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# How does the ICN accommodate its increasing diversity? Putting benchmarking into practice

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### Abstract

This article examines the way the International Competition Network (ICN) attempts to accommodate its increasing diversity within its overall framework of voluntary policy convergence promotion. A dilemma for the ICN is that the more successful its convergence endeavour is, the more diverse members it attracts. Drawing on recent publications of the ICN as well as secondary sources, this research identifies four strategies of the ICN for overcoming this challenge.

Among various causal mechanisms of policy convergence debated in the theoretical literature, benchmarking, a particular kind of transnational communications, characterizes the governance mode of the ICN. The author argues that, so as to achieve benchmarking among its increasingly diverse members, the ICN maximizes opportunities for information and experience sharing among its members, incorporates experts into the drafting of best practices, limits and prioritizes its agenda, and takes advocacy and capacity building seriously. This article also documents the partial alignment of ICN member jurisdictions' rules with non-binding best practices on merger review. While more comprehensive data is necessary to assess the actual impact of the ICN on national legislation, at least one may conclude that the Network is already more than a mere talking shop despite the absence of any binding rule. Nevertheless, since the ICN purposefully handled relatively easy areas in its first decade, the initial relative achievement vis-à-vis its own goals should not be over-evaluated.

## Introduction

A recent striking development in public policies is an ever-growing number of competition laws and authorities on a global scale. In 1980, only 15 countries had comprehensive competition law, while more than 112 countries adopted it by the end of 2010, with at least 14 countries drafting legislation (Panitchpakdi 2010). In the mid-1990s, the weak and uncoordinated public control of anti-competitive business practices, even in developed countries, was widely regarded as an example of the 'retreat of the state' from the market (Strange 1996: 160). This perception underlines not only the unexpectedly rapid development of competition policies around the world from that time, but also the often underestimated importance of cross-national policy convergence.

In parallel with such dissemination of competition policies, there have been several attempts to multilateralize international competition cooperation since the end of the World War II. The ideas of multilateral competition cooperation arose mostly at trade-related international organizations such as the Organization for Economic Cooperation and Development (OECD), the United Nations Conference for Trade and Development (UNCTAD) and the World Bank. A significant exception is the International Competition Network (ICN), a competition-dedicated informal network. Launched in 2001, the ICN is already a crucial institutional component of multilateral global governance in this policy field. As a virtual network of competition officers, stakeholders and academics from a wide range of jurisdictions, the Network aims to facilitate networking and benchmarking for policy convergence among its members' affiliating authorities, be it national or regional. Its membership soared from original 15<sup>1</sup> to over 100 in less than 10 years.

While it is becoming common among practitioners and academics to refer to the ICN as a major and promising institutional framework for global competition cooperation, arguably the ICN, a rising venue, faces a dilemma: the more successful the ICN's convergence endeavour is, the more diverse members it attracts. In fact, as will be documented in the following parts, it seems that ICN members and its executive body, the Steering Group, recognize this challenge and search for remedies. It is therefore interesting to address the following research question: how does the ICN accommodate its increasing diversity within the overall framework of voluntary policy convergence promotion? Here *diversity* refers to (i) a wide variety of policy goals, scope, instruments and institutional settings<sup>2</sup> as well as (ii) various levels of expertise on and experience in competition regulation across jurisdictions. It should be noted at this stage that increasing diversity among competition systems is not necessarily a negative phenomenon<sup>3</sup>. Nonetheless, by definition, it would certainly make international policy convergence more difficult. Why policy convergence matters at all is a point which will be explained in the next section. In this article, as defined by Knill

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<sup>1</sup> The founding members were competition agencies from Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States (Federal Trade Commission and Department Justice's Antitrust Division), and Zambia.

<sup>2</sup> Doern (1996a:24) identifies eight dimensions of policy systems for comparative analysis: the use of explicit non-competition criteria by competition authorities; ministerial discretion; pressures from other ministries; pressure by interests and their incorporation into governance; opportunities for private legal action; processes for giving guidance letters to parties; policy learning through media exposure and public communication; number and competence of competition institutions.

<sup>3</sup> For example, Budzinski (2003: 11-18) argues that competition policy paradigms are and would remain diverse given the reality of pluralism in competition economics.

(2005: 768), *policy convergence* means ‘any increase in the similarity between one or more characteristics of a certain policy (...) across a given set of political jurisdictions (...) over a given period of time.’

A puzzle here lies in the relative success of the ICN at least in its initial phase. According to the existing literature on policy convergence, intervening variables which facilitate policy convergence are similarities in terms of (i) culture, (ii) economic development, and (iii) existing institutional settings (Holzinger et al 2008: 25). Interestingly, the ever-growing membership of the ICN across continents increases diversity among the members in all three aspects. At the same time, there is some empirical evidence of competition policies alignment with ICN best practices (Coppola 2011; Coppola and Lagdameo 2011; Fox 2009). In short, this counter-intuitive combination of growing diversity, soft implementation mechanism, and a relative policy achievement makes the ICN an intriguing case for the study of policy convergence.

