



## **Unilateral Conduct Working Group Long-Term Strategic Plan, 2010-2014**

### **A. *INTRODUCTION: MISSION AND GOALS***

The ICN Unilateral Conduct Working Group was established at the fifth annual ICN conference in May 2006. Its primary objectives are to examine the challenges involved in addressing anticompetitive unilateral conduct of dominant firms and firms with substantial market power, facilitate greater understanding of the issues involved in analyzing unilateral conduct, and promote convergence and sound enforcement of laws governing unilateral conduct.

To achieve our mission, the Working Group strives to:

- Provide a forum for sharing experience and fostering consensus.
- Promote greater international convergence and increase understanding regarding differences in unilateral conduct standards.
- Help members improve the quality of their unilateral conduct enforcement.
- Encourage the use of economic analysis in unilateral conduct enforcement.
- Deepen understanding of the strengths and weaknesses of various remedial options in unilateral conduct cases.
- Strengthen cooperation among competition agencies in their review of unilateral conduct cases.
- Promote implementation of Recommended Practices and greater understanding of barriers to implementation.

### **B. *PAST WORK***

The Working Group has developed consensus Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies. The Group also has examined the similarities and differences among members regarding the treatment of different kinds of unilateral conduct and has prepared reports on exclusive dealing (2008), predatory pricing (2008), tying and bundled discounting (2009), and loyalty discounts and rebates (2009). The Working Group is preparing a report on refusal to deal for the 2010 Annual Conference.

The Working Group holds frequent conference calls with members to discuss the Group's work, and has recently begun using webinar technology on the calls. The Group also holds periodic conference calls with its non-governmental advisors to ensure effective private sector input.

To enhance understanding of unilateral conduct law and policy, the Working Group has organized workshops, teleconferences, and teleseminars with working group members and NGAs. The Working Group held its first teleseminar, on the topic of excessive pricing, in November 2009, and a second teleseminar, on remedies in unilateral conduct cases, in March 2010. The Working Group held its first workshop on implementing the Recommended Practices and evaluating unilateral conduct in Washington, D.C., in March 2009. Recordings of the teleseminars and a webcast of the workshop are posted on the ICN website.

### **C. *POTENTIAL FUTURE WORK 2010-2014***

The Working Group proposes five areas of future work, considering the factors suggested by the Steering Group, i.e.: the audience for the Group's work product; a balance between promoting existing work product versus creating new work product; a balance between work that is ripe for convergence efforts versus comparative dialogue; projects that complement the institutional strengths and impact of ICN's mission; projects that encourage broader member and NGA engagement; and initiatives that are well suited to ICN's practical, project-oriented nature:

#### **1. Complete and Promote Past Conduct Work and Identify Further Areas of Study**

- Continue work on the analysis of unilateral conduct through comparative reports, teleseminars, and workshops. The Working Group will consider whether to examine types of conduct that it has not previously covered, such as excessive pricing and price discrimination.
- Identify issues arising from past conduct work for further study. For example, the working group may further explore the various tests for identifying exclusionary conduct, foreclosure analysis, the role of recoupment in predatory pricing cases, and the role of intent in unilateral conduct cases.

#### **2. Undertake New Work**

- The Working Group will create a "workbook" on the analysis of unilateral conduct, similar to the April 2006 Merger Guidelines Workbook. The workbook will be based on the Group's previous conduct work, recommended practices on dominance, and reports on the objectives of unilateral conduct laws, the assessment of dominance, and state-created monopolies. The Group will identify analytical principles regarding types of conduct on which there is agreement, as well as remaining areas of disagreement.
- Consider work on remedies in unilateral conduct cases, which may include the types, effectiveness of, and experiences with remedies, in order to understand what agencies have learned about the use of various remedies in unilateral

conduct cases. The Group might also survey members regarding their experience, if any, in conducting retrospective studies of remedies.

### **3. Promote Implementation of Past Work**

- Promote implementation of past work, particularly the Recommended Practices, including by coordinating with the Advocacy and Implementation Network Support Group. More than a dozen agencies reported using the Group's work product to help analyze cases or as a reference, and several others use them for training or to benchmark their practices against those of other agencies as described in the reports. The Working Group will seek to identify barriers to implementation, including at its 2010 Workshop. Members and NGAs will be encouraged to promote implementation when commenting on laws and guidelines and in speeches and articles.

### **4. Facilitate Discussion and Provide Training Opportunities**

- Continue to facilitate discussion of issues that arise in analyzing unilateral conduct. The Working Group will aim to hold bi-annual workshops and semi-annual teleseminars. The Group may hold additional conference calls to enable members to delve into issues of mutual concern, identify commonalities and differences in approaches, and better understand the relative advantages and drawbacks of different policies.
- Conduct a series of training webinars. The sessions will be smaller than teleseminars, with approximately 25 participants. The Working Group will develop a curriculum that addresses topics ranging from the assessment of dominance to the design of remedies, drawing on the Group's work product and agencies' experience.

### **5. Undertake to Develop Recommended Practices or other Guidance**

- Building on the descriptive reports on types of unilateral conduct and on the workbook (to be drafted), seek to draft consensus Recommended Practices or, if that appears infeasible, alternative forms of guidance. This work could cover a general framework for analyzing unilateral conduct, the analysis of specific types of conduct, and the investigation of unilateral conduct, including the provision of procedural fairness and transparency. Given current differences in members' approaches to unilateral conduct analysis, the Working Group will explore the possibility of recommended practices with sensitivity to all members' views.

**6. Expand Participation by Members and NGAs**

- Encourage members and NGAs from outside the Working Group to participate in the group's work, workshops, teleseminars, and webinar training sessions.
- Encourage greater participation by economists to further explore unilateral conduct from traditional economic and law and economics perspectives (e.g., error costs, procedure, optimal rules). Economic input would also be valuable to the group's efforts to develop teleseminars, workshop programs, and training webinars. Economic input could also inform the development of a workbook and to foster consensus regarding approaches to different types of unilateral conduct.

**D. *NEXT STEPS — SETTING THE FUTURE DIRECTION 2010 - 2014***

- **Complete work plan and schedule for 2010-2011 work**
  - Agree on further areas for study
  - Establish the purpose, content, and schedule of training materials, workshops, and teleseminars
  - Assess the use of webinars as a tool for working group communication
  - Hold a workshop in December 2010 to deepen understanding of issues raised by the group's conduct reports and promote the use and implementation of the working group's Recommended Practices and reports. Conduct breakout discussions devoted to identifying barriers to implementation and exploring ways to overcome them
- **Discuss and agree on work for 2011-2014.**