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Law and politics of global competition – why and how non-state actors seek influence in the International Competition Network

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This article briefly explores the influence of non-state actors (such as large multinational firms and their lawyers) over the development of international competition policy in the International Competition Network (the ICN) – the most extensive network of competition authorities worldwide. The ICN was established in 2001. This is a timely intervention as the ICN's Third Decade review is currently taking place (due to be completed in March 2022). It should be read against a backdrop of increasing use (and influence) of transnational (non-governmental) regulatory networks, like the ICN. This discussion is based on some of the findings of our new book, *Law and Politics of Global Competition – Influence and Legitimacy in the International Competition Network*.²

Introduction

An '...important and growing...' phenomenon is that businesses and their manufacturing/distribution chains increasingly affect several countries.³ So do the anti-competitive arrangements that they adopt. Private barriers to market access are increasingly obvious as public ones fall.⁴ More than 120 legal systems now have competition rules; this number exploded in the 1990s, accompanied by the establishment of competition authorities (NCAs)⁵ worldwide.⁶ There are a bewildering array of substantive and procedural competition rules for businesses to follow. This has costs, in terms of a loss of efficiency, for companies operating across different countries. It can also have benefits from a democratic and public interest perspective, as each jurisdiction can (try to) protect the values that it holds dear.⁷

Some jurisdictions have sought wider influence for their own competition systems. Sometimes this has been through the extra territorial application of their competition rules, developing joint substantive and/or procedural competition rules or working procedures, and (largely unsuccessfully) attempting to develop multilateral competition rules. Many international organisations have also entered the competition arena, such as the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).

Many in the competition community thought that things could be better, and that a new approach was needed. In

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2 Oxford University Press, January 2022. The book has a larger scope covering: influence in the ICN: who seeks it, how do they do this and why?; ICN influence in national system; a quantitative analysis measuring interest and influence in the ICN and of the ICN; a discussion of the legitimacy, effectiveness and efficiency of the ICN. It concludes with

some suggestions for potentially improving the legitimacy, effectiveness, and efficiency of the ICN. More details can be found at <https://global.oup.com/academic/product/the-law-and-politics-of-global-competition-9780198859789?prevNumResPerPage=20&prevSortField=1&sortField=8&resultsPerPage=20&start=0&lang=en&cc=gb>.

3 John Fingleton, 'Competition Agencies and Global Markets: the challenges ahead' in Paul Lugard (ed), *The International Competition Network at Ten: origins, accomplishments and aspirations* (Intersentia 2011) at 174–75.

4 Merit Janow and James Rill, 'The Origins of the ICN' in Paul Lugard (ed), *The International Competition Network at Ten: origins, accomplishments and aspirations* (Intersentia 2011) at 22.

5 NCAs means one or more of the competition authorities in a particular jurisdiction. For example, in the EU this would include the competition authorities of the Member States as well as the European Commission.

6 J. Jordana, D. Levi-Faur and X. Fernández i Marin, 'The Global Diffusion of Regulatory Agencies Channels of Transfer and Stages of Diffusion' (2011) *Comparative Political Studies* 44(10) 1343–1369.

7 Christopher Townley, *A Framework for European Competition Law: co-ordinated diversity* (Hart Publishing 2018) chapter 1.

1997, the US Attorney General established a committee, the International Competition Policy Advisory Committee (ICPAC), to pay particular attention to three things: multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement co-operation between US antitrust authorities and their counterparts around the world.⁸ The ICPAC report proved highly influential.⁹ US and EU competition officials expressed their support for a transnational network in September 2000.¹⁰ In February 2001, the International Bar Association called a meeting of over 40 of the world's senior competition officials and practitioners which supported the idea of 'establishing a new organisation directed exclusively at international antitrust enforcement'.¹¹ 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.¹²

This article contains three parts. Part one explores why non-governmental actors seek influence in the ICN. Part two explores how they do it. Part three concludes.

I. Why do non-governmental actors seek influence in the ICN?

I.1 Non-governmental advisors (NGAs)

The ICN is a forum where competition experts discuss ways to improve competition policy. The ICN has grown considerably since 2001. By 2013 it included '128 agency members from 111 jurisdictions, making it the most extensive network of competition authorities worldwide'.¹³ Only NCAs can be ICN members. All prospective members must accede by letter to the ICN's 'Mission and Activities'.¹⁴ Members include the most influential NCAs worldwide, such as those in the USA and the EU. Nevertheless, all members enjoy 'the same rights and privileges of membership'.¹⁵ The ICN also produces many work products, including an array of surveys, guides, model forms, principles, and recommended practices. ICN work products and proposals for new work streams are adopted by consensus of all ICN members. States then decide whether to implement ICN outputs in their own jurisdiction.