The argument of this research is threefold. Firstly, the ICN takes four strategies to achieve policy convergence among its increasingly diverse member authorities: maximization of opportunities for information and experience sharing; incorporation of experts into the drafting process of best practices; emphasis on advocacy and capacity building; careful selection and prioritization of agenda. Secondly, the author argues that despite the purely voluntary nature of all ICN products, there is some evidence of gradual convergence among its members toward ICN Recommended Practices on merger review. Thirdly, such a relative success of the ICN in its initial phase is significant but should not be over-emphasized. Since the Network initially selected relatively easy tasks, it could face difficulties in agreeing on additional best practices.

Theoretically, this article draws on the literature on policy convergence in the study of comparative public policy. It will be argued that among various mechanisms of convergence, benchmarking - a sub-category of transnational communication - is the most relevant one to capture the nature of ICN governance. The following discussion will refer to various publications of the ICN as well as secondary sources. In particular, ICN documents published since 2011 are of great importance because the Network has conducted research on itself to take stock of its experience in the first decade.

The structure of this article is as follows. The next section will provide background information concerning the ICN. It also explains why convergence on a multilateral basis matters for both competition authorities and the private sector. Section II will present a theoretical framework, namely the theories of policy convergence. Since there are various mechanisms of policy convergence, this article identifies what ICN convergence efforts are and what they are not. After setting the scene in this way, the third section will answer the research question by investigating the way the ICN promotes policy convergence. Next, based on this empirical analysis, this article will measure ICN’s impacts on national legislation in merger review, and critically examine a view that the ICN would or should transform into a legislative body in the future. Conclusions shall summarize, integrate and evaluate theoretical and empirical parts of this article.

## I Background: the ICN and multilateral policy convergence efforts

To understand the relevance of the ICN is to understand the importance of *policy convergence* on a *multilateral* basis in competition policy. Firstly, this section provides background information about the ICN concerning historical context and major activities. Secondly, it explains why policy convergence particularly in a multilateral form matters in this field – which is by no means obvious. Without this analysis, interests of public and private actors would be left in a black box when we discuss the governance of the ICN and its challenges.

### The ICN – its contents and context

The International Competition Network is a programme-oriented virtual network, which was established in October 2001 by 15 competition agencies from 14 jurisdictions. It does not possess a permanent address, a letter head or employees (permanent secretariat)<sup>4</sup>. Above all, it lacks legal personality. In addition to such informality, voluntarism is a major feature of the ICN. As a matter of fact, the ICN has nothing to do with the making of binding international rules. Rather, aiming for voluntary convergence to superior substantial and procedural regulatory standards for competition policy, the ICN facilitates experience-sharing among authorities, and issues various documents (ICN 2001: 1; 2012: 5). Such informal arrangement largely derives from a recommendation from the International Competition Policy Advisory Committee (2000) appointed by the US Department of Justice. In addition, the ICN supports competition advocacy and attempts to facilitate inter-governmental cooperation (ICN 2001: 1; 2012: 5).

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While the ICN is much younger than the OECD, the UNCTAD and the WTO, the former has rapidly emerged as a key venue for international competition cooperation in one decade. In fact, by the beginning of 2012, its membership reached as many as 123 agencies coming from 108 jurisdictions (ICN 2012: 3). Together with such enlargement, ICN activities are becoming broader and richer. The most important kind of publications by the ICN is Recommended Practices, which are sometimes called best practices. Other main activities of the Network include annual conferences, working group discussion and supplementary workshops as well as tele-seminars. From the very beginning, these activities are open not only to national and regional competition officers, but also to so-called ‘non-governmental advisors’: individuals from private sectors, consumer groups, international organizations, academics, and professional (i.e. law and economics) companies or associations (ICN 2001: 2).

In short, the ICN is an innovative, bottom-up project for competition practitioners with special emphasis on voluntary policy convergence toward best practices. Other objectives such as advocacy, capacity-building and facilitation of international cooperation are important and complementary to the overall goal, but remain secondary. At first sight, the convergence of national and regional procedures, let alone substantial techniques, may look uncontroversial and unimportant. However, it is in reality essential to minimize a risk of inter-governmental conflicts and various costs of transnational business activities both for public and private actors.

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<sup>4</sup> The ICN mostly relies on its members’ financial contributions. For example, hosting countries rather than the ICN bear costs of annual conferences (ICN 2001: 4).

