

Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

Considerations for a “top-to-bottom review” of the ICN: Legitimacy, effectiveness and efficiency

Article | Concurrences N° 3-2022

www.concurrences.com

Mattia Guidi

mattia.guidi@unisi.it

Associate Professor

University of Siena

Mariana Tavares

mtavares@cruzvilaca.eu

Senior Counsel

Cruz Vilaça Advogados

Christopher Townley

chris.townley@kcl.ac.uk

Professor

King's College (London)

Mattia Guidi

mattia.guidi@unisi.it

Associate Professor

University of Siena

Mariana Tavares

mtavares@cruzvilaca.eu

Senior Counsel

Cruz Vilaça Advogados, Lisboa

Christopher Townley

chris.townley@kcl.ac.uk

Professor

King's College (London)

ABSTRACT

Is the International Competition Network (ICN), a network of competition authorities (NCAs) from around the world and non-governmental actors – often large multi-nationals and the firms that support them – efficient and effective? Many scholars and practitioners think so. They also see little need to discuss the ICN's legitimacy, because NCAs do not have to join it, ICN work products are agreed by consensus, and states are not forced to implement ICN work products. Despite these features, this paper argues that these questions are worth asking. We show that some actors – notably NCAs from advanced economies – may have significantly more influence than others in the ICN, and that the outputs that end up being recommended do not necessarily benefit developing countries. These are under increasing pressure to implement what the ICN recommends, even when contrary to their interests. We show how this is possible, making legitimacy an important issue too.

Le Réseau international de la concurrence (ICN), un réseau réunissant les autorités de la concurrence (NCA) du monde entier et d'acteurs non gouvernementaux – souvent de grandes multinationales et ceux qui les représentent – est-il efficace et efficace ? De nombreux universitaires et praticiens le pensent. Beaucoup ne voient pas non plus la nécessité de discuter de la légitimité de l'ICN, car les NCA ne sont pas obligées d'y adhérer, les projets de l'ICN sont achevés par consensus, sur un mode non contraignant, et donc les États ne sont pas obligés de les mettre en œuvre. Malgré ces caractéristiques, cet article soutient que ces questions méritent d'être posées. Nous montrons que certains acteurs – notamment les NCA des économies avancées – peuvent avoir beaucoup plus d'influence que d'autres dans l'ICN, et que les résultats qui finissent par être recommandés ne profitent pas nécessairement aux pays en développement. Celles-ci subissent une pression croissante pour mettre en œuvre les recommandations de l'ICN, même contrairement à leurs intérêts. Nous montrons comment cela est possible, en faisant de la légitimité une question importante également.

*The views expressed in this article are solely those of the authors. A response from Mr Andreas Mundt, ICN Chair and President of the Bundeskartellamt, will be published in the next issue of *Concurrences*.

“top-to-bottom review” of the ICN: Legitimacy, effectiveness and efficiency*

I. Introduction

1. Let's start with a puzzle. US and EU competition officials expressed their support for a new competition network in September 2000.¹ Why would NCAs want to spend their own time and resources establishing an international network when they were already discussing international competition policy and enforcement in both the OECD and UNCTAD? Shortly afterwards, in February 2001, the International Bar Association called a meeting of over forty of the world's senior competition officials and practitioners that supported the idea of “*establishing a new organisation directed exclusively at international antitrust enforcement.*”² From an early stage, it was clear that major businesses and law firms were prepared to offer money and analytical resources to support this initiative.³ Why would large commercial entities want to support such a network?

2. The International Competition Network (ICN) was set up in October 2001 by competition authorities (NCAs) from 14 jurisdictions. By 2013 it had grown to 128 NCAs from 111 jurisdictions. The ICN is “*the most extensive network of competition authorities worldwide.*”⁴ It now lists over 140 NCA members.

3. The ICN focuses exclusively on competition law and policy, both substance and procedure.⁵ It describes its mission in the following terms: “[T]o *advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.*”⁶

1 M. Janow and J. Rill, *The Origins of the ICN, in the International Competition Network at Ten: Origins, Accomplishments and Aspirations*, P. Lugard (ed.), Intersentia, Cambridge, 2011, 32–34. Largely following recommendations of the US Attorney General's International Competition Policy Advisory Committee (ICPAC), February 2000.

2 <https://internationalcompetitionnetwork.org/about/history.aspx> (last accessed 16 February 2022).

3 Janow and Rill, *The Origins of the ICN*, 35; F. Jenny, *The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 100 (in the same publication also see: Fox, 115–6 (although NCAs refused some assistance to preserve “government agency control”), Sokol, 157, Lewis, 209, and Anderson, 278).

4 ICN, *ICN Statement of Achievements 2001–2013* (2013), 3; 141 NCA members are listed in 2022 – <https://www.internationalcompetitionnetwork.org/members> (last accessed 16 February 2022).

5 ICN, *ICN Factsheet and Key Messages*, 1. That said, there have been some recent minor moves to engage with other policy areas, such as consumer protection and privacy. There was a scoping paper (<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/05/SG-Project-comp-cp-priv-scoping-paper.pdf> – last accessed 28 February 2022) and webinars (<https://www.internationalcompetitionnetwork.org/news-events/intersection-sept2021> – last accessed 28 February 2022), and a written paper (<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/02/Intersection-Project-Issues-identification-paper.pdf> – last accessed 28 February 2022).

6 ICN, *ICN Statement of Achievements 2001–2013*, 3.

4. Furthermore, when it comes to decision-making, the ICN describes itself as a “*project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.*”⁷

5. Only NCAs can be ICN members (not their states). All prospective NCAs must accede by letter to the ICN’s “Mission and Activities.”⁸ Members include the most influential NCAs worldwide, such as those in the US and the EU. Nevertheless, all members formally enjoy “*the same rights and privileges of membership.*”⁹ In addition, non-governmental advisors (NGAs), such as major corporates, law firms and academics, play a role. International organisations, such as the World Bank, UNCTAD and the OECD, are involved in ICN work too. However, NGAs and international organisations cannot be ICN members.

6. The ICN has created “*significant momentum*” in the international antitrust world.¹⁰ It “*has produced a tremendous body of work including recommended practices, manuals, reports and templates in addition to events like teleseminars, webinars, workshops, and annual conferences.*”¹¹

7. In the ICN’s 2020 Annual Conference, its current chair, Andreas Mundt, announced the Third Decade Project.¹² He called it a “*top-to-bottom review of the ICN’s working methods and substantive coverage with recommendations for the future of the network.*”¹³ He encouraged all members, NGAs and others to contribute to this project. This is an important initiative. This paper takes his request seriously (we also responded directly to the ICN chair, in 2021, along similar lines to this paper).

8. The ICN has made a lot of effort to improve its effectiveness and efficiency. As we outline below, further improvements can be made to both (Sections III and IV). In part, they would come through better definition of the ICN’s myriad conflicting goals. More rigorous efforts to assess the actual impact of ICN outputs would also help. However, more fundamentally, huge legitimacy question marks hang over the ICN’s creation, the

accession of many NCAs (both the UK and “EU NCA” probably acted ultra vires when joining, for example¹⁴) and their continuing participation, as well as NGAs’ role (Section III). In large part, that is due to the decision to create a transnational network (a network of NCAs) in 2001 rather than use a normal intergovernmental organisation (like the OECD or UNCTAD, for example). We will see how this “original sin” disproportionately benefits the rulemakers, principally NCAs from advanced industrialised states in North America and Europe (and their large multinational firms). This, ultimately, can affect the ICN’s legitimacy as these are not democratically accountable bodies.

9. While the ICN (and many commentators) has sought to engage with effectiveness and efficiency, there has been little engagement with legitimacy issues. A possible reaction might be to say that one does not need to worry about legitimacy here for two reasons. First, work products are only accepted as official ICN statements once they have been agreed by consensus within the ICN (or, to put it another way, as long as no NCA objects). Secondly, ICN work products are not binding. States can choose whether or not to implement them. Section II explores these two arguments. While both are formally true, we argue that, in practice, neither rule is likely to effectively protect newer NCAs (and especially their states) against the more powerful actors, particularly those from North America and Europe.

10. This matters. Contrary to the conventional wisdom that competition policy is purely technical and efficiency-enhancing (and therefore better dealt with by independent experts), competition policy and enforcement demand many highly (re)distributive choices. Competition rules are often widely drafted, leaving lots of room for interpretation by the local NCA. Alternatively, when legislative change is needed to implement an ICN work product, then local NCAs often join with key ICN actors to push for such a change back home. Framed as “technical” issues, competition specialists are told to ignore who wins and who loses when applying competition norms, and to “just focus on efficiency.” Yet, this myopic focus is likely to favour a certain group of actors in society. Precisely who benefits depends; but, if Section II’s arguments are correct (and ICN work products are not necessarily in the interests of all participating NCA’s states, and there is pressure to implement them), the overall beneficiaries are likely to be the ICN’s rulemakers (even if they do not benefit from every rule). The losers (rule takers) are a wide array of other states, particularly developing countries, that often have little or no influence in the ICN. They also include all those whose voices are rarely (if ever) heard there, such as consumers and small businesses; and the myriad other policy interests, such as the environment, that the NCAs and NGAs that established the ICN chose to ignore (contrary to the competition rules in many places).

7 ICN, Memorandum on the Establishment and Operation of the International Competition Network (2002), 1.

8 ICN, ICN Operational Framework (2012), 1.

9 Ibid., 2.

10 P.-H. Verdier, Transnational Regulatory Networks and Their Limits, *Yale Journal of International Law*, Vol. 34, 2009, pp. 113–172, at 158.

11 Kazuyuki Sugimoto, chairman of the Japan Fair Trade Commission, ICN Work Products Catalogue, September 2020, 2. The ICN Working Product Catalogue (2020), which lists the ICN available material, is 42 pages long.

12 The relevant speech is in the introductory session to Day 4 of the ICN 2020 Virtual Conference, 17 September 2020. Video of this conference is available at <https://www.ftc.gov/news-events/audio-video/video/international-competition-network-2020-virtual-conference-day-4> (last accessed 17 February 2022).

13 <https://www.internationalcompetitionnetwork.org/2020vac> (last accessed 17 February 2022).

14 C. Townley, M. Guidi and M. Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Oxford University Press, 2022, 268–270 and 323–335.

11. The claims that we make are important and foundational. As we will see, they are supported by a wide array of literature from law, political science and economics. Many are also supported by a survey we conducted between May and August 2018 among ICN NCAs and NGAs.¹⁵ This is not to say that we think that all those participating in the ICN (or even all those from the economically advanced states) consciously work toward some nefarious agenda. Many believe that they are doing good (and this may often be true). That is partly the point. Once the “right institutions” are in place, then individual agendas matter less because discordant voices are less influential (by design).

12. This paper has been written for three core audiences. First, for those participating in the ICN, we hope that they find our perspective illuminating. More importantly, for us, we hope that states who have NCAs in the ICN (or those considering allowing their NCAs to join) will find the paper helpful in highlighting where potential gaps may be in legitimacy, effectiveness and efficiency. Finally, it is for the larger academic and policy community interested in understanding power relationships within transnational networks. Not only is the ICN widely lauded by the competition community, but it is often cited as a model that other areas should follow.¹⁶ Nevertheless, wider questions about the appropriate role of transnational networks (like the ICN), whose interests those working in national regulators should be pursuing, and the way that transnational networks interact with democratic state actors now exist across many regulatory fields (and need to be confronted). Unfortunately, due to space constraints, this paper can merely sketch this terrain. However, more detail can be found in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network* (Oxford University Press, 2022). Cross-references are provided.

15 Our web survey was conducted between May and September 2018 among ICN participants, both members of NCAs and NGAs. The survey was sent out to 1,480 email addresses, in three waves (May, July and August). In total, 145 responses were collected, of which 74 are from NCAs, 68 are current NGAs and 3 were NGAs in the past. For more information, see *ibid.*, chapter 3.

16 See, for example, A.-M. Slaughter, *A New World Order*, Princeton University Press, 2005, chapter 1; E. M. Fox, Linked-In: Antitrust and the Virtues of a Virtual Network, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*; and Y. Devuyt, Transatlantic Competition Relations in *Transatlantic Governance in the Global Economy*, M. Pollack and G. Shaffer (eds.), Rowman & Littlefield Publishers, Inc. Lanham, 2001, 127.

II. Influence in the ICN and of the ICN*

13. In this section, we start by analysing who has particular influence within the ICN and how they can affect ICN work products to their advantage (1.). Then, we discuss the increasing pressure on NCAs (and their states) to implement ICN work products at home (2.).

1. Influence in the ICN

14. Some see policy networks, like the ICN, as a good way of dealing with transnational problems, supplementing normal national democratic institutions.¹⁷ Transnational policy networks enhance states’ ability to influence (even if they cannot control) what happens beyond their borders. This can improve efficiency and effectiveness at both a global and a local level. As we will see, the ICN also claims that being a diverse, consensus-led body enhances its legitimacy too.

15. However, a wealth of political science and international relations literature warns us not to focus solely on formal decision-making processes when analysing networks. Networks are often portrayed neutrally, but (like all institutions) networks are political. They facilitate and constrain actors and outcomes,¹⁸ creating winners and losers, depending upon how they are designed and how they are used. They can sometimes reduce legitimacy, effectiveness and efficiency too.¹⁹

16. So, when we analyse a network like the ICN, it is important to determine who is inside and who is outside the network. It is also important to see who is influential in the network. We start by asking who is NOT present in the ICN (and why). Then we turn to who is present (NCAs and NGAs), and how, in a formally neutral network, where everyone has equal rights, some may be more equal than others.

* For more detail on these arguments, and their justifications, see Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, chapters 1–3.