Non-state actors, such as business and law firms, were influential in the ICN's establishment and have been involved in the ICN since then, as NGAs. Unlike NCAs, NGAs and international organisations are not ICN members. We are told that there is not one kind of NGA that is considered a 'gatekeeper', partly to avoid any prioritising between large private sector organisations that operate on a multinational or national basis and also to encourage the objective of the broadest possible participation among NGAs.¹⁶

That may be true, but major EU and US multinationals, and the lawyers that represent them, seem to have a disproportionate voice, in fact. NGAs appear to be principally major multinational firms (and their representatives), such as:¹⁷ Alcan Inc., Barclays Bank, British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric, Goldman Sachs International, Intesa Sanpaolo, Google, Microsoft, NERA, Philips International, Rio Tinto plc, Shell International, Sumitomo Electric Industries, Ltd, the US Chamber of Commerce, Vodafone Group plc, and Walmart. These actors are identifiable because they contributed to ICN discussions as panel speakers.

In addition, businesses are nested in a supportive environment of service providers. The major UK and US law firms, for example, are part of this elite. So, it is no surprise to find the big global law firms, who serve the major EU and US multinationals, present and active in the ICN. It is likely that these law firms tend to protect their clients' interests there (and their own). This may well be at the expense of consumers and the economies of the states involved.

The results of our survey support the idea of the predominance of law firms (54 per cent), big businesses (14 per cent) and academics (14 per cent) among the most represented NGAs. Consumer organisations and economists are less present (around 6 per cent each). Other groups (international organisations, national courts, members of business confederations, small businesses) make up less than 7 per cent of NGAs.¹⁸

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 Chinese NCAs are not ICN members).¹⁹ We are told that many NGAs are 'from younger jurisdictions such as Armenia,

8 ICPAC, *Final Report* (2000), Executive Summary 1. The Committee was made up of five business people (all from US firms), two lawyers in law firms, a charity (focusing on knowledge diffusion in the USA), four academics, and one state employee (from Fannie Mae).

9 François Souty, 'From the Halls of Geneva to the Shores of the Low Countries: the origins of the International Competition Network' in Paul Lugard (ed), *The International Competition Network at Ten: origins, accomplishments and aspirations* (Intersentia 2011) at 50; Hugh Hollman and William Kovacic, 'The International Competition Network: Its Past, Current and Future Role', *ibid* 73-74; Daniel Sokol, 'The ICN in the Context of International Antitrust Institutions', *ibid* 156-57.

10 Janow and Rill, Note 4 above, at 32-34.

11 <http://internationalcompetitionnetwork.org/about/history.aspx>.

12 Janow and Rill, Note 4 above, at 35.

13 NCA members are listed in 2021 www.internationalcompetitionnetwork.org/members/.

14 ICN, *ICN Operational Framework* (2012) at 1.

15 *Ibid* at 2.

16 Calvin Goldman, Robert Kwinter and Navin Joneja, 'A Perspective on the Role and Contribution of NGAs at the ICN' in Lugard, Note 3 above, at 383-84.

17 See ICN Merger Review Working Group, *2002-2003 SubGroup Work Plans* (2002) at 6-11; NGA Submission, *NGA Report on Implementation of ICN Recommended Practices for Merger Notification Procedures* (2003); ICN-Unilateral Conduct Working Group, *Unilateral Conduct Working Group Questionnaire* (2006) at 27.

18 One ICN report says that NGAs are overwhelmingly from the private bar (70 per cent) and academia (15 per cent), as well as business, consumer groups, and international organisations <www.icnblog.org/?p=130>. A similar picture also emerges from ICN (Note 17 above) 27-29.

19 Of the Fortune 500 firms in 2020, for example, about 28 per cent come from the EU and 28 per cent from the USA and Canada. The rest come from China (28 per cent) and Japan (11 per cent) <https://fortune.com/global500/>.

Pakistan, Vietnam and others'.²⁰ Even if this were true (and ICN opacity makes it hard to check), they are unlikely to make up a large percentage of all NGAs present.²¹ Furthermore, while presence is important, active influence is more valuable. The ICN itself reports that NGAs from Europe and North America are the most active participants in ICN working groups.²²

Perhaps this is related to the way in which NGAs are appointed. The ICN states: 'NGAs are identified by ICN member agencies [NCAs], and liaise with and provide input into projects predominantly through these agencies'.²³ An ICN survey from 2010 showed that 74.4 per cent of NGAs got involved in the ICN because their NCA invited them.²⁴

That said, potential NGAs can directly approach a local NCA and ask to be appointed to the ICN. Section 1.2 explains why this might benefit them (or you).