## Why convergence matters

In general, competition laws have not developed enough to match the reality of international business activities. On the one hand, the legislation and enforcement of competition laws remain, to a great extent, nationally divided outside the EU. On the other hand, business activities are becoming more and more transnational at both regional and global levels. It is the tension between these two opposing forces which creates demands for international cooperation on the competition issue. In this context of increasing demands, national and regional competition agencies have been pursuing intensified cooperation particularly in the last two decades.

Competition laws vary significantly at the level of substantial analysis as well as procedures. For instance, some authorities put emphasis on the *abuse* of market dominant position for the analysis of monopoly, while others regard market dominance itself as problematic. In some countries, hard-core cartels are illegal *per se*, but they are not in others jurisdictions. These differences mainly come from different policy objectives. Typical goals of competition policy are economic efficiency; consumer protection; the redistribution of wealth; the protection of small and medium-sized enterprises; regional, social and industrial considerations; the facilitation of regional economic integration; the promotion of competitiveness, and so forth (Cini and McGowan 2009: 4-5; see also Motta 2004: 18-30). Given the reality of such divergent objectives and subsequent divergent policy instruments, the governance method of mutual recognition would be unacceptable for the international community. This is why convergence comes to front as a major response to growing inter-jurisdictional frictions.

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Without convergence, both regulators and the regulated would face various costs and risks. A shortage of coordination among competition authorities would result in uncertain environment for transnational businesses. They would bear extra costs due to cross-national procedural differences. Hence, companies prefer a 'one-stop-shop' competition regime. Convergence even in seemingly simple areas such as the length of merger review and cartel investigation techniques could easily reduce such costs. From the regulator's perspective, procedural compatibility significantly contributes to inter-agency cooperation such as simultaneous investigation to cartel members and monopolists.

National discrepancy also leaves room for manipulation by enterprises. For example, a multinational company may notify its cross-border business activity first at a competition authority which is most likely to approve the notification, and then proceed to other authorities concerned. In such situation, a decision by the first authority may affect following decisions by others. Outcomes of such forum-shopping by firms are unpredictable and could increase legal uncertainty.

There is another rationale for policy convergence, which is specific to economies with stringent competition policies. Economists Dewatripont and Legros (2009: 89-90) make a threefold argument about the international implications of competition policy. Firstly, competition policy has not only 'internal effects' (improvement of economic efficiency in the domestic market), but also negative 'external effects' (loss of international

competitiveness of domestic firms due to restriction / prohibition of monopolistic power). Secondly, while developed countries have sophisticated competition regulatory systems, less developed countries generally prioritize industrial policy. Thirdly, given these two points, developed countries have incentives to promote competition policy in less developed countries so as to minimize the potential negative external effects of their own domestic competition regulation.

### **Why multilateralism matters**

Even if we accept that convergence is significant in competition policy, it is still not obvious why multilateralism is also important. Multilateralism matters in competition policies convergence for three major reasons. Firstly, problem-solving capacities of individual states are largely insufficient in the current globalized economy. A typical problem which can be best dealt with is market-sharing. Market-sharing is a classic cartel strategy of companies to set and maintain high prices, and make excessive profits. A certain market may be divided geographically and allocated to cartel members. Those members agree, often informally, not to enter other members' areas so as not to cause competition. Since overseas business practices are difficult to investigate for various technical and legal reasons, competition authorities often fail to detect and terminate such conducts. One response to such private manipulation of markets is the extraterritorial use of competition law. In fact, extraterritoriality doctrine eased some problems including combats against market-sharing and other cross-jurisdictional restrictive practices. However, it proved to cause new problems at the same time (Fox 2001: 359-360). For example, differences in substantial testing of mergers result in contradictory decisions by competition authorities at times.

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The second major factor which has contributed to international competition cooperation is the spread of increasingly sophisticated international anti-competitive business practices. Take an example of cartel control again to demonstrate why inter-agency cooperation is of great importance. It is well known that some multinational corporations manipulate nationally divided competition rules and gain benefit by international cartels. Those companies typically make use of communication tools such as informal meetings and emails to make investigation difficult. In order to ensure no cartel member confesses their illegal conducts to regulators in pursuit of penalty immunity, a cartel leader may set up a monitoring system. Also, micro-economics has proved that cross-sector cartels (multimarket contact) are more consolidated than single-sector ones because breaking a cartel agreement in one area might trigger counter-measures in all other areas (Bernheim and Whinston 1990).

In response, states employ numerous measures to deter, detect and sanction cartels. Those measures include sophisticated econometrics to identify and prove cartels; 'dawn raids' (investigation without beforehand notice); high penalty fees; criminal sanctions if domestic laws allow; the leniency system in which 'whistle blowers' obtain total or partial exemption from penalties; promotion of private enforcement; (e.g. giving consumer and business organizations rights to litigate collectively on behalf of damaged individuals). Nevertheless, all those attempts are arguably ineffective until international cooperation facilitates inter-agency information exchange, even if there are confidentiality rules, and simultaneous or coordinated initiation of investigation.