17 For example, R. A. W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Open University Press, Buckingham, 1997, 9.

18 *Ibid.*, 11 and 160. Specifically in relation to the European Competition Network (ECN), which is similar to the ICN for these purposes, Wilks and Sturm argue that networks are political structures, although Schaub and Tesaro protest this characterisation, C.-D. Ehlermann and L. Laudati (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy*, Hart Publishing, Oxford, 1998, 15, 34–35, 66, 77, 79, and 172–173.

19 T. Börzel, Organizing Babylon – On the Different Conceptions of Policy Networks, *Public Administration Review*, Vol. 76, Issue 2, 1998, pp. 253–273, at 253; and B. Kohler-Koch, Interdependent European Governance, in *Linking EU and National Governance*, B. Kohler-Koch (ed.), Oxford University Press, 2003, 140–141.

1.1 NCAs not states

17. Some believe that restricting the ICN to a network of NCAs and NGAs, excluding lawmakers, is what has made the ICN so effective.²⁰ NCAs may have more common interests and want to focus on similar things. The more alike those involved are (interests, outlook and sense of problem), the more easily they are likely to find common ground. Von Finckenstein (founding chairman of the ICN) explains: “*The ICN formula works because: participants are involved as experts, not as representatives of governments; discussions focus on the production of optimal practices without the immediate concern for implementation; we are also able to avoid defensive posturing which leads to a lowest common denominator approach; public and private sectors, and member agencies from developing and developed economies, participate on an equal footing.*”²¹

18. How actors seek to “persuade” others to change is likely to be different in a network of NCAs. States normally negotiate through political bargaining (or force), whereas “regulators” tend to focus upon “expert argument.” Populating the ICN with competition experts, from NCAs and NGAs, puts “expert argument” front and centre. “Expert argument” here means the partial, economic paradigm that has become prevalent in NCAs over the last two decades (often with a short-term consumer welfare goal).

19. There are at least two reasons why this might particularly benefit large, well-resourced NCAs. First, a “technical” focus favours those that are particularly strong in this approach. The large, established NCAs of the US and EU certainly fall into this category. It will be hard for newer NCAs (particularly the less well funded from developing countries) to effectively challenge them on this terrain. Secondly, a network without states more effectively preserves NCAs’ autonomy, enhancing their power (NCAs are often independent). This gives them more scope to focus network discussions on areas of importance to them and rely on solutions they favour (even if their states might disagree). In the words of Singer: “*Political intervention, in its various guises, is the bane of a regulator’s existence. When politicians attempt to influence regulatory policy directly (...) they threaten the agency’s autonomy and prestige. (...) Regulators will use all strategies at their disposal to minimize the possibility of intervention.*”²²

20. Interpreting competition policy in these narrow technical ways fits with the prevailing philosophy in the well-established NCAs. By contrast, in a body of state actors, one would expect there to (also) be discussions about the redistributive effects of a certain rule.²³

20 P. Kalbfleisch, From Ditchley Park to The Hague – A Journey Worthwhile, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 4.

21 K. von Finckenstein, Introductory Remarks (2003), 3–4.

22 D. A. Singer, *Regulating Capital: Setting Standards for the International Financial System*, Cornell University Press, 2007, 22.

23 Comparing actors’ arguments as state representatives or technical experts, see, for example, C. Ossege, *European Regulatory Agencies in EU Decision-Making: Between Expertise and Influence*, Palgrave Macmillan, London, 2016.

Competition rules are highly redistributive between different stakeholders in society, and different states. The ICN’s hunt for “Superior standards and procedures” is dressed up as value-neutral. It is not. For example, if we use competition rules to open up developing countries’ markets, who benefits: western multinationals, local firms, local consumers? Will they all benefit equally, or should the spoils be weighted in favour of one group? Also, the ICN focuses on competition all of the time (rather than other policy areas). So, the social and environmental consequences of driving lower prices are ignored, which can disproportionately impact certain groups (which, one might add, are little represented within the ICN).²⁴ Many others (outside of this narrow competition clique) might not agree that these narrow “expert arguments” are the best way to organise this highly redistributive policy area (see Section III).

21. In this respect, our survey has revealed a consistent pattern, according to which some NCAs are more likely to implement ICN recommendations because they have more resources, but also because sometimes these measures are already present in their legislation. This means that these NCAs push (often successfully) for ICN work products that recommend the adoption of their own standards. This has several benefits for these NCAs as well as NGAs familiar with that jurisdiction (nothing new to learn, nothing needs to change in their agreements, etc.). Of course, these rules may also be “better” in the sense that they benefit all countries that adopt them. That will depend on many factors, as UNCTAD, for example, explains.²⁵ Examples of these factors include: the national rules (and objectives for their competition rules), legal and economic context, variety of capitalism, whether they are a net exporter or importer, do they wish to protect SMEs, encourage exports, etc.²⁶ Trade fundamentalism, removing all trade protections, is not the best way to help poor countries to achieve economic growth.²⁷ Competition fundamentalism, ignoring goals, needs and context, is unlikely to be a panacea either. Most of these issues are not aired when pushing the ICN’s uniformity agenda onto rule takers.

22. And when we investigated NCAs’ perceptions about why some authorities push for the adoption of their own standards, we observed a stark divide between the older

24 C. Townley, *A Framework for European Competition Law: Co-ordinated Diversity*, Hart Publishing, Oxford, 2018, chapter 1.

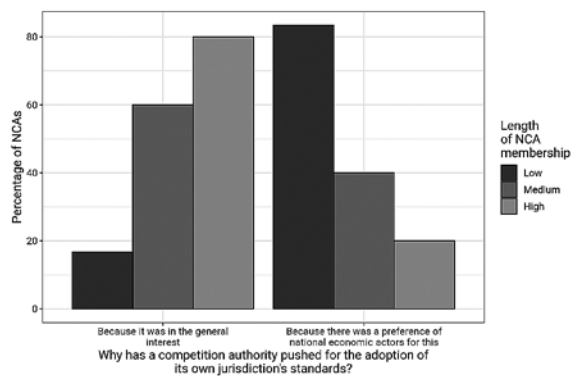
25 UNCTAD, Model Law on Competition: draft commentaries to possible elements for articles of a model law or laws (2020).

26 D. Lewis, Introductory Address to 2009 ICN Conference (2009); P. A. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, 2001; A. Wigger and A. Nölke, Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the Case of Antitrust Enforcement, *Journal of Common Market Studies*, Vol. 45, Issue 2, 2007, pp. 487–513; A. T. Guzman, Antitrust and International Regulatory Federalism, *New York University Law Review*, Vol. 76, Issue 4, 2001, pp. 1142–1163. Similarly, Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, section I.3. Legislators use various goals in their national competition legislation, should these be ignored, UNCTAD, Model Law on Competition: draft commentaries to possible elements for articles of a model law or laws, 11.

27 D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, W. W. Norton & Company, Inc., New York, 2011, chapters 7 and 8. Similarly, H.-J. Chang, *23 Things They Don’t Tell You About Capitalism*, Penguin Books, London, 2010, Thing 7, and the references cited in both works.

members (which include the founders of the ICN) and the newest members, as we can see in Figure 1: older members attribute this to the “general interest”; newest members attribute it to a preference of national economic actors. Even though these results reflect NCAs’ perceptions, we think they are worth considering.

Figure 1. Distribution of responses, by group, for the question asking why an NCA pushes for the adoption of its own standards (percentages come from the total number of responses from each group)



23. If, as seems likely (see von Finckenstein quote, above), the founding NCAs, and the NGAs involved, set up the ICN as an informal transnational network to avoid political influence, they are not alone. Roger recently conducted an empirical study on international organisations established since 1945 (including the ICN). If independent (non-majoritarian) actors drive the creation of international organisations, it is more likely that informal institutions will result (often avoiding political “interference”).²⁸ There would be less need to worry about this if these structures helped to resolve the specific problems that they face in the best way, as functionalists suggest.²⁹ Yet, functionalism does not provide a full explanation for the form of such bodies. Power-based theories seem relevant too.³⁰ Roger’s empirical work shows that, while some informal bodies are well matched to the underlying problems that they face, many are not. He calculates that almost 46% of informal international

28 C. Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters*, Oxford University Press, 2020, 9–10, 62–63 and 92–93. This finding is statistically significant. At page 7, he adds that these “contrasting domestic implications can be just as significant as the functional properties of these institutions when it comes to explaining why states, and actors within states, want to create them.” Roger adds (p. 63) that formal agreements could also achieve this end. However, as they demand political involvement (and thus risk compromise), regulators avoid them if they can adequately achieve their goals alone.

29 F. Vabulas and D. Snidal, Organization without delegation: Informal intergovernmental organizations (IIGOs) and the spectrum of intergovernmental arrangements, *The Review of International Organizations*, Vol. 8, 2013, pp. 193–220, at 209–210.

30 “The scholar who did the most to popularize functionalism and the transaction-cost approach in international relations, Robert O. Keohane, also took pains to point out their characteristic blind spots. Keohane (1984) [R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press, 1984] argued that international institutions are created in order to facilitate cooperation by reducing transaction costs, but he argued that they were created by the most powerful states for their own purposes, and were generally skewed to favor their interests.” R. W. Stone, *Informal governance in international organizations: Introduction to the special issue*, *The Review of International Organizations*, Vol. 8, 2013, pp. 121–136, at 123–124. Similarly, Slaughter, *A New World Order*, chapter 6.

organisations are not well matched. Furthermore, 74% of mismatched international organisations are informal.³¹

1.2 NCAs

24. As Fox argues, developed countries are the most active (and influential) in setting the ICN’s agenda and designing the content of its recommended practices.³² How can this be? Mere presence in the ICN does not equate to influence. Activity is an important indicator of this. So, here we look at activity within the ICN Steering Group, as well as ICN Working Groups. While ICN membership is extremely wide, and participation in the ICN activities has been facilitated by the organisation of virtual meetings, most of them with unrestricted access for members, influence in these two groups is less widespread.

25. Only NCAs can be Steering Group members (only NCAs can be Working Group chairs too). NGAs and international organisations are there by invitation only and can be removed. There is a widespread view among NCAs and NGAs that membership of the Steering Group is a key path to influence. In our survey, we asked respondents if membership of the Steering Group enabled its participants to have more control over the ICN’s agenda and work products. Eighty-six per cent of respondents answered that members of the Steering Group have more influence than other members on the ICN agenda. Sixty-nine per cent also said that they have more influence over ICN work products compared to other NCAs.

26. Originally, there were no formal rules about which NCAs could be in the Steering Group. When the UK led the ICN in 2012, it suggested some rules. The rules that were agreed contain process and substantive elements.³³ In terms of process, outgoing Steering Group members recommend the composition of the new Steering Group. The affinity bias (an unconscious bias that we all have to a greater or lesser degree) makes it likely that outgoing members will recommend those like them (from similar states with similar backgrounds).³⁴ The Annual Conference confirms this selection, by consensus. We are not aware of particular discussion of these choices at the Annual Conference.

31 Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters*, 208–209.

32 Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network* 106. Also, “[d]ue to the power dynamics that are inherent in the institutions and mechanisms that formulate and propagate international competition law norms [in part through the ICN], they are heavily influenced by and reflect the perspectives and practices of the United States, European Union and developed countries more generally.” W. Ng, *Changing Global Dynamics and International Competition Law: considering China’s potential impact*, 14th ASCOLA Conference, 2019, 5.

33 These are set out in ICN, *ICN Operational Framework*, 3.

34 The affinity bias “is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This leads people to invest more energy and resources in those who are in their affinity group while unintentionally leaving others out. Due to the prevalence of affinity bias, the legal profession [and others] can best be described as a ‘mirrortocracy’—not a meritocracy.” K. Nalty, *Strategies for Confronting Unconscious Bias*, *The Colorado Lawyer*, Vol. 45, No. 5, 2016, pp. 45–52, at 46.

27. While there is some geographic diversity,³⁵ Steering Group membership largely rotates between people from the same twenty or so jurisdictions, particularly those from richer, more technically advanced NCAs (especially those that started the ICN in the first place). This is most likely the result of both resource availability and the affinity bias, which effectively enables Steering Group members to perpetuate their power (even if they do not feel that this is their aim). Furthermore, as the years pass, their level of experience in leading the ICN increases, which makes it even harder for other NCAs to challenge the composition of the Steering Group. The lack of diversity in Steering Group membership carries the risk that the only (or the main) issues discussed will be the ones of importance to the richest countries in the world, given the Steering Group's power over the ICN agenda. Was this the point?

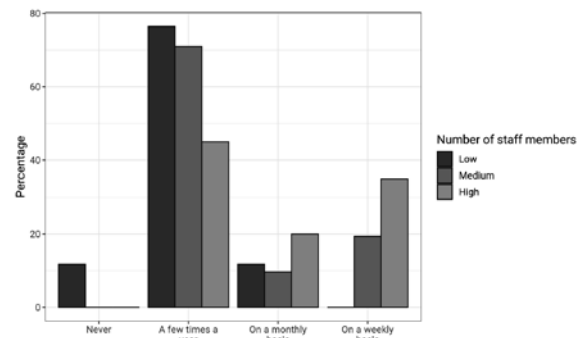
28. Any NCA can join any Working Group, so there is no issue with Working Group membership. What becomes important is how influential an NCA is (or can be) in a specific Working Group. Eighty-seven per cent of the respondents to our survey consider that Working Groups' co-chairs have more influence than other members in determining the ICN agenda. Seventy-four per cent also think that they are more influential in shaping work products. Working Group chairs are appointed by the Steering Group. Despite instituting rotation ten years ago, we see the power of the EU and North America with eight chairs (out of fourteen, this is 57%); compared to the rest of the world, for example: Australia, Mexico and Turkey all had one chair, South Africa chaired twice. This is not entirely representative.³⁶

29. These disproportionate leadership roles give the richer NCAs disproportionate power to influence the selection and content of ICN work. They do not provide total control, just more control than most other NCAs. Well-resourced NCAs can augment this power and influence in other ways too.³⁷ For a start, all "negotiation" happens in the shadow of political and economic power, even if this is not mobilised. In addition, their leadership roles allow these NCAs to get into the debate (and drafting) of work products early, giving them critical leverage.³⁸ The lack of resources of the other NCAs makes it hard for them to counter this power. Finally, of course, the richer NCAs provide further "assistance" through training and other such support. Younger NCAs often find this support helpful, but it is also like a Trojan horse, welcoming

rulemakers into the least-resourced NCAs and providing opportunities to "educate" them into a similar mindset. The poorer NCAs may also feel (rightly or wrongly) that too much disagreement within the ICN (and elsewhere) may lead to the withdrawal of such support.