1.2 Reasons for NGAs' engagement with the ICN

The ICN believes that NGAs' participation in ICN activity is important,²⁵ especially in the promotion of recommended practices. Similarly, in their evaluation of their own contributions, lawyers acting as NGAs are extremely positive about their role in the ICN.²⁶ When asked, NGAs often emphasise as key benefits of ICN participation networking with enforcers, better understanding them and discussing with them.²⁷ From the other perspective, NCAs often give three reasons for supporting NGAs' presence in the ICN. In their view, NGAs provide: more resources, advice, and increased legitimacy.²⁸

However, to understand the reasons for NGA engagement we must take into consideration that competition policy and enforcement are highly redistributive between different stakeholders in society, and different states. It matters what the ICN says as it has a significant influence on the way many NCAs interpret and apply their competition rules (NCAs often have a lot of latitude with this, given the imprecise wording in many competition provisions and given that many NCAs have a high level of independence). An advantageous regulatory regime can significantly enhance firms' profitability. Major multinationals and their lawyers use their influence in the ICN to achieve specific individual advantages for themselves. They can also use it to change the 'rules of the game', to stack the deck in their favour for the future.

2. How might NGAs exercise influence in the ICN?

NGAs have powerful mechanisms of influence. Some are common to NCAs (meaning that better resourced NCAs often end up with more power and influence in the ICN too – such NCAs are often from North America and the European Union). Here we focus on four issues: epistemic community and the technical nature of rules; presence is something; getting in early; and revolving doors.

2.1 Epistemic community and the technical nature of rules

An epistemic community is a network of professionals 'with recognised expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area'.²⁹ Expert opinion is informed by the epistemic community's own broader world view.

Transnational regulatory networks, like the ICN, create and store relational capital between NCAs. However, Lewis claims that the ICN was never just about institutions. It is about meeting with individuals, building respect, and trust: 'It has become a dense network, not merely of competition agencies, but of deeply committed individuals'.³⁰ The employees of NCAs and NGAs are part of this community. Their presence in the ICN affects the conversation and brings the concerns and costs of doing business centre stage there.³¹ The overwhelming presence of big business (and the highlighting of their interests, with little counterweight) in these conversations is likely to distort the types of issues discussed and the weight given to various matters when deciding how best to deal with them.

2.2 Presence is something

If we want to see whether (and how) NGAs (particularly major multinationals) exercise power within the ICN, we

20 Ulf Böge, Closing Speech 4th Annual ICN Conference, 6–8 June 2005, at 2.

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

22 ICN, *The Future of the ICN in its Second Decade—Final Report* (2016), at 14–15; 20 per cent of the most active NGAs come from North America and 16 per cent from Europe. Only 7 per cent of 'particularly responsive' NGAs, are from Asia and Oceania, and even then, they are mainly from the richer countries there: *ibid* at 26.

23 Unilateral Conduct Working Group (Note 17 above) at 1. To become an NGA, one can approach one's local NCA, the chair of the Working Group that you want to join, or the ICN Liaison for NGAs. However, if they are approached, the latter two revert to the relevant, local NCA, ICN, NGA Toolkit (2012) at 6.

24 ICN, NGA Toolkit (2012) at 7.

25 Frederic Jenny, 'The International Competition Network and the OECD Competition Committee: differences, similarities and complementarities' in Lugard (Note 3 above) at 101. Fostering cooperative links between NCAs and NGAs is a key ICN aim: ICN Cartel Working Group, *2010–2011 Work Plan* (2010) at 4.

26 Speaking for firms, Ronald Stern, 'The Role of the ICN in Fostering Convergence: An NGA's Perspective' in Lugard (Note 3 above). Speaking for law firms, Dave Anderson, 'Reflections on the ICN and Its NGAs: Advocacy and Implementation', *ibid*; Goldman and others, Note 16 above, at 383.

27 The ICN's Vision for its Second Decade (2012) 24. Similarly, Unilateral Conduct Working Group, *2012–2013 Work Plan* (2012) at 4.

28 Bizarrely, the ICN also highlights that NGAs might find it interesting to be in ICN discussions, and they will learn more about competition law and policy: ICN, Note 24 above, at 4. Similarly, ICN, NGA Toolkit (2020) at 3.

29 Haas, 'Introduction: Epistemic Communities and International Policy Co-Ordination' (1992) 46 *International Organization* 1.