Thirdly, the relative importance of multilateralism is increasing as bilateralism gradually has turned out insufficient. Above all, transaction costs of bilateral negotiation are enormous because, unlike on-the-border economic issues, international negotiation on competition often involves domestic legislative changes (see the US-Japan Structural Impediments Initiative below). By contrast, multilateral cooperation not only reduces such transaction costs, but also facilitates trans-governmental experience-sharing, cross-national policy learning and possibly the promotion of best regulatory practices on a wide scale<sup>5</sup>.

Summing up, the ICN has emerged to enhance the convergence of competition policies on a multilateral basis. Without a significant degree of convergence, both regulators and the private sector would bear unnecessary costs and face legal uncertainty. Acknowledging the importance of convergence, the next section will overview theories of policy convergence in comparative public policy and apply them to the competition issue.

## II Theories of policy convergence

Policy convergence as a *concept* is sometimes used as a synonym to similar ones such as policy transfer and policy diffusion. Yet, the analytical focus of policy convergence is effects (increase or decrease in similarity over time), while the other two are mainly about processes (adoption patterns) (Knill 2005: 765). For example, 'diffusion without convergence' is possible because diffused ideas might be adopted and contextualized in various ways according to local political contexts (Radaelli 2005: 927)<sup>6</sup>. Policy convergence as a *theoretical framework* accommodates various accounts for the causes of convergence. This is why we researchers should be explicit about the type of convergence we talk about. According to the existing literature, there are five major mechanisms of cross-national policy convergence, namely, independent problem-solving, imposition, harmonization by binding international law, regulatory competition among jurisdictions, and transnational communication (Holzinger, Knill and Arts 2008: 22). Each of the five can be briefly illustrated with examples from the international dimension of competition policy (See Table 1 below). This exercise is essential to better understand what ICN activities are and what they are not.

### Five mechanisms of policy convergence

Firstly, policy convergence may happen as a consequence of separate governmental efforts to the same, pervasive problem. One example of this independent problem-solving is the issue of extraterritoriality mentioned above. The

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<sup>5</sup> There are additional specific reasons, while they are less relevant in the argument of this article. Large economies with mature competition authorities may regard multilateral competition forums as an opportunity to set global standards according to their own preferences, while small economies and developing countries may prefer multilateralism being afraid of disadvantaged in bilateral negotiation with larger economies (Doern 1996b: 307-309).

<sup>6</sup> The ever-growing literature on Europeanization is a classic example of process-oriented research agenda. A majority of researchers agree that regardless the dimensions of change (polity, policy and politics), Europeanization should be analytically distinguished from convergence (for example, Börzel 2005: 61). In fact, there are already numerous empirical works which illustrate Europeanization of states without convergence. See for example Green Cowles and Risse (2001: 236-237); Ladrech (2010: 12-13).

**Table 1: causal mechanisms of policy convergence**

Causal mechanisms	Examples in competition policy
1 Independent problem-solving	Unilateral extraterritorial application of competition law
2 Imposition	US-Japan Structural Impediments Initiative
3 International harmonization	Failed attempt of rule-making at the WTO
4 Regulatory competition	'Race to the bottom' in the regulation of export cartels
5 Transnational communication	Networking and benchmarking at the ICN

Source: For the left row, Holzinger, Jörgens and Knill (2008: 22).

US Supreme Court's Alcoa judgement in 1945 introduced the effects doctrine into US antitrust law and policy. The effects doctrine means that domestic competition law can be (or should be) applied extraterritorially when business activities outside its jurisdiction, be it its nationals' or foreigners', do harm directly and considerably on the domestic market. Later, West Germany and the EU also established legal basis for extraterritoriality through case law in a similar way (Gerber 1983: Cini and McGowan 1998: 201-202). A fact that the extraterritoriality doctrine did not go beyond the US for decades indicates that states mostly accept this concept in individual responses to cross-jurisdictional cases they face.

Secondly, a state may impose certain types of competition policies on other states. As already indicated in the previous section, states with rigorous competition policies have an economic incentive to encourage other states to provide at least a comparable level of regulation. It is not rare such 'encouragement' comes in a coercive way taking advantage of political and economic leverage. A good example here is the Structural Impediments Initiative (SII) which is trade-plus negotiation between the US and Japan from September 1989 to June 1990. While the previous bilateral negotiation, the MOSS (Market Orientated Sector Specific) (1982-1988), concentrated on traditional market access issues, the SII went further to discuss domestic market regulation and private business conducts. On the one hand, the Japanese government requested the US to improve its macro-economic conditions, especially a growing fiscal deficit. On the other, Japan agreed on several recommendations from the US including the empowerment of the competition authority, Japan Fair Trade Commission (Sekiguchi 1993: 49-50)<sup>7</sup>.