30. Regarding the superior ability of more resourced NCAs in shaping the ICN choices, see for instance Figure 2, where we can see how poorly staffed NCAs can only rarely engage in ICN activities. The influence of the biggest NCAs also resides in their ability to continuously follow decision-making processes. Our survey shows that the NCAs with more resources are also generally the ones that have been in the ICN for the longest. Experience and insider knowledge give them additional advantages.

Figure 2. Distribution of responses, by the group, for the question "How often is your competition authority in touch (at a distance or at conferences) with other ICN participants for ICN-related issues?" (percentages are calculated among the total number of responses from each group)



31. The final thing to assess here is whether the "consensus rule" for agreeing the ICN work schedule or new ICN work products is sufficient to protect all NCAs and their states. Several factors make us question this. On the one hand, we have seen the power and influence of richer NCAs. On the other hand, newer NCAs often have less opportunity and resources to protect their state interests, given that they: (i) lack control over the ICN agenda; (ii) lack relevant knowledge; (iii) may be overly relaxed about not vetoing proposed ICN work products, given the lack of need to implement them (but see below), etc.

32. Secondly, while an open search for the best ideas sounds meritocratic, ideas can come from anyone; however, it likely favours "advanced NCAs" and their states.³⁹ Their large research budgets (and greater expe-

35 In the past ten years, new Steering Group members included three agencies from the European Union—Hungary, Poland and Portugal—and NCAs from Colombia, Kenya, Morocco, and Singapore.

36 "Although open to competition officials and their advisors from any country, US and European participants tend to play the central roles in the working groups and annual meetings." D. Gerber, *Global Competition: Law, Markets and Globalisation*, Oxford University Press, 2010, 116.

37 Scholars stress this in fora like the GATT too, R. Steinberg, In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO, *International Organization*, Vol. 56, 2002, pp. 339–374, at 354–356. The same applies in other transnational networks of independent technocrats like the ICN.

38 On the importance of this, see R. Lall, Timing as a Source of Regulatory Influence: a Technical Elite Network Analysis of global finance, *Regulation & Governance*, Vol. 9, Issue 2, 2015, pp. 125–143.

39 Is there a contradiction between the argument that some powerful states use the ICN to advance their domestic interests and the interests of their "national champions," and the fact that many NCAs participating in the ICN are insulated from state influence? The answer depends upon the ideology that NCAs employ in the ICN. Where an NCA's ideology is thought to advance its state's domestic interests (including its industrial policy), then its state has less reason to seek presence, or influence, in the ICN. Here, it is irrelevant whether the NCA seeks to achieve these state aims, or they are a consequence (by product) of its own agenda. Richer jurisdictions, like the EU and the US, largely seem to support their NCAs' competition ideology because, from an industrial policy perspective, it is thought to benefit firms from these regions. NCAs do not only consider the effects on themselves. They also consider the effect on their firms. Wilks talks of a surrendering of many areas of government through contracting out or privatisation and then subjecting firms to regulation by business-friendly regulatory agencies, S. Wilks, *The Political Power of the Business Corporation*, Edward Elgar Publishing, Cheltenham, 2013, 105.

rience) provide significant advantages compared to newer NCAs. This generates opportunities to advance their industrial policy goals by advocating the rules they favour. In an arena which they dominate, they can dress up their preferences as the best technical solutions. Yet, different varieties of capitalism, competition goals, histories and socio-economic frameworks may all impact upon the optimal substantive and procedural competition rules that are wanted/needed.⁴⁰ Newer NCAs find these narratives hard to refute. They often do not have the time or advanced knowledge to question whether the “advanced NCAs” position is right for their own state and will work optimally there.⁴¹

33. Third, the focus on technical issues in the ICN, rather than on negotiating from a state perspective, may drive a wedge between what NCAs are aiming for and what their states might want. Richer NCAs often offer support to newer NCAs in their technical approach “against” their own states, for example. This wedge is likely to be driven further by the epistemic community. A particularly powerful effect of policy networks is how they socialise members over time.⁴² This helps newer NCAs fit in but makes it hard to challenge the status quo.⁴³ Network actors are Janus-faced, with allegiance to their epistemic community (here the competition community) and also their jurisdictions. These allegiances are often in tension. But the power of networks is so strong that, in many instances, network actors use their specialist knowledge to favour ideas from their epistemic community and marginalise their own national interests.⁴⁴ This matters too. Many states did not condone the ICN’s establishment (in fact, they were often bi-passed). And states are not allowed inside the ICN to defend their own interests.

1.3 NGAs

34. Wilks tells us to think not only of economies of scale, but also of politics of scale. Global governance is a prime (and successful) hunting ground for multinationals. Individual multinationals may have little individual influence; together they are a force to be reckoned with.⁴⁵ The decision to allow NGAs into the ICN’s heart helps bake the desires of principally rich, western multinationals into this system.

40 See above, footnote 26.

41 This is not to impugn the abilities of the many bright, hard-working and dedicated staff working in newer NCAs. Their lack of resources (time and equipment) simply handicaps them in this effort.

42 M. Weber, *Economy and Society*, University of California Press, 1978, 41; G. F. Thompson, *Between Hierarchies and Markets: The Logic and Limits of Network Forms of Organization*, Oxford University Press, 2003, 30–31; Kohler-Koch, *Interdependent European Governance*, 140; and M.-L. Djelic and S. Quack, *Transnational Communities and Governance*, in *Transnational Communities: Shaping Global Economic Governance*, M.-L. Djelic and S. Quack (eds.), Cambridge University Press, 2012, 12–13.

43 V. A. Schmidt and C. M. Radaelli, *Policy Change and Discourse in Europe: Conceptual and Methodological Issues*, *West European Politics*, Vol. 27, Issue 2, 2006, pp. 183–210, at 203.

44 Ossege, *European Regulatory Agencies in EU Decision-Making: Between Expertise and Influence*, 34–55 provides several EU examples.

45 Wilks, *The Political Power of the Business Corporation*, 5 and 43–47.

35. Many stakeholders are (potentially) affected by the substantive and procedural content of the competition rules. Some seem positive about the diversity of ICN participants.⁴⁶ We are less sanguine. We list relevant stakeholders here. Only those in CAPITALS are currently really represented in the ICN: CONSUMERS (in all the various states⁴⁷); PARLIAMENTS (as their rules are affected); COURTS; NATIONAL COMPETITION AUTHORITIES (NCAs); BIG and small BUSINESSES (and the firms that represent them); ECONOMIC CONSULTANTS; INTERNATIONAL ORGANISATIONS IN FAVOUR OF (or rejecting) SUCH RULES; those whose separate system is affected by the competition rules (e.g. due to externalities that clash with competition provisions, such as intellectual property or environmental norms).

36. When it comes to NGAs’ expertise, the main participants are business people from the major multinationals. Perhaps the largest area of expertise is lawyers. Many are employed by these major multinationals directly, or the law firms that multinationals use. The ICN does not clearly state who the NGAs are (which is problematic, given their influence). The ICN often says that it is keen to recruit more widely. The ICN challenged economists to get involved.⁴⁸ This initiative has not been very successful.⁴⁹ It is unclear how many NCAs, especially those from richer states, support this. Our survey supports the idea of the predominance of law firms (54%), big businesses (14%) and academics (14%) among the most represented NGAs. Consumer organisations and economists are less present (around 6% each). Other groups (international organisations, members of business confederations, small businesses) make up less than 7% of NGAs.⁵⁰ There are not many other kinds of service providers (such as business schools, management consultants and accountants) in attendance either. There is also a lack of political scientists, sociologists, behavioural economists, and international relations scholars, whom all have

46 D. Sokol, *The ICN in the Context of International Antitrust Institutions*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 157–158.

47 Some consumers are represented. However, these consumers’ NGAs represent a minority and do not include consumers from many states, <http://www.icnblog.org/?p=130> (last accessed 18 February 2022). This 2010 data is supported by our own 2018 survey, Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, chapter 3.

48 M. Mandorff, *Engaging economists in the ICN: Uniting under a common language*, *Competition Policy International*, 2012, 1–2; C. Lewis Lagdameo and A. Heimert, *The Unilateral Conduct Working Group*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 295.

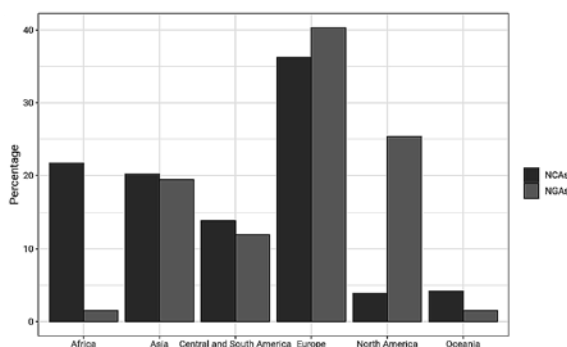
49 In their discussions with ICN members, especially those from transition economies, Hollman and Kovacic have heard “recurring concerns that ICN must increase participation by non-private sector NGAs (such as academics or officials of consumer groups) to balance the representation of NGAs from companies or law firms.” H. Hollman and W. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 59. P. Marsden, *Acta Non Verba: Keep ‘Talking Shop’, Don’t Become Another Talking Shop*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 148, also argues for more diversity among the NGAs.

50 One ICN report says that NGAs are overwhelmingly from the private bar (70%) and academia (15%), business, consumer groups, and international organisations, <http://www.icnblog.org/?p=130> (last accessed 22 February 2022). A similar picture also emerges from ICN, *The Future of the ICN in its Second Decade: Final Report*, 2016, 27–29.

something to say about the distributional interests and outcomes of the ICN and its rules.

37. When one looks to see where NGAs are based, many are from Europe and North America. This is not necessarily surprising; it partly reflects the origin of many of the largest firms globally (especially given that the Chinese NCA is not in the ICN).⁵¹ We are told that many NGAs are “from younger jurisdictions such as Armenia, Pakistan, Vietnam and others.”⁵² Even if this were true (and the lack of transparency makes it hard to check), they are unlikely to make up a large percentage of all NGAs present.⁵³ Furthermore, while presence is something, active influence is more important. The ICN itself reports that NGAs from Europe and the Americas were participating in the working groups the most actively.⁵⁴ Our survey confirms this information. As Figure 3 shows, Europe and North America appear to be over-represented in terms of NGA participation, and others (most notably Africa) under-represented.

Figure 3. Geographic distribution of NCAs and NGAs



work. Coppola et al. describe the range of work that NGAs can get involved in (as well as the special, perhaps even unique, nature of their role in the ICN): “NGAs help identify projects; produce and offer important comments on work product; contribute to the policy dialogue at conferences and workshops; and help disseminate ICN work product and promote its use. In no other government competition fora do non-governmental experts play such an integral role. The network’s inclusive approach to membership coupled with the active participation of non-governmental advisors from around the world means that the ICN is truly a reflection of the global antitrust community.”⁵⁵

51 Of the Fortune 500 firms in 2020, for example, about 28% come from the EU and 28% from North America. Others come from China (28%) and Japan (11%), <https://fortune.com/global500> (last accessed 22 February 2022).

52 U. Boge, Closing Speech 4th Annual ICN Conference, 6–8 June 2005, 2.

53 Our survey supports the geographical predominance of European (40%) and North American (25%) NGAs, with Asia (19%), South America (12%), Africa and Oceania (1%) much less represented.

54 ICN, The Future of the ICN in its Second Decade: Final Report, 14-5. Twenty per cent of the most active NGAs come from North America and 16% from Europe. Only 7% of “particularly responsive” NGAs are from Asia and Oceania, and even then, they are mainly from the richer countries there, *ibid.*, 26.

55 M. Coppola, E. Kraus, C. Lagdameo, P. O’Brien and R. Tritell, (Nearly) A Century with the ICN, *Competition Policy International*, 2020.

39. So, who are NGAs acting on behalf of in the ICN? Worryingly, the ICN thinks that firms act for the benefit of all “independence and integrity are key features of the NGA role. NGAs work towards the advancement of the ICN’s general interest to the benefit of all stakeholders.”⁵⁶ NGAs often agree.⁵⁷

40. At best, this is naïve. Wils has called it almost inevitable that “among the different NGAs, those representing (directly or indirectly) the views and interests of big business will end up being most vocal.”⁵⁸ The lack of ICN transparency makes this hard to check. However, Jenny reports a discussion at the ICN Annual Meeting in 2004. Some NCAs from developing countries proposed that the ICN start working on recommended practices on abuse of dominance. This idea was flatly rejected. Jenny says: “Some delegates suspected that the refusal of the ICN to take up the issue of abuse of dominance was due to the reluctance of business-related NGAs who did not want to see competition authorities encouraged to go after large multinational firms using abuse of dominance or monopolisation provisions.”⁵⁹

41. It was another two years before the Steering Group created the Unilateral Conduct Working Group to look at this issue. Even if the NGAs lost the battle in the end, their ability to disrupt ICN work for two years on this point likely brought considerable extra profits to the multinationals that had been taking illicit advantage of their market power (and their advisors).

