to 119.

The ICN Working Groups will now proceed with their work programme for 2015-2016 as put forward in the 2015 conference (including a project on agency ethics, a series of webinars on cartels and the continuation of a number of existing projects), and will reconvene in Singapore in April 2016 for the next annual conference.

SOURCES

- International Competition Network press release, 1 May 2015
- ICN2015 Program Book
Merger Control

NOTIFICATIONS

1. Mahle Behre/Delphi Thermal Systems Business (M.7564, 18.05.15).

2. Simplified procedure cases
   - PSP/OTTP/Tomopah Solar Energy Holdings (M.7629, 19.05.15).
   - Lindsay Goldberg/VDM Metals Group (M.7635, 18.05.15).

PHASE I CLEARANCES

3. Unconditional clearances: simplified procedure
   - 3i Group/Oiltanking GmbH/Oiltanking Ghent/Oiltanking Terneuzen (M.7591, 19.05.15).
   - Sabadell/TSB (Case M.7597, 20.05.15).

PHASE II CLEARANCE WITH UNDERTAKINGS

4. Orange/Jazztel – The European Commission has granted approval to the proposed acquisition of Jazztel plc, a telecommunications company registered in the UK but mainly active in Spain, by rival Orange SA of France, subject to conditions. The Commission had concerns that the takeover, as originally notified, could have led to higher prices of fixed internet access services for Spanish consumers. These concerns were addressed by Orange’s commitments to ensure that a new competitor can enter the retail markets involving fixed internet access services (M.7421, IP 15/4997, MEMO/15/4998, 19.05.15).

Antitrust

5. General Court dismisses Roullier Group appeal against animal feed phosphates cartel decision, ruling on the first hybrid cartel case – The General Court dismissed an appeal by Roullier Group challenging the fine imposed by the Commission for its participation in the animal feed phosphates cartel. Roullier was the only addressee of the cartel decision not to use the Commission’s cartel settlement procedure – it withdrew from settlement negotiations and the case was continued under the standard procedure. Roullier claimed that it had been penalised for this withdrawal, as the fine ultimately imposed on Roullier was around €15 million higher than the amount proposed by the Commission during the settlement negotiations. However, the Court noted that the Commission applied the same method when calculating the range of fines at the stage of the settlement procedure and the amount of the fine ultimately imposed as part of the standard procedure. The Court clarified that the difference may be explained in particular by the fact that the Commission applied, as part of the settlement proposal, reductions as part of the settlement proposal that it was not required to apply as part of the standard procedure and that it took account, during the standard procedure, of new information which required it to review the file, to redefine the period taken into account and readjust the amount of the fine. In any event, the Commission was not bound, when reaching a decision under the standard procedure, by the range indicated as part of the settlement proposal that it was not required to apply as part of the standard procedure and that it took account, during the standard procedure, of new information which required it to review the file, to redefine the period taken into account and readjust the amount of the fine. The Court held that the Commission had correctly investigated the case during settlement discussions, had conducted a proper analysis and assessment of the anti-competitive practices attributed to Roullier, and did not err in calculating the amount of the fine (Case T-456/10, Judgment of Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission, Press Release 57/15, 20.05.15).
6. **Post Danmark II – Advocate General’s opinion on Article 102 and rebate schemes** – On reference from a Danish court, Advocate General Kokott has given her opinion on the Court’s approach to the assessment of rebate schemes under Article 102 TFEU. In particular, the Advocate General was asked to clarify: (i) whether there is a legal requirement to carry out an “as-efficient-competitor” test in order to establish abuse of a dominant position; and (ii) whether an appreciability threshold is applicable in the assessment of any exclusionary effect that a rebate scheme may have. The Advocate General gave her opinion that a rebate scheme operated by a dominant undertaking constitutes abuse within the meaning of Article 102 where an overall assessment of all the circumstances of the individual case shows that the rebates are capable of producing an economically unjustified exclusionary effect. In the assessment, it is important to take into account the criteria and rules governing the grant of the rebate, the conditions of competition prevailing on the relevant market and the position of the dominant undertaking on that market. Where an overall assessment of the other circumstances of the case demonstrates the abusive nature of the rebate scheme, Article 102 does not require the abusive nature of a scheme to be demonstrated by means of a price/cost analysis such as the “as-efficient-competitor” test where an overall assessment of the other circumstances would show its abusive nature. Nevertheless, national competition authorities and courts are free to use a price/cost analysis in their overall assessment of all the circumstances of an individual case, unless it would be impossible for another undertaking to be as efficient as the dominant undertaking due to the structure of the market. In relation to any de minimis threshold, aside from the requirement that a rebate scheme operated by a dominant undertaking must have an actual or potential adverse effect on trade between Member States, the exclusionary effect that may be produced by such a scheme does not have to exceed any form of appreciability threshold in order to be classified as abuse within the meaning of Article 102. It is also sufficient for the presence of such an exclusionary effect to be more likely than its absence (Case C-23/14, Post Danmark A/S, Advocate General’s opinion, 21.05.2015).

7. **Advocate General’s opinion on an ECJ appeal against the Commission’s heat stabilisers cartel decisions** – Advocate General Nils Wahl has handed down an opinion on an appeal by AC Treuhand to the European Court of Justice against a General Court judgment that dismissed its challenge to the Commission’s heat stabilisers cartel decisions. The Advocate General considered that the appeal should be upheld, as the General Court had erred in agreeing with the Commission’s decision that AC Treuhand had directly participated in the heat stabilisers cartels in breach of Article 101 TFEU due to its administrative role in the organisation and conduct of cartel meetings. The Advocate General considered that AC Treuhand acted in its capacity as a consultancy firm and was clearly not active, nor potentially active, on the relevant markets as regards the applicable cartel decisions. The Advocate General noted that AC Treuhand may have performed an accessory role in assisting the cartel members to carry out their anti-competitive activity; however, the Commission had not raised this argument (Case C-194/14, AC Treuhand AG v European Commission, Advocate General’s opinion, 21.05.15, opinion not yet available in English).
State Aid

8. **General Court dismisses actions brought by airline Niki Luftfahrt against Lufthansa’s acquisition of Austrian Airlines and the restructuring aid granted by Austria to Austrian Airlines for that purpose** – The General Court dismissed actions brought by Niki Luftfahrt against the Commission’s decisions approving Lufthansa’s planned acquisition of Austrian Airlines and, subject to certain conditions and full implementation of the restructuring plan as notified, the restructuring aid included in the negative purchase price to be paid by Lufthansa. In particular, the Court upheld that the compatibility of Lufthansa's acquisition of Austrian Airlines with EU competition law gave rise to serious doubts only regarding certain routes, and that commitments proposed by Lufthansa and Austrian Airlines, which aimed to reduce barriers to entry, were sufficient to dispel those doubts. The Court further confirmed that the State aid granted to Austrian Airlines was, as restructuring aid, compatible with EU law on State aid (Cases T-511/09 and T-162/10, Judgment of Niki Luftfahrt GmbH v Commission, Press Release 54/15, judgment not yet available in English).