Thirdly, international harmonization forces states to align their legislation with international or supranational laws. This is what the WTO Working Group on Competition and Trade aimed for. The competition issue reached agenda at the Singapore ministerial conference in 1996. The so-called Singapore issues, namely trade and investment, trade and competition, public procurement, and trade facilitation (simpler trade procedures) all go beyond a traditional understanding of on-the-border trade policy. Former European Commissioner for Competition Sir Leon Brittan was

<sup>7</sup> Japan Fair Trade Commission indeed employed more staffs, conducted organizational reforms and established severer sanctions including both pecuniary and criminal ones. Yet, contrary to US recommendations, The Japanese government did not completely forbid the alleged unfair business practice, namely the exclusion of non-members from trade with and manufacture and trade groups (Sekiguchi 1993: 50).



one of the most active promoters of binding multilateralism at the WTO. Specifically, he listed four potential points for negotiation (Brittan 1999: 4-5): commitment to progressive domestic legislation on competition; agreement on core principles of transparency and non-discrimination; provisions on cooperation procedures such as positive comity rules; gradual convergence, if not harmonization, in selective areas such as hard-core cartel control. The EU plan even included the application of the dispute settlement system to competition rules. Nevertheless, this EU initiative did not gain much support from other WTO member states and was abandoned at the Cancun ministerial conference in 2004 (for the failure of competition rule-making at the WTO, see Bradford 2007).

Fourthly, regulatory competition is a market-driven process of convergence. An analytical focus of the debate over regulatory competition is the *direction* of convergence. While some researchers hypothesize convergence to the lowest common denominator (also known as ‘race to the bottom’ or ‘the Delaware effect’) between states due to transnational market forces, others provide some empirical evidence of convergence to the highest common denominator (‘race to the top’ or ‘the California effect’) (Vogel 1997; Murphy 2004; Sebastiaan 2003). This theoretical and empirical debate has gained popularity particularly in the study of environmental policies. While those theories of regulatory competition are less relevant in competition policy, downward competition logic may underline the issue of export cartels (Fox 2006: 355; Jacquemin 1993: 96).

Last but not least, transnational communication may also enhance cross-national policy convergence in several ways. Since transnational communication seems the most relevant convergence mechanism concerning the ICN, we shall unpack this conceptual tool in the next section. Yet, before that, it should be explained why the other mechanisms are irrelevant to the study of the ICN. Above all, the ICN denies any effort or ambition of binding rule-making. Therefore, the logic of international harmonization does not apply to the ICN. It is also worth reminding that the regulatory competition argument is useful in explaining the *direction* of convergence. Nevertheless, since the very beginning the Network takes a benchmarking approach to policy convergence. By definition, benchmarking means the facilitation of the race to the highest standard. Therefore, a more relevant theoretical issue relating to the ICN is the *degree* of convergence, or the reasons best practices may be implemented without monitoring and sanctioning systems. We shall come back to this topic shortly.

### **Benchmarking as a distinctive type of transnational communication**

There are four sub-categories of transnational communication, namely lesson drawing, transnational problem-solving, emulation and international policy promotion (Holzinger, Knill and Arts 2008: 42). These four mechanisms of transnational communication, presented in Table 2 below, are not mutually exclusive. Also, in reality a particular policy programme may enhance more than one of the four patterns of transnational communication. ICN activities can be categorized into two categories using this framework. Firstly, the ICN serves as a networking facilitator. Analytically, this function would encourage information exchange and experience-sharing among policy-makers and transnational actors, and therefore enhance lesson drawing and emulation across jurisdictions. Yet, the second,

overall goal subsumes this objective of networking. The primary goal of the ICN - the identification, adoption and publication of best practices best fits to the category of international policy promotion or benchmarking.

**Table 2: Mechanisms of policy convergence through transnational communication**

	Mechanism	Incentive	Response
1	Lesson drawing	Problem pressure	Transfer of model found elsewhere
2	Transnational problem-solving	Parallel problem pressure	Adoption of commonly developed model
3	Emulation	Desire for conformity	Copying of widely used model
4	International policy promotion	Legitimacy pressure	Adoption of recommended model

Source: Holzinger, Jörgens and Knill (2008: 42)

Benchmarking is not identical to lesson drawing and emulation between certain pairs of states. It is a method of governance which promotes superior policy models through ‘legitimacy pressure’ (Holzinger et al 2008: 47-48): governments may copy a certain model because an actor –often but not exclusively an international institution – promotes it as the best one based on cross-national / regional comparison. Best practices serve not only a ‘pressure’, but also as an ‘opportunity’ for competition authorities. A fact that those practices are internationally acknowledged helps competition authorities promote those rules in their own jurisdictions vis-à-vis other governmental bodies.