42. Powerful coalitions of multinationals intervene in the ICN because they care about the outcomes of governance. They want to remake the structures of opportunity (to their own advantage, not that of society at large). This is not easy. Their continued presence implies that they feel it has been worth it.

43. NGAs have fewer tools at their disposal than NCAs to achieve these ends, but they are still likely to have plenty of influence. Their presence in the ICN is already something. Letting them know when initiatives arise, giving them early, additional opportunities to stop (or delay) them, as we have seen. Getting into the debate early is also something they can take advantage of. NGAs are often involved in drafting ICN work products; this gives them powerful input into shaping initiatives. In addition, the revolving door helps them to keep NCA employees “honest.” NGAs send their employees on temporary secondments to NCAs, providing adequate

56 ICN, NGA Toolkit (2012), 3. Similarly, ICN Advocacy Working Group, Summary of ICN Teleseminar on Building Agency/Bar Relationships (2009), 2.

57 “The goals of NGAs, and indeed all competition law advisers, are in principle aligned with those of the agencies in that everyone in the competition community wants to promote and encourage competition law and culture. We are all aiming to effect justice by creating and maintaining good systems.” D. Anderson, Reflections on the ICN and its NGAs: Advocacy and Implementation, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 279–280.

58 W. Wils, Independence of Competition Authorities: The Example of the EU and its Member States, *World Competition*, Vol. 42, Issue 2, 2019, fn. 76.

59 Jenny, The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities, 101.

opportunities to help to shape their thinking on various issues. In addition, those working in NCAs know that if they wish to leave and join an NGA, they need to exhibit “appropriate” ideological stances (i.e. those shared by NGAs).

44. Networks are controversial (or we think that they should be). Their rise has been “aided by the perception that many regulatory issues are technocratic.”⁶⁰ In part, this is because many network actors do not see themselves as involved in a political exercise but in a technical one, designing the “best” rules. Yet, regardless of competition officials’ motivations, networks (and the rules they propagate) facilitate and constrain actors and outcomes,⁶¹ creating winners and losers.

2. ICN Influence

45. Despite the ICN’s “consensus rule” for accepting new work products, NCAs and NGAs from advanced industrialised economies often have more influence. So, ICN work tends to focus on issues of interest to them (even at the expense of others). The same is true for the focus of the resulting work products.

46. What happens when it comes to the implementation of ICN work products? There is a tension at the ICN’s heart. On the one hand, it formulates proposals for procedural and substantive convergence. On the other hand, the ICN is an informal international organisation without a rulemaking function. Its members are not under the special obligation of a formal international agreement captured by the *pacta sunt servanda* doctrine.⁶² When the ICN reaches consensus on work products, “it is left to its members to decide whether and how to implement the recommendation.”⁶³

47. Formally then, the ICN cannot force its members to implement its work products. However, the mere fact that the ICN is an informal network and that its working products are not legally binding does not tell us much about its capacity to influence its members to adopt them, in fact.

48. This discussion is particularly relevant today. Although the ICN explicitly emphasises NCAs’ (and their states’) right to informed divergence from ICN work products, the ICN has shifted its focus from the production of work products (which still takes place)

towards pushing their implementation. Implementation is now part of the ICN’s DNA too. Feedback from many ICN members supports this shift towards an “implementation focus.” More convergence is also supported by the NGAs. Many would like the ICN “to reach greater convergence of national competition laws, practices and procedural rules, as well as more inter-agency cooperation in the future.”⁶⁴ This includes more uniform implementation of ICN work products. Yet, there is reason to question how appropriate such choices are. Diversity in competition law enforcement has many benefits (not just costs). It is not obvious that the ICN is the right forum for making such choices. Nor is it obvious that the paths to influence (see Section II) are appropriate for these highly political judgments (especially given the lack of oversight by democratic institutions, although this depends on the values in the state concerned).

49. In order to understand ICN influence, it helps to remind ourselves how changes might be made to competition policy. NCAs can often achieve major substantive and procedural impact just by changing the way in which they implement (widely drafted) competition rules. So, NCAs can often follow ICN work products without involving other state actors. However, sometimes, implementing ICN work products requires legislative change, for example, where national competition rules explicitly diverge from ICN rules. This is normally not within the gift of NCAs, and they need wider approval.

50. Addressing the issue of the impact of soft law, political scientists distinguish between first-order and second-order effects.⁶⁵ The analysis of the former focuses on the short-term: coordination and compliance, i.e. the consequences of soft law that imply the adoption of certain standards, the implementation of recommendations and the compliance with a certain rule.⁶⁶ In relation to the ICN, first-order effects include efforts by the ICN itself, ICN members and NGAs to push NCAs (directly or indirectly) to interpret their own competition rules in line with ICN work products. Where legislative change is needed in order to achieve this in a country, first-order effects would include instances where the ICN helps NCAs to lobby their own states to make such legislative changes.

51. Transnational networks principally influence through two main mechanisms: self-regulation and improving the capacity of states to comply. The ICN employs both of these mechanisms consistently and effectively.⁶⁷

60 K. Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, *Virginia Journal of International Law*, Vol. 43, 2022, 24.

61 Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, 11, see also at 162. Similarly, see the argument between Wilks and Sturm (emphasising power in networks and how they are not value-neutral) and Schaub and Tesouro (arguing that networks are not about power), Ehlermann and Laudati (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy*, 15, 34–35, 66, 77, 79 and 172–173.

62 “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” (Vienna Convention on the Law of Treaties, Art. 26).

63 ICN, ICN Operational Framework, 1 (vi).

64 ICN, The Future of the ICN in its Second Decade: Final Report, 39.

65 A. L. Newman and E. Posner, *Voluntary Disruptions: International Soft Law, Finance, and Power*, Oxford University Press, 2018. See also, for example, G. Capano, M. Howlett, M. Ramesh and A. Virani (eds.), *Making Policies Work: First- and Second-order Mechanisms in Policy Design*, Edward Elgar Publishing, Cheltenham, 2019.

66 K. Abbott and D. Snidal, Hard and Soft Law in International Governance, *International Organization*, Vol. 54, Issue 3, 2000, pp. 421–456; A. Newman and D. Bach, The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation, *Journal of European Public Policy*, Vol. 21, Issue 3, 2014, pp. 430–452; P. A. David, Clio and the Economics of QWERTY, *American Economic Review*, Vol. 75, No. 2, 1985, pp. 332–337.

67 We provide many examples in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, chapter 2, section 2.2.

Self-regulation occurs because transnational networks help to make reputation matter. They socialise their members,⁶⁸ monitor them closely and support them in adhering to “best practice” norms. In this way, networks build trust, cohesion, and common purpose among their members.⁶⁹ At the same time, this monitoring of compliance by members puts those not complying under pressure to justify their divergence or conform. This can be painful, especially for those lacking confidence (or feeling the need to conform to “deserve” training or other support). A second way for transnational networks to strengthen compliance is to improve the capacity to comply. Countries often lack sufficient material and human resources to pass, implement, and apply laws effectively. According to Slaughter, networks play an important role here. They can engage in capacity building⁷⁰ directly, through training and technical assistance programmes, and indirectly, through provision of information, coordinated policy solutions, and moral support to their members.⁷¹

52. The analysis of second-order effects, by contrast, takes into consideration a double dynamic—time and politics—and focuses on the mechanisms which, over time, allow political actors to shift the balance of authority among competing regulatory factions.⁷² In relation to ICN work products, this might include their use by litigants in court, or lobbyists in political debates, to move the legitimate parameters of the debate, to define “best practice.” ICN documents have been used in efforts to define what is normal or appropriate in many situations; for example, as the ICN explicitly acknowledges,⁷³ in private submissions to state consultations on the possible changes to the national competition rules,⁷⁴ and justifications for considering certain elements in legislative proposals.⁷⁵

68 Lewis, Introductory Address to 2009 ICN Conference, 5.

69 Slaughter, *A New World Order*, 33.

70 The ICN has developed a “Training on Demand project,” financed by the American Bar Association’s Section of Antitrust Law, <https://www.internationalcompetitionnetwork.org/training> (last accessed 19 February 2022).

71 Slaughter, *A New World Order*, 185.

72 Newman and Posner, *Voluntary Disruptions: International Soft Law, Finance, and Power*, 22.

73 ICN, ICN Statement of Achievements 2001–2013, 18.

74 Law firms and others often refer to ICN surveys and other work products as a means of pointing to what is “normal” in other jurisdictions or “objectively” best practice. This was the case in two responses to a UK government enquiry into reform of its competition system, for example – https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/312063/D-F-competition-regime-for-growth.pdf and https://www.lawscof.org.uk/media/10534/comp-ls-response-to-hol-im-sub-combrexit-competition-inquiry_sep-17-2.pdf (last accessed 19 February 2022).

75 For example, justification for the consideration of certain elements in market power assessments in digital markets, Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, 15 December 2020, para. 73.

II. Legitimacy*

53. We believe that each state must assess the ICN and its outputs (as well as how they should be used in that state) through a legitimacy lens shaped by that state’s understanding of democracy. As so many states use ICN work products, each with different versions of democracy, many legitimacy assessments are potentially relevant. They may also change over time. So, we consider it more useful to provide states (and others) with a toolbox that they can use to make their own legitimacy assessments. Morgan and Yeung call this “middle level” theorising.⁷⁶

54. As regards input legitimacy, it is important, first of all, to assess the origins of the ICN’s mandate. Here one might ask questions like, did the NCAs that established the ICN, and do NCAs, when joining it, act within the limits of their powers? While this seems to have been the case for the Portuguese NCA, for example, we believe that the NCAs from the UK and the EU (DG COMP) acted outside of their powers. We also need to understand the nature of the ICN. The ICN sometimes calls itself an “international organisation,” placing itself in a similar category to the OECD and UNCTAD.⁷⁷ Yet, while it has been established by public bodies, the ICN is not a “standard” public international organisation. This is because, unlike the OECD and UNCTAD, the ICN was not created by states themselves (but by NCAs). We discuss these issues at length in our book, but due to lack of space, we do not engage with them here.⁷⁸

55. In addition, each state can assess whether the goals, procedures and institutional structures that the ICN pursues through its work products are appropriate for that state (do they match its competition law’s requirements). This applies both at a formal level (should ICN “constitutional principles” such as non-discrimination and no public policy in competition law be followed) as well as seeing what happens in practice. Sections I and II showed how there is much to fight over in this highly redistributive area and that advanced NCAs are likely to be able to ensure that joint rules favour them.⁷⁹

56. There is little discussion about the “input” legitimacy of the ICN and its outputs. However, for those that reflect upon this issue, Fox provides a helpful expression of one logic. According to Fox, the ICN’s legitimacy “*is built around notions of participation and transparency.*”⁸⁰

* For more detail on the arguments, Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, chapter 4 (especially 4.3.1.) and conclusion.

76 B. Morgan and K. Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press, 2007, 222–228.

77 See, for example, Vice-Chair for Young Agencies and Regional Diversity, *Lessons to Be Learnt From the Experience of Young Competition Agencies: An Update to the 2006 Report* (2019), 3.

78 Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 256–260 and Annex 4.1.

79 Similarly, Verdier, *Transnational Regulatory Networks and Their Limits*, 162.

80 Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 125–126. See also J. Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 195 and 199; and ICN Merger Working Group, *ICN Recommended Practices for Merger Notification and Review Procedures: Member Self-Assessment – Report on 2016 Survey Results* (2017), 1.

57. Deliberative theories focus on citizens' liberty to participate in politics. Those affected by an issue should have equal participation rights, so that relevant issues (for them) will be debated, and debates are accessible to them, with their resources being considered when assessing this.⁸¹

58. The ICN has tried to increase the number, geographic origin and range of expertise of its participants (see above). However, a deliberative democracy justification for the ICN is unconvincing. Participants are normally non-majoritarian actors (NCAs rather than states). NGAs can participate when invited. Yet, most stakeholders are not represented in the ICN (as Fox explicitly points out after the previous quote). We have also seen the likelihood of greater voice for NCAs and NGAs from the US and the EU. In other words, there is not necessarily a diverse range of actors involved and, even to the extent that there were, there are large disparities in their "voice" and ability to effectively participate.

59. States, and others, looking to increase the ICN's democratic legitimacy through a deliberative democracy model would need to engage with a wide range of affected citizens through the ICN. Furthermore, due to likely problems of resourcing, language, gaps in understanding, and other problems, those citizens that got involved would likely need significant support. The level of engagement required under such a model would radically alter the nature and cost of the ICN. Changes of this magnitude, if they are even possible, seem unlikely to happen any time soon.⁸²

60. Another key input legitimacy justification could be a liberal democracy approach. Liberal theories consider active citizen engagement in each issue unnecessary. Citizens elect politicians to engage for them (the unelected should not do this, as they are not accountable). Different liberal democracy models demand that politicians be directly involved in competition policy and enforcement (given the highly redistributive nature of enforcement),⁸³ indirectly involved by pushing their NCA to act in specific ways, or to appoint those in charge of NCAs, so that citizens can punish these officials at the ballot box if they act contrary to citizens' wishes. Disputes about the "best" model arise even in established democracies. In part, this is because many scholars have argued that we should insulate regulatory agencies (and their outputs) from democratic oversight to some degree.⁸⁴ For citizens, political accountability should improve the quality of regulatory agencies' outputs.⁸⁵

81 T. A. Börzel and D. Panke, *Network Governance: Effective and Legitimate?*, in *Theories of Democratic Network Governance*, E. Sørensen and J. Torfing (eds.), Palgrave MacMillan, London, 2008, 164–165; E. Sørensen and J. Torfing, *Theoretical Approaches to Democratic Network Governance*, in *Theories of Democratic Network Governance*, E. Sørensen and J. Torfing (eds.), Palgrave MacMillan, London, 2008, 234–235.