30 David Lewis, 'Some Reflections on the ICN' in Lugard, Note 3 above, at 215.

31 The individuals that work in the NGAs form a managerial elite that works with political elites (and those in the NCAs) in many countries; Stephen Wilks, *The Political Power of the Business Corporation* (Edward Elgar 2013) at 33.

have to check their ability ‘to participate in political decision-making in respect of public policies’.³² Power over public policy includes direct pressure, indirect influence (agenda-setting) and hegemonic power, the ability to secure desired outcomes by creating systems of norms, expectations and meanings.³³

This ‘privatisation’ of the regulatory space³⁴ within the ICN gives firms (and their regulatory intermediaries, such as law firms) direct access to competition policy debates and opportunities to exert direct pressure and indirect influence over policymakers and enforcers. When it comes to indirect types of influence (such as agenda-setting), the ICN has explicitly highlighted NGAs’ role in identifying topics for discussion and work. The ICN specifically says that NGAs help to identify topics for discussion and work and may be consulted when Working Groups plan their future work so that they can offer suggestions for the ICN’s substantive agenda.³⁵

The ICN has also highlighted several other roles which give NGAs the opportunity to exert direct pressure towards their desired outcomes. NGAs contribute to the drafting and reviewing of ICN recommended practices, case-handling manuals, databases, and toolkits. Over 56 per cent of NGAs said they were involved in drafting (on why this matters see below) or reviewing.³⁶ NGAs also conduct research and prepare background papers³⁷ which gives the opportunity to apply pressure in relation to the content of rules.

Businesses (NGAs) do not have formal control in the ICN. There are several reasons for this. First, NGAs are not actual ICN members (or members of Working Groups) by right. Nor are they invited to vote on ICN agendas or the adoption of work products in the ICN annual meeting. However, we still believe that NGAs’ presence in the ICN makes a major difference (they seem to too as they spend significant time and resources on this). In fact, when asked what they value about their participation in the ICN, NGAs emphasise: networking with NCAs, better understanding NCAs, and discussing with NCAs.³⁸ Opportunities to influence seem to be centre stage. So although major multinationals (many of whom are NGAs) do not have ‘legal’ power over ICN processes, NGAs’ presence likely gives them power, in fact.

2.3 Getting in early

Getting in early in the debate gives NGAs the ability to exert influence at an early stage in this complex, technical area (competition policy and enforcement). Here we mention two mechanisms (access to informal social networks and increasing returns processes) to see if they might also help to explain how NGAs could manipulate the ICN to support their desired distributional consequences.³⁹

The idea here is that regulatory standards are adopted over several phases. They start with agenda-setting, then planning, then a discussion paper, consultation, and approval. The technical complexity of competition issues affects those who have access to these important informal social networks (which might be the ICN more generally, or for a special favoured few the ICN Steering Group or Working Group leadership, for example). This might give some NGAs a first-mover advantage. Those involved earlier tend to enjoy more influence.

NGAs with ‘timely and high-quality information’ about the regulatory agenda, may suggest a new Working Group or the scoping of a project (or an idea within a project), before others are even aware that the issue is being discussed. This helps them to set or lead the agenda. In addition, because of their specialist knowledge and skills, these NGAs are more likely to be delegated (trusted with) key roles, such as drafting relevant sections of a recommended practice or doing feasibility studies. NGAs from the EU and the USA are likely to propose rules that already apply to them (and that they are familiar with), making them more knowledgeable, likely leaders in this area (and better able to win arguments, should any arise). This is reaffirmed by our survey: 77 per cent of our NGA respondents considered being involved in drafting at early stages as either ‘important’ or ‘very important’. NGAs only considered ‘expertise’ to be more influential than early involvement (by 94 per cent of respondents).

Yet it is not all NGAs that will have such ready (and influential) access. Only a few have close personal relationships with NCA officials, regularly interacting with them.

2.4 Revolving doors

In regulation, the expression ‘revolving doors’ indicates cases in which employees of regulatory agencies work (before or after) in regulated firms. As regulators and regulates have, in principle, distinct preferences and goals, this may be problematic. Statutes of regulatory agencies usually forbid people who have served there to take jobs in regulated firms for a certain period of time. However, these rules do not usually apply to normal employees. As a matter of fact, employees of NCAs are encouraged to spend time working in firms. Similarly, firms’ employees are encouraged to spend time working in

32 Ibid at 16–17.

33 Ibid 17.

34 Some argue that using private actors to achieve regulatory goals can be more efficient and innovative, Michael Trebilcock and Edward Iacobucci, ‘Privatization and Accountability’ (2003) 116 *Harvard Law Review* 1422. However, others worry that asking private, profit-orientated firms to take over regulatory tasks undermines the public values in regulatory systems: Paul Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007).