Frequent and abundant exchange of information and ideas is a necessary condition for the convergence through transnational communication. Promoters of internationally recognized benchmarks are in many cases international institutions embedded in transnational epistemic communities (Haas 1992) or advocacy networks (Keck and Sikkink 1998). While epistemic communities or groups of experts provide expertise, advocacy networks mainly give popular supports to activities of international institutions. In other words, the level of transnational communication is by no means restricted to the most senior governmental officials representing their jurisdictions. Rather, transgovernmental and transnational interactions are common across various issues ranging from environmental control to securities regulation (Slaughter 2004: 172-177).

While there are various theoretical approaches to the study of policy convergence, one thing they all have in common is scepticism to cultural determinism. Before proceeding to empirical analysis, it should be clarified why this article is cautious to the over-emphasis of cultural accounts. Page (1999: 445) argues that in non-western countries, certain typical characteristics play a pivotal role in their concept of competition: in particular, historical factors (e.g., in Asia), religion (Islamic countries), ideological changes (former-communist countries), and economic upheavals (developing countries). For example, according to this line, Asian countries with Confucianism traditions are tolerant

to ‘cooperation’ among businesses. Cartels and vertical business networks with mutual stake-sharing (*keiretsu*) are understood as ‘mutual help’ rather than conspiracies.

On the one hand, it is true that different countries use competition policy for different purposes. Besides, states often make compromise with neighbouring policies such as trade and industrial policy, research and development policy, and environmental policy. On the other, the abovementioned culture- and ideology- oriented argument over-emphasizes cross-national and cross-regional differences. It cannot capture the reality of rapid policy development in non-western countries such as Japan and South Korea in the last few decades. For example, in 2010, a total amount of penalty fees on cartels imposed by Japan Fair Trade Commission was the third largest around the world only after the European Commission and Brazil (Global Competition Review 2011: 18). Nor does it explain why all BRICS countries, emerging powers with diverse cultures and political contexts, are currently strengthening and modernizing their competition law. Therefore, serious debate over comparative competition policy should go beyond the deterministic cultural explanation.

Drawing on the existing literature which identifies five mechanisms of policy convergence, the author has argued in this section that different issues within the competition policy involve different mechanisms of convergence. This intellectual exercise has clarified characteristics of core ICN activities using concepts in comparative public policy. Now we proceed to the specific policies of the ICN.

### **III Accommodating diversity: limited scope, extensive networks**

The ICN accommodates public members with highly diverse rules because of its very attractiveness. The working method of the ICN falls into the category of international policy promotion or benchmarking in theoretical terms. Since the discussion here flow from theoretical debate to empirical analysis, what the theory of convergence tells us and it does not should be clarified. According to the theoretical framework, (i) an extensive exchange of information, knowledge and ideas is a pre-requisite for effective convergence through transnational communication such as benchmarking. In addition, (ii) to make ‘best practices’ really best, it is crucially important to incorporate experts into policy debate and embed the standard-promoting institution into an epistemic community.

For an identification of other specific strategies of the ICN – to be precise, its Steering Group and co-chairs of Working Groups - in face of pluralism in competition systems, the documentation of various ICN products is essential. Arguably, the ICN absorbs its increasing diversity in four ways. Firstly, the ICN maximizes opportunities for information exchange and experience sharing among its members. Secondly, it incorporates trans-governmental advisors so as to make best practices credible. Thirdly, it carefully excludes politically sensitive issues and prioritizes areas within selected agenda. Last but not least, the Network puts stress on advocacy and capacity building from the outset, and is reinforcing this effort in the last few years.

## **Maximizing interactions**

In a quantitative sense, most day-to-day activities of the ICN are about information and experience sharing. Members of the Network frequently exchange emails and phone calls on a bilateral basis. There are also online-video seminars on various issues. One source reports that approximately 90 per cent of interactions among the members are indeed conducted by email and telephone conferencing (Damro 2006: 146). ICN Blog and Bulletin Board are utilized for posting latest news about ICN activities. Because of the project-oriented nature of the ICN, it is not easy to recognize and follow its all publications. Therefore, the Product Catalogue is downloadable on the ICN website. Templates are also important for information pooling. First, Working Groups coordinators distribute templates to public members. Then, the latter fill in requested information about statutory and administrative rules of their home country. Finally, those documents are uploaded to the website so that all members can access it. In these ways, the ICN makes great efforts to encourage and smoothen inter-member interactions.

## **Incorporating experts into the drafting process**

In principle, the ICN attempts to incorporate as many stakeholders as possible. The inclusion of professionals (most importantly, economists and lawyers) and academics makes sense because drafting credible best practices is virtually impossible without expertise. This point is particularly important in competition policy because effective competition regulation requires expert knowledge on competition law, micro-economics (especially econometrics) and market structures in specific cases. Other participants such as business groups and consumer groups are also important members representing specific interests. They do not necessarily have less expertise than professional and academic members. Nevertheless, the private sector and consumers are more relevant to better inclusiveness rather than expertise. The creation of a NGA Liaison position in 2009 suggests continuing commitment of the ICN to wider membership both in terms of professions and geographical reach (Coppola 2009: 19). Almost the only limit on the membership is that public members should be mainly engaged in competition policy rather than other policies, for example international trade and development.