82 Even if more "inclusion" does not necessarily increase legitimacy, it may (by taking account of a wider range of ideas) facilitate a higher quality of policy output, increasing effectiveness (although fully engaging with a wider range of stakeholders could undermine the efficiency of the system). That is not "input legitimacy," however.

83 See Townley, *A Framework for European Competition Law: Co-ordinated Diversity*, 97 and following.

84 See *ibid.*, chapter 3; and Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 246–248.

85 A.-M. Slaughter and D. Zaring, *Networking Goes International: An Update*, *Annual Review of Law and Social Science*, Vol. 2, 2006, pp. 211–229, at 220.

61. Could some form of control of competition policy by politicians help generate input legitimacy? The choices that a state makes about how much leeway to give its NCA over competition policy are likely driven by some combination of (i) its understanding of the role of its NCA; (ii) the reasons for delegating responsibility to the NCA; (iii) the political salience of competition issues in that state; and (iv) how important active political intervention is perceived to be there. Different states have different views on democratic legitimacy here (and what is "appropriate" depends on each state's system and context).

62. In Portugal, for example, the NCA's by-law entitles it to represent the Portuguese state internationally. Since its creation in 2003, the Portuguese Competition Authority received a legal mandate to (i) establish cooperation relations at the EU level and internationally in matters of competition policy⁸⁶ and (ii) secure technical representation of the Portuguese state in the EU and internationally.⁸⁷ The reform of its by-law in 2014 left these competences unchanged.⁸⁸

63. These provisions give the Portuguese NCA a general, explicit legal mandate to join and participate in international bodies without any need for further, specific authorisation either from the national Parliament or the national government. The NCA relies on this power to legitimise its activities in the European Competition Network, the OECD and UNCTAD. In addition, this power covers the Portuguese NCA's participation in the ICN as well as in other international networks. In this context, the Portuguese Competition Authority is also competent to establish its priorities regarding EU and international cooperation.⁸⁹ For example, with the aim to promote the discussion and implementation of international best practices in competition policy, the Portuguese Competition Authority established among its priorities for 2018 its participation in the EU Merger Control Working Group and in two ICN working groups: Advocacy Working Group and Promotion and Implementation Group.⁹⁰

64. By way of comparison, let's look at the EU position. If the correct procedures are followed, agreeing ICN work products is possible from an EU law perspective (as

86 Article 6(1)(d) of the Portuguese Competition by-law approved by the Decree-law 10/2003, of 18 January 2003, *Diário da República* 15/2003, Série I-Am 2003-01-18, no longer in force.

87 Article 6(1)(h) of the Portuguese Competition by-law approved by the Decree-law 10/2003, of 18 January 2003, *Diário da República* 15/2003, Série I-A, 2003-01-18, no longer in force.

88 See Article 5(i) and Article 6 of the Portuguese Competition by-law approved by Decree-law 125/2014, of 18 August 2014, *Diário da República* 157/2014, Série I-A, 2014-08-14.

89 The Portuguese Competition Authority's plan of annual priorities for the years of 2012 to 2017 is available at <https://www.concorrenca.pt/pt/arquivo> (last accessed 22 February 2022).

90 See the Portuguese Competition Authority Priorities Plan for 2018, available at https://www.concorrenca.pt/sites/default/files/archive/AdC_Prioridades_2018.pdf (last accessed 22 February 2022). Furthermore, more political oversight is generated because the Portuguese NCAs annual budget proposal (which has to be approved by the Ministry of the Economy) includes an estimate of how much the NCAs international representation activities will cost during the relevant period. The Annual Report and Accounts for each financial year report on the expenditure in relation to the EU and international cooperation and technical representation of the Portuguese state. This annual report is presented and discussed before the national Parliament.

long as they do not conflict with the EU Treaties or EU Court judgments).⁹¹ In terms of what the relevant procedure is, debate remains. A key issue is whether or not “agreeing” work products within the ICN counts as an international agreement, from an EU perspective. If they do, then the procedure to follow is explicitly laid down (Article 218(2)–(6) TFEU). Broadly, the Commission should submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations (it may also address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted). The Commission often then actually negotiates. Finally, the Council, on a proposal by the negotiator, adopts a decision concluding the accord (after consulting the European Parliament).

65. It seems unlikely that ICN work products are international agreements, given the extensive statements that the parties to them do not intend them to be binding (although this is increasingly questionable, given the rising focus on implementation, see Section II). The ECJ (the top EU Court) has accepted the possibility of non-binding arrangements on the international plane in the past.⁹² However, it still seems necessary to basically follow the formal procedure for binding international agreements in the relevant area when concluding them.⁹³ The implication is that the EU institution in charge of policy in the relevant area must still set this for non-binding arrangements (this would be the Council here). Whether ICN work products are held to be binding international agreements or non-binding ones, DG COMP probably did not follow the right procedure in the ICN.⁹⁴ Failure to

do this means that the act where it decided to act unilaterally within the ICN (or where it was authorised to) is likely void.⁹⁵

66. The procedures that DG COMP has followed in “agreeing” the ICN recommended practices so far fall far short of the Article 218 TFEU standards (not even involving the Commission, let alone the Council and the European Parliament). So, DG COMP may be acting outside of its powers. If the right procedures are followed, the legitimate actors may retroactively mend this legal error.

67. States might reflect upon where they stand on this spectrum (between the EU and Portugal) and review their NCA’s participation in the ICN in light of this. What is particularly concerning, though, with the ICN is the lack of a general “political moment,” even at its inception, where wider state interests elected this course (unlike the OECD, for example). Even those that favour these sorts of transnational networks normally see such a “constitutional moment” as crucial for legitimacy.⁹⁶

68. Some questions to think about (chapter references are to the relevant places in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Oxford University Press, 2022):

– If a deliberative democracy model is relevant in a country’s legal order:

(i) Are all relevant stakeholders adequately represented, in fact, in the ICN (Chapter 4, Section 3.1.1.)? Are more efforts needed to increase the diversity of the NGAs, geographical origin and expertise within the ICN (Chapter 1, Section 2.2.)?

(ii) Are all relevant stakeholders adequately represented, in fact, in the resulting national discussions (Chapter 4, Section 3.1.1.)?

– If a deliberative democracy model is not followed in a country’s legal order, does ICN work map onto its liberal democracy model? In other words, is the country’s national legislature informed and given an appropriate level of oversight commensurate with that

91 Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Annex 4.1 provides more detailed reasoning.

92 CJEC, 23 March 2004, *France v. Commission*, case C-233/02, EU:C:2004:173, para. 41.

93 Some deviation from the formal procedure seems possible; how much is not entirely clear. Similarly, P. Garcia Andrade, *The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, *European Papers*, Vol. 1, No. 1, 2016, pp. 115–125, at 117 and 120–121.

94 The Lisbon Treaty introduced a new procedure that may be designed to be used when bodies set up by an agreement (like the ICN) are called upon to adopt acts having legal effects (which might include the production of ICN recommended practices). This provision, Article 218(9) TFEU, demands a shift in focus from the binding nature of an arrangement to its legal effects in the EU legal order. Can mere (non-binding) recommended practices of an international body could have “legal effects” in the EU order? This is possible. In one case, for example, the ECJ held that non-binding recommendations from the International Organisation of Vine and Wine (OIV) were “capable of decisively influencing the content of” EU rules (and so they “have legal effects”). There, EU legislation relied on OIV recommendations (CJEU, 7 October 2014, *Germany v. Council*, case C-399/12 EU:C:2014:2258, paras. 59–64). The limits of “legal effects” remain unclear under Article 218(9) TFEU, T. Ramopoulos and J. Wouters, *The Institutional Structure*, in *Oxford Principles of European Union Law*, R. Schütze and T. Tridimas (eds.), Vol. I, Oxford University Press, 2018, 1083. “Soft law” such as ICN recommended practices can have considerable legal effects, by inducing actors to modify behaviours, R. A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of ‘Soft’ International Agreements*, *West European Politics*, Vol. 44, No. 1, 2021, pp. 72–92. By way of comparison, according to the Commission, a non-binding OECD recommendation is capable of having legal effects, Eur. Comm., *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the OECD Public Governance Committee and the OECD Council on the draft Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones*, COM(2019)294 final, 1 July 2019, section 4. ICN recommended practices are capable of having legal effects. This is increasingly likely as the ICN augments its monitoring of the implementation of its recommended practices and raises the pressure on NCAs to converge. So, the EU courts may insist on input legitimacy for ICN recommended practices (as DG COMP “agrees” to them). If so, the Article 218(9) TFEU procedure may have to be followed when negotiating and agreeing them. Even if ICN recommended practices are incapable of having “legal effects” to this standard, the ECJ may hold that competence allocation is still relevant (given the potential effects noted

above). Recent treaty changes bolster the emphasis on input legitimacy vis-à-vis effectiveness and efficiency, CJEU (Grand Chamber), 28 July 2016, *Council v. Commission (Swiss Molu)*, case C-660/13 EU:C:2016:616, paras. 31–43. If the ECJ emphasises input legitimacy, it could stipulate a procedure for international agreements without legal effects which is similar to Article 218(9) TFEU.

95 In many areas (not just competition), EU Directorate Generals (DGs) have ignored the formal procedures, directly making “non-binding” international arrangements themselves, often with no input from other EU institutions or the Member States. Some speculate that the aim of these agreements was to increase effectiveness and efficiency, see the discussion in Wessel, *Normative Transformations in EU External Relations: The Phenomenon of ‘Soft’ International Agreements*, 75. DG COMP (the Directorate General of the EU Commission which deals with competition) has also concluded many “non-binding” competition arrangements without following the formal rules (although sometimes it follows them), V. Demedts, *The Future of International Competition Law Enforcement: An Assessment of the EU’s Cooperation Efforts*, Brill Nijhoff, Boston, 2018, section 4.1.3(A), lists several examples, such as with Brazil, Chile, Russia and China, see <https://ec.europa.eu/competition/international/bilateral/index.html> (last accessed 22 February 2022).

96 See, for example, R. O. Keohane, S. Macedo and A. Moravcsik, *Democracy-Enhancing Multilateralism*, *International Organization*, Vol. 63, 2009, pp. 1–31, at 1–2.

required in its legal order (even if this is through the NCA) in respect of ICN cooperation and implementation (Chapter 4, Section 2.1.)? Or is there another model that a country uses, and has this been adequately followed both within the ICN and in the resulting discussions (Chapter 4, Section 3.1.1.)?

- Have ICN goals been sufficiently delineated, and have the tensions between various goals and interests been adequately explained? This applies at an ICN “constitutional level,” with its “non-discrimination” and “competition only” principles. It also applies when producing individual ICN work products. How do these goals map onto the goals set for a country’s NCA and national competition policy (Chapter 4, Sections 3.1. and 3.2.1.)?
- Are countries aware of the impacts on relevant values of discussions within the ICN (and the work products that might result from them)? Are they aware of the various choices that could be taken in ICN discussions and when drafting ICN work products (Chapter 4, Section 2.1.)?
- Are countries able to diverge from ICN work products, both in principle and in practice (Chapter 4, Sections 2.1. and 3.1.2.)? If not, or if this is difficult, what is constraining countries and (how) can they remedy this?
- Does the ICN support informed divergence adequately (Chapter 2, Section 2.3)?
- In terms of the ICN work products that influence states’ actions (as well as training and technical assistance that NCAs may be provided with by other ICN members):
 - (i) Does it impact upon other values and interests in a national system (including human rights)? Is it preferable for national competition rules to pursue an exclusive competition goal (Chapter 4, Section 2.1.)?
 - (ii) Even if countries consider an exclusive competition goal preferable, is the competition goal pursued in the ICN work product the specific competition goal that states favour in their system, such as consumer welfare, for example (Chapter 4, Section 2.1.)?
 - (iii) In case countries decide to implement some ICN recommendation, has there been an appropriate public discussion in that state (Chapter 4, Section 2.1.) and have the implications of using an ICN work product been fully debated before it has been adopted (Chapter 4, Section 4.)?⁹⁷
 - (iv) Do states understand what influence NCAs and NGAs have had over the relevant ICN work product and the impact of this influence (Chapter 4, Section 2.1.)?

⁹⁷ Critique may need to be part of a wider build-up of civil society. This means supporting competition curricula in local universities, for example, C. Townley, H. Shahein and R. Whish, Teaching and Researching Competition Law and Economics in New Competition Jurisdictions, in *New Competition Jurisdictions: Shaping Policies and Building Institutions*, R. Whish and C. Townley (eds.), Edward Elgar, Publishing, Cheltenham, 2012. It may also involve things like engagement with law firms in the local law societies, consumer organisations, trade associations, environmental groups, and so forth.

(v) Have national governments, parliaments or courts been pressured by ICN members, or others, to follow an ICN work product? Has this been done in cooperation with the NCA (Chapter 1, Section 2.2.3.)?