35 ICN, Note 28 above, at 5. Similarly, ICN, ICN Factsheet and Key Messages (2009) 4.

36 ICN, Note 28 above, at 2; and C. Townley, M. Guidi and M. Tavares, *Law and Politics of Global Competition - Influence and Legitimacy in the International Competition Network* (Oxford University Press 2022), chapter 2.

37 Hollman and Kovacic, Note 9 above, at 59.

38 ICN, Note 27 above, at 24. Similarly, Unilateral Conduct Working Group, Note 27 above, at 4.

39 Lall, Ranjit, ‘Timing as a Source of Regulatory Influence: a technical elite network analysis of global finance’, (2014) *Regulation & Governance* 1. His focus was financial regulation, but competition policy and enforcement seem similar in relevant respects.

NCA. These policies, which are now common in many NCAs and NGAs, especially in the EU and the USA, help to consolidate an elite (between NGAs and the NCAs) with collective goals, sharing the fruits of power. Importantly, this further extends rich, western multinationals' influence and power.⁴⁰

There seem to be two processes at work here. First, all good employees working in NCAs know that, when they leave the NCA, there is the potential for employment or consultancy work. Some may be motivated to moderate their behaviour while working in the NCA in order to make these potential, future benefits that they might receive from NGAs (for example, law firms, businesses) more likely. This might incentivise them (whether this is intentional or not) to seek out and show deference to NGAs' arguments, in their NCA work. Given their origin, these arguments likely involve (potential) impacts of competition rules on NGAs. They are unlikely to emphasise others' interests unless they coincide with these multinationals' interests too.

The second process arises due to the perceived lack of funds that many NCAs say they face. In order to ameliorate this, and because they see it as good experience for their employees, many major multinational businesses and law firms encourage their employees to go on secondment to NCAs. This is a way of subsidising NCAs. Obviously, when a firm's employees work inside an NCA on policy or enforcement projects, they are in a prime position to protect and pursue their employers' interests (while conflict rules prevent the most obvious examples of this, more dispersed influence is still there). In addition, spending time in an NCA helps these employees to make connections with NCA employees to facilitate the first process. There is some empirical support for this. Having worked in NCAs is considered 'important' or 'very important' for being an influential NGA by 51 per cent of our survey's respondents.

3. Conclusion

Competition rules are highly redistributive between different stakeholders in society, and different states. 'Superior standards and procedures' are dressed up as value neutral. They are not. For example, if competition rules are used to open up markets in developing countries, who benefits? Western multinationals, local firms, local consumers? Will they all benefit equally, or should the spoils be weighted in favour of one group? Competition rules are generally widely drafted, so decision-makers often have a lot of discretion in how to interpret and apply them. It matters what ICN work products say. Despite the ICN's formal rule that NCAs (and their states) can choose whether or not to apply them, they have a lot of influence on the way many NCAs interpret and apply their competition rules. NGAs have mechanisms to influence the ICN work product and outcome.

On issues where influential NGAs speak with a common voice, they are likely to have great weight within the ICN. Their resources, and the opportunity to participate at the heart of the ICN, give NGAs (who are disproportionately multinationals from advanced economies and their lawyers) the opportunity to frame debates (and influence which debates take place).

However, today powerful NGAs (and thus 'their NCAs') disagree on several issues: think of the intersection of digital issues and competition policy, for example. In part this is because much of the 'low-hanging fruit' (such as due process) has already been picked. So we are left with more obviously distributive topics where influential, rich country NGAs have divergent views. This may mean that NGAs (and even NCAs) start to lose their influence on many newer topics within the ICN over time. Or it might mean that such topics are avoided in the ICN until there is more consensus.

So NGAs are seeking common ground again (and more influence). They have consistently said that 'implementation is fundamental to ensuring that the promise of ICN best practices and work products is translated into tangible results'.⁴¹ (Re)focusing the ICN on the implementation of its existing work products is becoming the new battleground.

40 Wilks, Note 31 above, at 78. Similarly, Andrés Palacios Lleras, 'Competition Law in Latin America: 100 Years of Solitude' in Swethaa Ballakrishnen and Sara Dezalay (eds), *Invisible Institutionalisms: Collective Reflections on the Shadows of Legal Globalisation* (Hart Publishing 2021) at 195-96.

41 Anderson, Note 26 above, at 277.