## **To discuss or not to discuss: restrictive agenda**

ICN selects and prioritize its agenda carefully. Currently, there are five Working Groups at the ICN: (i) advocacy (founded in 2001), (ii) agency effectiveness (2002, formally Capacity Building and Competition Policy Implementation), (iii) cartels (2004), (iv) mergers (2001) and (v) unilateral conduct (2009). There is also an Advocacy and Implementation Network Support Programme (2008: previously 'Support System'). The ICN's pragmatism is evident in its prioritization, or more specifically two-speed strategy. As the ICN's Vision for its Second Decade (ICN 2011: 5-6) explains, in areas where differences are relatively narrow, such as leniency programmes and merger review periods, the ICN seeks for publication of Recommended Practices and Guidelines in conjunction with national competition agencies. By contrast, in areas where differences are greater such as the analysis of unilateral conduct,

‘the ICN facilitates ‘informed divergence’: identifying the nature and sources of apparent divergence and understanding and respecting any underlying divergent rationale’ (ICN 2011: 6).

The selectiveness of agenda is also noticeable. First of all, any international harmonization effort was and remains off the table. It should be reminded that the ICN solely relies on voluntary domestic implementation of agreed best practices by member authorities. Nor does it have dispute settlement mechanisms. Similarly, the ICN does not bring up controversial issues such as export cartels, which were mentioned above. The WTO Working Group discussed it, but it soon proved a highly sensitive and controversial topic because of the beggar-thy-neighbour-policy nature (Bhattacharjea 2004).

Themes raised for new work for the ICN’s second decade have a wide range. Those which were mentioned by at least two ICN public members included training and educating agency staff; evaluating/assessing the impact of competition enforcement; efforts on consumer welfare (partly for use as an advocacy tool); sector-specific work (e.g. banking, insurance, telecoms); work more closely with the judiciary / engage in outreach to judges; work on economic analysis (including the use of econometrics). Topics which are specific to large states are not in this list. For example, private litigation, which is quite active in Anglo-Saxon countries, does not come up to main discussion. Yet, this does not necessarily mean that less developed countries have agenda-setting power in proportion to their numbers. Take an example of ICN working groups’ co-chairs<sup>8</sup>, who may influence and frame workshop specific topics. Among 15 seats in total for five working groups, developed countries / region occupy 11. Given that the majority of ICN public members are now from developed countries, this composition is not proportional.

It is also worth recapitulating here that the level of convergence in those areas is practical techniques rather than general norms. Eleanor M. Fox (2006: 290-291) observes, ‘the dominant international antitrust conversation has shifted from concepts of cosmopolitan world principles to practical details (e.g. timing of merger filings), cross-fertilization and slow evolution of common norms’ over time. ICN products are by no means value-free. They refer to ‘big norms’ such as transparency and fairness indeed (ICN 2002), but they mostly do so in specific contexts, particularly in discussion about regulatory procedures.

### **Strengthening each other domestically**

It should be highlighted that the issues of advocacy and capacity building have been at least as important as other substantial themes in the ICN from the very beginning. Particularly, it is noteworthy that, together with merger regulation, they constituted one of the two pillars of the first and second ICN Annual Conferences. It means that those issues came up to agenda earlier than typical competition topics such as cartels and monopoly (which is called unilateral conduct in ICN terms).

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<sup>8</sup> Composition of substantial Working Groups’ co-chairs at the time of 2012 is as follows: Advocacy: France, Mauritius, Portugal; Agency effectiveness: Mexico, Norway, US; Cartel: Japan, US, Germany; Merger: Italy, DG COMP of the EU, India; Unilateral conduct: Sweden, Turkey, UK.

The great importance of advocacy and capacity building is a not original but distinctive feature of competition cooperation. The majority of jurisdictions ICN members belong to did not have competition laws until the 1990s. Given such short histories of competition regimes, advocacy vis-à-vis the public and the media, and capacity building are essential for effective enforcement. At the Tenth Annual Conference, the Curriculum Project was launched for capacity building. This Project is under supervision of Vice Chair for Outreach, and produces various training modules which consist of a combination of video lectures, slides and final exams. At the ICN Annual Conferences in 2011 and 2012, a total of eight modules were released. Module topics include market definition and market power, to name a few.