- In terms of relationships between NCAs and the ICN:
 - (i) Do NCAs follow all relevant national procedures when establishing, joining and operating in the ICN? Do they act within the limits of their powers there (Chapter 4, Section 2.1.)?
 - (ii) Is it clear to NCA officials who they are acting for within the ICN (for example, do they represent the national or the international community and whose benefits are they working for)? How can they be pushed to focus on the appropriate benefits (Chapter 1, Section 2.1.2.)?
 - (iii) Do any revolving doors between those within NCAs and state organisations in other countries, or private firms (or the potential for them), need to be reviewed where they could be having an adverse influence on the incentives of those working in NCAs (Chapter 1, Section 3.2.)?
- In terms of NGAs participation in the ICN (Chapter 1, Section 2.2.):
 - (i) Should the ICN formalise the criteria for being an NGA rather than leaving this up to local NCAs (given the risk of undue influence)?
 - (ii) Should NCAs be the gatekeepers for allowing NGAs in their jurisdiction to participate in the ICN (as well as encouraging potential NGAs in their jurisdiction to participate), or should this power be devolved to some other actor, and if so, who?
 - (iii) Should a list of all NGAs in the ICN be provided and a list of all the work they do (and have done) there?
 - (iv) Should the body that appointed the NGA to this role explain publicly why and how they were chosen (and should this appointment process be formalised)?
 - (v) Should NGAs draft ICN work products?
 - (vi) Should NGAs finance ICN’s initiatives, such as, for example, training?
 - (vii) Should the NGA be obliged to disclose what its influence has been? For example, is it appropriate to insist that all NGA submissions clearly refer to the name of the entity doing this work so that inputs are more transparent? More efforts could also be made to track changes in draft ICN work to better see how NGAs influence them and to publicise this. In fact, a more effort to track unseen influence may be helpful at all levels of the ICN.
 - (viii) Are there other ways in which NGAs influence NCAs within the ICN (or elsewhere), and do these need to be controlled (Chapter 1, Section 3.)?

- In terms of increasing the influence of developing countries (and others with reduced influence) within the ICN, one needs to start by fully understanding the barriers to fuller engagement by NCAs from developing

countries (or some other group). As experts in understanding these themes, people at UNCTAD may be useful partners here.⁹⁸ Once this understanding has been developed, then it is worth considering whether it would increase legitimacy to do the following:

(i) Encourage more research and participation by NCAs from developing countries within the ICN. This is in meetings, but also responding to ICN surveys,⁹⁹ taking more senior posts within the ICN hierarchy, allowing them to get into debates early (Chapter 1, Sections 2.1.2. and 3.1.). In addition, are mechanisms needed to more actively facilitate full participation by these actors? The aim here is to ensure that their ideas and issues are more fully considered (Chapter 1, Section 2.1.2.).

(ii) Create an advisory council of NCAs from developing countries.¹⁰⁰ They could better review together (perhaps proposed ICN agendas, draft ICN work products, etc.), generating economies of scale and gaining greater confidence to challenge those that already have influence within the ICN. Alternatively, a group of independent experts could be tasked with assessing the impact of specific policies on developing countries.

(iii) Explicitly demand that the needs and interests of small jurisdictions and newer NCAs be integrated into all ICN work products (and that this be demonstrated).

(iv) Make the use of languages other than English more widespread in the ICN and its work.

(v) Encourage and support (financially and otherwise) more twining between NCAs from similar jurisdictions.

– Would the introduction of a secret system for NCAs voting on whether to accept proposed ICN work products make the ICN more legitimate (Chapter 4, Section 4)?

– Should there be a maximum time duration for the mandate of the ICN chair?

– Given the highly redistributive nature of competition policy and enforcement, and what we know is happening in the ICN (and in terms of implementation), is the trade-off achieved between delegation and accountability for NCAs appropriate in all legal orders (Chapter 4, Section 2.2.)?

– Finally, it is important that potential conflicts between legitimacy, efficiency and effectiveness are properly assessed in a country's legal order. Is this done? If it is not done, why is it so?

⁹⁸ Absent such a deep engagement, there is a real risk of making matters even worse. For example, in 2016 the ICN, reporting on its survey about desired goals in five years' time for the ICN, reports one suggestion (without saying who made it): "Another way to reduce the burden for agencies in terms of time and staff could be an increased involvement of NGAs in the drafting and commenting of work products." ICN, *The Future of the ICN in its Second Decade: Final Report*, 23. Section II explains why this might make matters worse.

⁹⁹ Newer NCAs tend to respond less to ICN surveys (being less well resourced, they often do not have the time). For example, see responses to *ibid.*, Annexes 1 and 3.

¹⁰⁰ ICN, *The ICN's Vision for its Second Decade* (2012), 19–22.

III. Effectiveness and Efficiency*

69. Effectiveness and efficiency are two kinds of "output legitimacy" that might be able to compensate, to some degree, for a lack of "input legitimacy."¹⁰¹ Different legal orders will accept different balances.

1. Effectiveness

70. Héritier and Lehmkuhl call "policy effectiveness" the extent to which a policy achieves the goals defined at the start.¹⁰² "Effectiveness" is an important governance criterion. Governance mechanisms that are unable to solve problems and achieve their goals are hard to justify.¹⁰³ Note that "effectiveness" does not ask about the appropriateness of the goal(s) set, nor how well they link with other policies, etc.

71. When analysing effectiveness, commentators often highlight that the ICN facilitates consensus on substance and procedure,¹⁰⁴ and ultimately brings enforcement practices into greater alignment.¹⁰⁵ Many think that the ICN "had been an enormous success."¹⁰⁶ We are more sceptical. A good starting point is to ask how the ICN assesses its own effectiveness. The ICN often emphasises the many different types of ICN work products that have been produced and the wide range of topics covered.¹⁰⁷

72. If one merely looks at the number of ICN work products that have been produced, one could easily conclude that it has been highly effective. Yet, a thorough effectiveness assessment may also consider the "quality" of ICN work products. Our starting point is that measuring the effectiveness of ICN work products is currently impossible. There are myriad tensions within¹⁰⁸

* More detail on the arguments here are in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, respectively at chapter 4 (especially 4.3.2.) and conclusion (Effectiveness), and chapter 4 (especially 4.3.3.) and conclusion (Efficiency).

¹⁰¹ See, for example, R. Baldwin, Regulatory Legitimacy in the European Context: the British Health and Safety Executive, in *Regulating Europe*, G. Majone (ed.), Routledge, 1996, London, 90.

¹⁰² A. Héritier and D. Lehmkuhl, Governing in the Shadow of Hierarchy: New Modes of Governance in Regulation, in *New Modes of Governance in Europe: governing in the shadow of hierarchy*, A. Héritier and M. Rhodes (eds.), Palgrave Macmillan, London, 2011, 66.

¹⁰³ Börzel and Panke, *Network Governance: Effective and Legitimate?*, 157.

¹⁰⁴ Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 123–124; Coppola et al., (Nearly) A Century with the ICN; and Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead*, 196.

¹⁰⁵ Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 123–124; W. Rowley and O. Wakil, *The ICN Five Years On*, *Global Competition Review*, 2007, 29; Coppola et al., (Nearly) A Century with the ICN.

¹⁰⁶ Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 123.

¹⁰⁷ ICN, *ICN Factsheet and Key Messages*, 3–4; see also 8–15.

¹⁰⁸ Tensions arise within individual goals because they are insufficiently specified. For example, the ICN has said that it works to optimise consumer welfare. The ICN "works to facilitate improved enforcement and advocacy of competition law, which fosters vibrant competition in open and well-functioning markets and optimizes consumer welfare. This should create conditions that promote lower prices and wider consumer choice." *Ibid.*, 3. Yet, the

and between¹⁰⁹ ICN goals. A meta goal is necessary in order to rationally balance conflicting goals.¹¹⁰ The ICN has not specified one. Perhaps even more problematically, the ICN normally does not even note that these conflicts exist or explain how its work products resolve relevant tensions. In part, this feeds into a wider NCA narrative of how they like to steer clear of “political issues.” This is, as we have noted several times, impossible.

73. The second dimension, when looking at the “quality” of ICN outputs, is whether the ICN (and its working groups) principally focus on the “easy topics” where agreement is relatively forthcoming. There is a tension between outputs’ quantity and the quality. Gerber says: “*The ICN has been highly influential as a forum for the exchange of ideas and experience and for the development of an international competition law ‘community’.* Its most direct influences on competition law development have probably related to procedures for enforcement against international cartels and to merger law enforcement. (...) *These efforts to enhance convergence have been of much value in moving toward a more effective normative framework for global competition. (...) Nevertheless, their success and potential should not be overdrawn. In many major substantive areas such as dominant firm conduct and vertical restrictions, there is little evidence that they have made great strides towards convergence or that they have overcome significant differences among competition law systems.*”¹¹¹

74. The ICN does not include this “quality” dimension in its effectiveness assessments either. There is certainly some evidence that the ICN seeks to avoid controversy. The Merger Working Group’s early work, for example, was intentionally picked for its “*non-controversial and practical nature.*”¹¹² Note that, even where ICN work products have been relatively easy to agree, they may still be valuable. Furthermore, focusing on the “easy wins” is a sensible strategy for a new network. It helps build

.....
consumer welfare goal demands trade-offs between different groups (perhaps vulnerable consumers versus others, today’s consumers over those of tomorrow, or consumers in one’s own jurisdiction over others abroad). See, for example, C. Townley, *The Relevant Market: an acceptable limit to competition analysis?*, *ECLR*, Vol. 32, Issue 10, 2011. pp. 490–499; and O. Odudu, *The Distributional Consequences of Antitrust*, in *Handbook of Research in Trans-Atlantic Antitrust*, P. Marsden (ed.), Edward Elgar Publishing, Cheltenham, 2007. O’Keoghene </author></authors><secondary-authors><author>Marsden, Philip</author></secondary-authors></contributors><title><title>The Distributional Consequences of Antitrust</title><secondary-title>Handbook of Research in Trans-Atlantic Antitrust</secondary-title></titles><dates><year>2007</year></dates></pub-location>Cheltenham</pub-location></publisher>Edward Elgar</publisher></urls></record></Cite></EndNote>. The ICN does not explain how it has chosen between these different groups in its work products.

109 Tensions also arise between ICN goals. For example, the ICN says it works for the benefit of NCAs and consumers. Conflicts between consumer and NCA goals are clearly possible, possibly affecting access to justice and other issues (think of the amount of work that an NCA is prepared to do to “understand” a consumer complaint). This is also linked to NCA resources, something not entirely within the control of most NCAs, but it is also linked to deeper issues such as the NCAs’ priorities and how it sees itself and the role that it performs in society. The ICN claims to work for other beneficiaries too, such as states and firms. Tensions arise there too.

110 On the need for a meta-goal, C. Townley, *Article 81 EC and Public Policy*, Hart Publishing, Oxford, 2009, chapter 8.

111 Gerber, *Global Competition: Law, Markets and Globalisation*, 116. Similarly, Sokol, *The ICN in the Context of International Antitrust Institutions*, 159; and Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 133.

112 Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 120.

cohesion and momentum. The critique might be stronger if a tendency to avoid controversial topics persists twenty years later. Some argue that the ICN now focuses on more complex issues.¹¹³ There is some evidence to support this, although change is coming timidly. To the extent that the ICN embraces complexity, it is even more imperative that it be transparent about how it trades off its goals.

75. The ICN goes further by linking its effectiveness to real-world implementation.¹¹⁴ An implementation focus is not necessarily to be expected in a soft law network (and it has been much debated by commentators¹¹⁵). There is a risk that too much of an implementation focus could undermine the importance of the ICN as a forum for simply exchanging ideas, discussing and better understanding others. Merely focusing on the production and implementation of ICN work products likely underestimates the ICN’s effectiveness on this less concrete, but potentially really important, dimension. The ICN may really claim to make a major contribution here (although scholars question the efficacy and accountability of this unstructured learning in the ICN).¹¹⁶ In any event, the ICN has made implementation a key effectiveness parameter. While there is some suggestion that implementation of ICN work products is increasing over time, many point out that there is still a lot of work to do.¹¹⁷

76. Furthermore, ICN assessments of its own effectiveness are questionable because the methodology that they adopt is insufficiently specified. We also question how robust it is. Assessing effective implementation well is hard, complex work. Many methodological questions need to be considered prior to the analysis. For example, what is the appropriate area of ICN work where implementation is required? Secondly, what is the best way to collect data on effective implementation? Assessment, in public policy studies, is taken very seriously, and it normally includes *ex ante* assessment (why some measure is needed), interim assessment (how implementation is progressing once the law—or, in this case, the recommendation—has been adopted) and *ex post* assessment (have the goals specified *ex ante* been achieved?).¹¹⁸ The ICN does not seem to do this systematically.¹¹⁹

113 Coppola et al., (Nearly) A Century with the ICN.

114 ICN, *A Statement of Missions and Achievements Up Until May 2005* (2005), 3. We could not find this, so we rely on R. Stern, *The Role of the ICN in Fostering Convergence – An NCA’s Perspective*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 325.

115 See the discussion in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 287–289.

116 Y. Svetiev, *Experimentalist Competition Law and the Regulation of Markets*, Hart Publishing, Oxford, 2020, 162–163.

117 M. Coppola and C. Lagdameo, *Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures*, in Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations*, 303, 307–309 and 315.

118 See E. Bozzini and J. Hunt, *Bringing Evaluation into the Policy Cycle: CAP Cross Compliance and the Defining and Re-defining of Objectives and Indicators*, *European Journal of Risk Regulation*, Vol. 6, No. 1, 2015, pp. 57–67.

119 See the more detailed discussion in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 291–294.

77. One should also discuss whether the ICN is more effective at achieving the interests of rich, rather than newer, poorer, NCAs. Their interests sometimes overlap, but they often have different priorities. There is a real risk that richer NCAs will be favoured, given the ICN's origin, and the mechanisms of influence highlighted in Section II. Some are confident that the ICN is (or is becoming) more inclusive.¹²⁰ There are reasons to be cautious.¹²¹ To be fair to the ICN (and its leadership), on many occasions it has sought to understand why newer NCAs are often less active in the ICN.¹²² Many of the reasons for lack of activity by newer NCAs (such as a lack of resources) are not the ICN's fault.

78. Nevertheless, several criticisms can be levelled at the ICN and its approach here. First, while the ICN makes some effort to help newer NCAs to take an active role in selecting new areas for ICN focus and to input into the creation of these work products, they have been largely ineffectual.¹²³ The number of newer NCAs with staff in key roles has increased, but not significantly. Newer NCAs' input into ICN work products is still marginal. And many ICN work products still hold little interest to newer NCAs. We believe that significantly more (and better) effort could be made in this direction. Unfortunately, the ICN seems to see its main role, with respect to newer NCAs, as being to educate them and to help them to implement ICN work products (rather than supporting them to take an active role in their own development).¹²⁴ The ICN goes to great lengths to assist with implementation in many imaginative ways. We are sceptical about whether the focus on helping newer NCAs to implement ICN work products

that they have often not input into (and may well disregard their specific needs) is quite as selfless as the powerful ICN actors suggest.¹²⁵ Uniform enforcement practices benefit large multinationals operating in the states of these newer NCAs. Before the impact on newer NCAs (and their states) is conclusively declared, it might be better to thoroughly assess the outcomes of the use of ICN work products.¹²⁶ Yet, despite claiming to be “a results-based, project-oriented organization,”¹²⁷ the ICN spends very little effort in actually checking the empirical results of its activities. Until newer NCAs are inputting into the ICN agenda and ICN work products on something like an equal footing, it may be more appropriate for the ICN to limit its efforts to encourage the implementation of ICN work.

79. Some questions to think about (chapter references are to the relevant places in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Oxford University Press, 2022):

– How should ICN effectiveness be measured? Should one focus on quantitative or qualitative indicators (Chapter 4, Section 3.2.1.)? How can these different methodologies be combined effectively (Chapter 4, Section 3.2.1.)?

(i) Should one focus on both administrative and legislative outputs, or even just greater consensus on issues within the relevant communities (Chapter 4, Section 3.2.2.)?

(ii) What would be the impact of focusing on one at the expense of others? For example, would more focus on implementation undermine ICN members' willingness to agree ICN work products (Chapter 4, Section 3.2.2.)?

(iii) When NCAs offer technical assistance and training to other NCAs, is this a Trojan horse to push uniformity through “blind” pushing of inappropriate ICN work products?

– Is the ICN (and its work products) more effective at achieving the interests of advanced industrialised nations (and their NCAs) than of poorer nations and their NCAs? Are the impacts on consumers and other relevant actors in these states assessed? What efforts

120 For example, Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 130; and Coppola et al., (Nearly) A Century with the ICN.

121 In 2011, Hollman and Kovacic noted that topics of importance to newer NCAs may be ignored unless richer NCAs are also interested. Hollman and Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 60. Our survey supports this contention today as well.

122 For example, ICN, *The Future of the ICN in its Second Decade: Final Report*, 22. Coppola et al., (Nearly) A Century with the ICN report several other efforts to canvass ICN members and NGAs.

123 During the term of Alejandra Palacios, the ICN had a Vice-Chair for Younger Agencies and Regional Diversity, that hosted a Younger Agencies Town Hall Meeting, in 2021.

124 The ICN is quick to note that it is of value to both established and newer NCAs. It describes the ICN as “a forum for newer agencies to draw on the experiences and support of more established agencies, for example as they seek to advocate a competition culture in their jurisdiction, where there may face vested local interest groups,” ICN Factsheet and Key Messages, 7. Similarly, Coppola et al., (Nearly) A Century with the ICN. In its 2016 report, the ICN lists the following things it has introduced since 2011 in terms of helping newer NCAs. Nearly all of them are implementation-focused: “The ICN implemented a working group leadership ‘rotation’ plan that includes clear criteria for more involvement by a broader range of members. A number of members such as Finland, India, Norway, and South Africa have become first-time WG co-chairs since 2011; the ICN established a welcome track for new members; Working Groups, such as the MWG, have a work stream dedicated to ‘outreach’ to new members as part of their annual planning; the Vice Chair for Implementation started an initiative to collect successful implementation stories from across the network to inspire others to consider implementation and to demonstrate the real impact of ICN’s work; and more ICN content has been translated into other languages such as Spanish and French.” ICN, *The Future of the ICN in its Second Decade: Final Report*, 7. Similarly, in the Washington and Singapore discussions about how to respond after the ICN’s 2016 survey report, participants made several suggestions of what to do here; most seem aimed at helping newer NCAs learn from existing NCAs and materials—although the last bullet point on p. 53 says “devote greater attention to issues which are relevant for younger agencies (benefits of competition, privatisation, bid-rigging) and/or to broader policy questions.” However, the topics selected for priority include none of particular interest to newer jurisdictions, although they are going into more controversial areas, like the interface between competition and public interest considerations and vertical restraints, *ibid.*, 52–53 and 56.

125 “The ICN’s work product is strengthened by the diversity of views that underlie its creation. Broad-based project participation ensures that the work reflects sound approaches applicable across various legal traditions and experience levels. This further reinforces the relevance of ICN work product, promoting support by newer and more mature agencies as well as NGA community, and thus ready advocates for the adoption and implementation of such work product” and fn. 22 “Agencies and individuals unable to participate in the ICN’s day-to-day work still benefit from ICN work product, which is available free-of-charge, on the ICN’s website, and the network, including discussion of work product and issues with experts from around the world either remotely or via participation in the ICN’s annual conference.” Coppola et al., (Nearly) A Century with the ICN.

126 Different contexts, experience of competition, knowledge, understanding of capitalism, etc., might also affect the kind of competition that works best (and most readily accepted) in a state. Pushing states to implement ICN work products may not give adequate regard to this (especially where newer jurisdictions are often less influential in the content of these work products). By way of example, Svetiev refers to the experiences of South Africa and China, Svetiev, *Experimentalist Competition Law and the Regulation of Markets*, 167–168.

127 ICN, ICN Factsheet and Key Messages, 1.

are being made to ensure that all can contribute more equally, and are these sufficient (Chapter 4, Sections 3.2.2. and 4)? Could this be improved?

- If states diverge from ICN work products, is this problematic (Chapter 4, Section 3.2.2.)? If so, why? If not, is this always true, or only sometimes (if so, when). Also, is this clear to all?
- Is it more effective to establish regional hubs for providing training and assistance to NCAs from developing countries, especially in places where language, culture and the competition problems faced are similar?¹²⁸ “Western experts” might just export their own competition system without sufficient understanding of how it will transplant in these very different systems, for example.
- Have regular and recent effectiveness assessments of ICN-related actions been made, and are they considered to be of an acceptable quality? Is an appropriate and robust methodology used? How effective is the ICN and its outputs on this basis (e.g. when its work is implemented by NCAs/states, do superior outcomes occur there and at what cost?), both absolutely and when compared to other actors (Chapter 4, Section 3.3.1.)? Finally, it is important that potential conflicts between legitimacy, efficiency and effectiveness are properly assessed in a country’s legal order. Is this done? If it is not done, why is it so?

2. Efficiency

80. Let’s now turn to “efficiency” issues. Efficiency has several dimensions, so optimally efficient structures are unlikely to be unique, but a result of trade-offs.¹²⁹ All of these efficiency discussions also have trade-offs with effectiveness and legitimacy. So, to assess what is the “best” organisational structure and actor to be making (even soft) policy in this area is highly complex and political. Different states are likely to come to different assessments about what is most appropriate for them. This assessment will likely impact upon their willingness to use ICN work products without a prior check.

128 In 2016 the ICN, reporting on its survey about desired goals in five years’ time for the ICN, noted that one suggestion was “to organise teleseminars and meetings in all regions for members to have the opportunity to connect with or attend nearby events.” ICN, *The Future of the ICN in its Second Decade: Final Report*, 23. There is some suggestion that some ICN members maybe even be rethinking their reluctance to allow regional groupings. Summarising after one 2015 survey, the ICN says “As mentioned above, the ICN’s comparative advantage is its broad reach to agencies around the world and all perspectives in the competition community. ICN’s accessibility to all can be strengthened through more interaction at regional level, for example by cooperating with other international or regional organisations, by organising teleseminars focussing on regional issues or by facilitating cooperation on regional basis, i.e. by giving opportunities for networking and discussions at ICN events. Interaction with regional networks and at regional level may have advantages: it can broaden the reach and awareness of ICN work and promote convergence; can encourage members from the same region, as well as members from different regions, to share common experiences with ICN work and discuss challenges; it can decrease or spread out costs of participation; and it can inform or inspire the discussion of ICN work and topics in regional initiatives.” *ibid.*, 24–25. There is some theoretical support that work products should be easier to agree on in smaller, more homogeneous groups, Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 85.

129 L. Hooghe and G. Marks, *Does Efficiency Shape the Territorial Structure of Government?* *The Annual Review of Political Science*, Vol. 12, 2009, pp. 225–241, at 226–227.

81. Networks in general, and the ICN in particular, are highly efficient conduits for information sharing. They provide regular, repeated and structured opportunities (online and in-person) for actors to share information about how (and why) they do (or do not do) things. It also facilitates personal relationships between actors, which can aid information sharing (either general policy work or in specific enforcement contexts) outside of ICN meetings. Note that for those not fluent in this competition “language” (even those heavily impacted by competition rules), and/or those interested in competition’s wider impacts, the ICN is not an efficient body. It largely bypasses them.

82. Secondly, there are many overlaps between the ICN, OECD and UNCTAD.¹³⁰ The ICN certainly foresees a risk of overlaps,¹³¹ and we agree with this (although it is contested by some¹³²). This generates efficiency issues, often with only marginal gains in effectiveness. There are also legitimacy losses (given that the ICN’s input legitimacy is less than the OECD and UNCTAD). These effects in individual cases are compounded due to the lack of a clearly articulated strategy for precisely when the ICN can be most efficiently and effectively deployed. If the ICN comes to the same conclusions as the OECD or UNCTAD, one wonders whether this is efficient and effective. If it comes to different conclusions, one wonders whether this work is legitimate (or even relevant). The only way out seems to be if the ICN starts something additional, new and fundamentally valuable for the states (and not just the NCAs) involved. In this case, it is important to demonstrate that this work could not be more efficiently, effectively and legitimately performed by the OECD or UNCTAD. On top of this, ICN participation generates substantial opportunity costs (especially as its outputs are freely available to all).

83. Some belated efforts are being made to reduce the inefficiencies here. For example, the ICN created the role of Horizontal Coordinator to help enhance coordination across the ICN’s working groups (for example, in relation to the scheduling of calls). Similarly, some efforts are made to schedule ICN meetings (time and place) alongside OECD and UNCTAD meetings. Although more could be done, the ICN now has a direct liaison with the OECD and UNCTAD to consider cooperation opportunities. For example, in 2012 the ICN and OECD did a joint enforcement cooperation survey.¹³³ The ICN also works with other international organisations, such as the World Bank and the African Competition Forum.¹³⁴

130 For example, Hollman and Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 60 and 62–63; and Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 304–307.

131 See, for example, ICN Agency Effectiveness Working Group, *Report on Agency Effectiveness through Organisational Design* (2019), 7–8; and the ICN said: “In drafting the recommended practices, the Advocacy Working Group replied [relied?] on the OECD’s extensive work on competition assessment, including the *OECD Competition Assessment Toolkit*.” <https://www.internationalcompetitionnetwork.org/working-groups/advocacy/comp-assessment> (last accessed 22 February 2022).

132 Fox, for example, writes that, while many thought that overlaps would occur, this has not materialised. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 125.

133 For further commitments see, for example, ICN, *The ICN’s Vision for its Second Decade*, 11–13.

134 ICN, *The Future of the ICN in its Second Decade: Final Report*, 8 and 21.

84. As we saw in the effectiveness discussion, question marks arise when it comes to what should be done with information shared through the ICN. There is a tension between seeing the ICN as a vessel for informed divergence and as a more active conduit for aligning competition systems around the world. Different network structures may be needed in order to efficiently and effectively achieve these two aims.¹³⁵ So, choices are needed. As we saw in our effectiveness discussion, a key problem is the lack of definition of a meta goal for the ICN, as well as a lack of explanation about how different goals should be traded off against each other. If we do not know precisely what the ICN is trying to achieve (informed divergence or harmonisation), we cannot assess how efficiently it is achieving that end.

85. Some questions to think about (chapter references are to the relevant places in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Oxford University Press, 2022):

– Efficiency can be assessed on many dimensions, and trade-offs are likely between these dimensions. For example, one might assess how efficient each of the following is (and whether cost savings could be made in each area):

(i) Is the ICN considered to be an efficient body for sharing information? This could be a factor of the number of members (more members increases efficiencies of scale but may mean more conflicts), how judgmental it is seen to be (which might discourage honest and open dialogue), how closely tied members' interests are perceived to be (are there big divergences and how much does diversity matter), how clear the (trusted) provenance of certain information is (is information circulated by the ICN trusted or is it just adding extra noise?), etc. (Chapter 4, Section 3.3.1.).

(ii) Are there efficiency benefits in terms of keeping ICN work separate from the OECD, UNCTAD and others, or is there largely inefficient duplication (Chapter 4, Section 3.3.1.)? Can this be improved? For example, if all these bodies continue to exist, should they focus on different types of issues?

(iii) Is it worthwhile to participate in the ICN, or could the money be more appropriately used for other things, such as more competition enforcement (Chapter 4, Section 3.3.1.)? This is particularly relevant given that ICN outputs are available to all, even non-members.

(iv) Have NCAs or states that will potentially follow ICN work products considered the costs to them and their firms and consumers (and other relevant stakeholders) of adaptation to new rules, as well as the potential hit that “rule-taking” NCAs might take to their self-esteem (Chapter 4, Section 3.3.2.)?

– Is the ICN (and its work products) more efficient at achieving the interests of advanced industrialised nations (and their NCAs) than of poorer nations and their NCAs? If so, what efforts are being made to ensure that all can contribute more equally and are these sufficient (Chapter 2, Section 2.4. and Chapter 4, Section 3.3.2.)?

– Have regular and recent efficiency assessments of ICN-related actions been made, and are they of an acceptable quality? Is an appropriate and robust methodology used here? How efficient is the ICN and its outputs on this basis (e.g. when its work is implemented by NCAs/states, do superior outcomes occur there and at what cost?), both absolutely and when compared to other actors (Chapter 4, Section 3.3.1.)? Finally, it is important that potential conflicts between legitimacy, efficiency and effectiveness are properly assessed in a country's legal order. Is this done? If it is not done, why is it so?

IV. Conclusion

86. There are trade-offs between goals that international fora like the ICN aspire to achieve and democratic principles. Recalling Rodrik's trilemma, it is impossible to maximise democracy, national determination, and economic globalisation at the same time.¹³⁶ We can maximise combinations of two of these three, but not all three together. We believe that this trilemma applies to the ICN too. It aims to create a level playing field of competition globally, promoting the diffusion of uniform competition rules in different jurisdictions (i.e. it strongly favours economic globalisation), but it gives little weight to national peculiarities, and so far it does not allow for democratic control either. This matters. Competition policy is not value-neutral; it has strong redistributive implications.

87. The ICN might counter that it can ignore the trilemma. Even if it focuses on economic globalisation, other bodies can consider democracy and national determination. This is because NCA members set ICN rules by consensus. These NCAs are acting in the interest of their own states when they operate within the ICN (or so the ICN “assumes”). Furthermore (it might add), these NCAs (and their states) can then decide whether or not to implement ICN work products at home (taking the trilemma into account at that stage).

¹³⁵ Informed divergence might work better with less connected network actors working in smaller groups. However, if the aim is more uniformity-related, we may want better communication between all ICN actors, to facilitate dissemination and peer pressure. Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, 308–310 and references there.

¹³⁶ Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, xviii.

88. Yet, a small group of NCAs and NGAs, mainly from advanced industrial states, has a strong influence over the ICN agenda and work products. ICN “best practice” is often tailored for their economies and might be less useful in developing countries. Furthermore, the ICN’s “consensus rule” offers little protection. As with many “technical networks,” several ICN features drive a wedge between the interests of newer NCAs and their states (such that these states can no longer assume that NCAs necessarily act in the interest of their states). We have also seen the considerable pressure that the ICN, its NCAs and NGAs put on some NCAs (and their states) to adopt ICN “best practice.” All of this might matter less if the ICN had been established by democratic actors. However, as we have seen, it was set up by a small group of NCAs (supported and encouraged by several multinationals). They also chose its rules and continue to dominate the ICN. The lack of transparent ICN processes, highlighted above, exacerbates these problems. Coming back to the puzzle that we started with, this may be a reason why at least some NCAs and NGAs were so keen to establish the ICN, and to do it in this way.

89. So, an assessment of the legitimacy, effectiveness and efficiency of the ICN (and states’ use of its work products) is particularly necessary. Currently, the actors with the greatest democratic legitimacy claims are national rather than global. That the ICN increases interdependence without involving national democratic actors, without being open to all those affected by its work, and without incorporating properly the input from all its members is, we argue, undesirable. To put it another way, globalisation often demands policies that are coordinated across countries so as to facilitate trade and investment, but there is the risk that greater “*emphasis on deep economic integration*” reduces “*the room for national differences in social and economic arrangements,*” and “*the space for democratic decision making at the national level.*”¹³⁷ Nevertheless, rather than focusing on what we think is the most appropriate balance of legitimacy, effectiveness and efficiency, we have adopted some middle-level theorising here. One’s view of legitimacy (and its appropriate relationship with effectiveness and efficiency) links to one’s model of democracy. There are different models. As a result, there are different ways of legitimising these processes, some of which overlap. We believe that each state should assess the ICN and its outputs (as well as how they should be used in that state). This assessment should be shaped by that state’s understanding of democracy. Many states (and thus assessments) are potentially relevant. They may also change over time. So, we have suggested a list of questions that states and others might employ when assessing the ICN and its outputs.

90. In addition, there are some additional transparency questions to think about (chapter references are to the relevant places in Townley, Guidi and Tavares, *The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network*, Oxford University Press, 2022):

- Are states fully informed of the processes and specific discussions within the ICN that might be relevant for them, including what issues were debated there, what disagreements occurred and between whom and why, the influence of specific NCAs and NGAs there on matters of interest to you, what they have input and when (Chapter 4, Sections 2.1. and 4)?
- Insofar as states delegate extensive enforcement powers (including discretion in the application of the competition rules) to an NCA, are there appropriate transparency, reason-giving, notice and comment procedures, and are they being followed (Chapter 4, Section 2.1.)? NCAs might not be acting in their state’s best interests (Chapter 4, Section 3.1.2.).
- Have regular and recent transparency assessments of ICN-related actions been made, and are they acceptable in your legal order?

91. As can be seen above, there are many potential issues, and lots of points to discuss. The recent launch of the ICN’s Third Decade project is a great opportunity to have a joint, deep and far-reaching reflection on these issues. Differences will emerge. While offering minor tweaks, some will likely tell us that there are no realistic alternatives to the current structures. It is worth reflecting upon this (as well as thinking about who makes these claims and what they have to fear from change). This is not just an issue for competition policy and enforcement. Wider questions about the role of transnational networks, whose interests those working in NCAs should be pursuing, and the way that transnational networks interact with democratic state actors now exist across many regulatory fields.

92. Even if the ICN were considered necessary, states can demand access to it and more transparency for the work done there, who exercises influence and how. This could allow states to conduct more informed political scrutiny of ICN work products before deciding whether to use them in the state concerned. They might even introduce more political oversight into the ICN (by insisting on a reformulation of its membership from NCAs to states). States might (also) achieve this through more political scrutiny of their NCAs (both their work within the ICN and also “back home”), perhaps through reducing their independence, or at least increasing their accountability vis-à-vis democratic bodies. How states respond will depend, in part, on each jurisdiction’s view of legitimacy’s importance (and how they define legitimacy). They may also need to consider how such demands may affect the viability of the ICN as well as, ultimately, its effectiveness and efficiency.

93. There is a lot to think about and, in our view, many improvements can be made. We hope that these suggestions provide helpful input for the ICN process as well as national reviews. A response to the authors’ viewpoint will appear in the next issue. ■

137 Ibid., 205; also 189–190 and 200.

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

Editoriaux

Jacques Attali, Elie Cohen, Claus-Dieter Ehlermann, Jean Pisani Ferry, Ian Forrester, Eleanor Fox, Douglas H. Ginsburg, Laurence Idot, Frédéric Jenny, Arnaud Montebourg, Mario Monti, Gilbert Parleani, Jacques Steenbergen, Margrethe Vestager, Bo Vesterdorf, Denis Waelbroeck, Marc van der Woude...

Interviews

Sir Christopher Bellamy, Lord David Currie, Thierry Dahan, Jean-Louis Debré, Isabelle de Silva, François Fillon, John Fingleton, Renata B. Hesse, François Hollande, William Kovacic, Neelie Kroes, Christine Lagarde, Johannes Laitenberger, Emmanuel Macron, Robert Mahnke, Ségolène Royal, Nicolas Sarkozy, Marie-Laure Sauty de Chalon, Tommaso Valletti, Christine Varney...

Dossiers

Jacques Barrot, Jean-François Bellis, David Bosco, Murielle Chagny, John Connor, Damien Gérardin, Assimakis Komninos, Christophe Lemaire, Ioannis Lianos, Pierre Moscovici, Jorge Padilla, Emil Paulis, Robert Saint-Esteben, Jacques Steenbergen, Florian Wagner-von Papp, Richard Whish...

Articles

Guy Canivet, Emmanuelle Claudel, Emmanuel Combe, Thierry Dahan, Luc Gyselen, Daniel Fasquelle, Barry Hawk, Nathalie Homobono, Laurence Idot, Frédéric Jenny, Bruno Lasserre, Luc Peeperkorn, Anne Perrot, Nicolas Petit, Catherine Prieto, Patrick Rey, Joseph Vogel, Wouter Wils...

Pratiques

Tableaux jurisprudentiels : Actualité des enquêtes de concurrence, Actions en réparation des pratiques anticoncurrenceuses, Bilan de la pratique des engagements, Droit pénal et concurrence, Legal privilege, Cartel Profiles in the EU...

International

Belgium, Brésil, Canada, China, Germany, Hong-Kong, India, Japan, Luxembourg, Switzerland, Sweden, USA...

Droit & économie

Emmanuel Combe, Philippe Choné, Laurent Flochel, Frédéric Jenny, Gildas de Muizon, Jorge Padilla, Penelope Papandropoulos, Anne Perrot, Nicolas Petit, Etienne Pfister, Francesco Rosati, David Sevy, David Spector...

Chroniques

ENTENTES

Ludovic Bernardeau, Anne-Sophie Choné Grimaldi, Michel Debroux

PRATIQUES UNILATÉRALES

Marie Cartapanis, Frédéric Marty, Anne Wachsmann

PRATIQUES COMMERCIALES DÉLOYALES

Frédéric Buy, Valérie Durand, Jean-Louis Fourgoux, Marie-Claude Mitchell

DISTRIBUTION

Nicolas Eréséo, Nicolas Ferrier, Anne-Cécile Martin, Philippe Vanni

CONCENTRATIONS

Olivier Billard, François Brunet, Jean-Mathieu Cot, Eric Paroche, David Tayar, Simon Vande Walle

AIDES D'ÉTAT

Jacques Derenne, Francesco Martucci, Bruno Stromsky, Raphaël Vuitton

PROCÉDURES

Alexandre Lacresse, Christophe Lemaire

RÉGULATIONS

Orion Berg, Guillaume Dezobry, Emmanuel Guillaume, Sébastien Martin, Francesco Martucci

MISE EN CONCURRENCE

Bertrand du Marais, Arnaud Sée, Fabien Tesson

ACTIONS PUBLIQUES

Jean-Philippe Kovar, Aurore Laget-Annamayer, Jérémy Martinez, Francesco Martucci

DROITS EUROPÉENS ET ÉTRANGERS

Walid Chaiehoudj, Rafael Allendesalazar, Silvia Pietrini

Livres

Sous la direction de Catherine Prieto

Revue

Christelle Adjémian, Mathilde Brabant, Emmanuel Frot, Alain Ronzano, Bastien Thomas

> Abonnement Concurrences +

Devis sur demande
Quote upon request

Revue et Bulletin : Versions imprimée (Revue) et électroniques (Revue et Bulletin) (avec accès multipostes pendant 1 an aux archives)
Review and Bulletin: Print (Review) and electronic versions (Review and Bulletin) (unlimited users access for 1 year to archives)

Conférences : Accès aux documents et supports (Concurrences et universités partenaires)
Conferences: Access to all documents and recording (Concurrences and partner universities)

Livres : Accès à tous les e-Books
Books: Access to all e-Books

> Abonnements Select

Devis sur demande
Quote upon request

e-Bulletin e-Competitions | e-Bulletin e-Competitions

- Version électronique (accès au dernier N° en ligne pendant 1 an, avec accès aux archives)
Electronic version (access to the latest online issue for 1 year, with access to archives)
- Revue Concurrences – Version électronique (accès au dernier N° en ligne pendant 1 an, avec accès aux archives)
Review Concurrences – Electronic version (access to the latest online issue for 1 year, with access to archives)

> Abonnements Basic

Devis sur demande
Quote upon request

e-Bulletin e-Competitions | e-Bulletin e-Competitions

- Version électronique (accès au dernier N° en ligne pendant 1 an, pas d'accès aux archives)
Electronic version (access to the latest online issue for 1 year, no access to archives)

> Revue Concurrences | Review Concurrences

HT TTC
Without tax Tax included

- Version électronique (accès au dernier N° en ligne pendant 1 an, pas d'accès aux archives)
Electronic version (access to the latest online issue for 1 year, no access to archives)
- Version imprimée (4 N° pendant un an, pas d'accès aux archives)
Print version (4 issues for 1 year, no access to archives)

Devis sur demande
Quote upon request

699 € 714 €

Pour s'assurer de la validité des prix pratiqués, veuillez consulter le site www.concurrences.com ou demandez un devis personnalisé à webmaster@concurrences.com.

To ensure the validity of the prices charged, please visit www.concurrences.com or request a personalised quote from webmaster@concurrences.com.

Renseignements | Subscriber details

Prénom - Nom | *First name - Name*

Courriel | *e-mail*

Institution | *Institution*

Rue | *Street*

Ville | *City*

Code postal | *Zip Code* Pays | *Country*

N° TVA intracommunautaire | *VAT number (EU)*

Formulaire à retourner à | Send your order to:

Institut de droit de la concurrence

19 avenue Jean Aicard - 75011 Paris - France | webmaster@concurrences.com

Conditions générales (extrait) | Subscription information

Les commandes sont fermes. L'envoi de la Revue et/ou du Bulletin ont lieu dès réception du paiement complet. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of the Review and on-line access to the Review and/or the Bulletin require full prepayment. For "Terms of use", see www.concurrences.com.

Frais d'expédition Revue hors France 30 € | 30 € extra charge for shipping Review outside France