In addition to public advocacy, advocacy toward non-competition governmental departments is equally significant for competition authorities. Pro-competition rules are often in conflict with interventionist measures such as research and development policy, regional policy and employment policy. This is why advocacy policy has potential to enhance the autonomy of competition policies in relation to neighbouring policies, and foster a basis for cross-jurisdictional policy convergence. As discussed in the theoretical part, the legitimacy of internationally recognized best practices is not only a pressure but also an opportunity for competition authorities. In fact, there are several pieces of evidence that ICN members have used ICN Recommended Practices to convince the legislative bodies that proposed reforms are reasonable and favourable (ICN 2012: 14). For instance, German and Irish competition authorities have cited ICN Recommended Practices on mergers in their official documents so as to demonstrate that reforms they are proposing are in full conformity with international standards. Similarly, numerous competition authorities such as those in Belgium, Brazil, Finland, Mexico and Portugal used the Recommended Practices for the promotion of legislative reforms.

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To sum up, this section has attempted to give an answer to the main research question, that is, how does the ICN accommodate its increasing diversity within the overall framework of policy convergence promotion? Taking into account the theoretical literature on benchmarking as well as competition issue specific factors, this part has identified, illustrated and documented four strategies of the ICN to accommodate variety among its members. While this intellectual exercise has its own value, we would be still left with a 'so what' question unless the ICN best practices have at least some real impact on convergence. Thus, the next part is devoted to discussion over the degree of policy convergence among ICN member authorities.

#### **IV The degree of convergence: a critical evaluation**

While the previous section put emphasis on the scope of convergence, here we turn to the analysis of the degree of convergence. To recapitulate the argument so far, there are favourable conditions for ICN's convergence-through-benchmarking efforts: extensive information and experience exchange; focus on relatively less divergent areas; incorporation of experts into the drafting of best practises; technical assistance and advocacy mainly to less mature authorities. Nevertheless, an actual degree of alignment with benchmarks is a matter of empirical analysis. Quantitative data provide us an overall picture, while country-specific legislative changes would illustrate and

complement that general argument. This part will also critically assess a prescriptive evaluation of the ICN in the literature saying that the Network would and should become a legislative body.

### **Some concrete evidence of ICN impacts**

ICN publications are the most extensive in the field of merger. In fact, 13 Recommended Practices were agreed on a unanimous basis and published in a short period of 2002-06. They cover major areas such as notification thresholds, timing of notification, and substantial analytical methods. In total, there are 13 recommended practices about merger notification procedures and eight more about merger analysis<sup>9</sup>. The Merger Working Group conducts survey for implementation assessment and a better quality of work products. According to this Working Group's report in 2010 (ICN 2010: 30), 35 agencies (65% of all 54 respondents) answered that they had already changed their merger rules based on the Merger Working Group's products.

Coppola (2011: 225) also provides first-hand quantitative data concerning convergence in merger rules<sup>10</sup>. For example, among 87 ICN members with merger control regimes, 44 jurisdictions are currently in conformity with Recommended Practices on Review Periods. 27 out of these 44 conducted reforms which brought them into compliance with the Practices. With regard to the Recommended Practices on Thresholds, 39 members have rules in line with this recommendation. 18 out of this 39 jurisdictions experienced reforms, while 21 had ICN-compatible rules from the beginning.

ICN State of Achievements 2001-2012 (2012: 13)<sup>11</sup> gives examples of ICN merger products impacts on members. These examples are important in a sense that their changes are with no doubt attributable to ICN publications as they voluntarily announce such influence. Reportedly, the Czech, Swedish, and Finish agencies used the Recommended Practices when they conducted reforms to merger thresholds. Colombia and Costa Rica have relied on the Recommended Practice on review periods to design their reforms to their procedural rules. The State of Achievement also indicates ICN Recommended Practices' influence on non-members (ICN 2012: 13): 'when a draft Chinese antimonopoly bill was circulated, many agencies and bar associations urged the Chinese government to adopt merger rules consistent with the ICN Practices. Changes in successive drafts of the antimonopoly law reflected many of these comments'.

In contrast to the merger, impacts of the ICN are not clear in other areas. First of all, there is little comprehensive data about domestic implementation of ICN recommendations outside mergers. Secondly, the majority of working groups are still at the experience-sharing stage rather than the model promotion stage. An interesting area which seems in transition between these two stages is the Unilateral Conduct Working Group. This Working Group have adopted two sets of recommendations, namely Recommended Practices on the Assessment of Dominance /

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<sup>9</sup> While they are updated relatively frequently, the latest versions are available online (ICN: no date).

<sup>10</sup> See also Coppola and Lagdameo (2011: 300-303) for details concerning members' conformity with ICN merger recommended practices.

<sup>11</sup> For further country cases, see ICN (2005: 5-6).

Substantial Market Power, and Recommended Practices on the application of unilateral conduct rules to state-created monopolies. Although this is already a progress, there is not sufficient data about national alignment with those recommendations. At least one can say that future consensus-building on specific monopolistic business conducts is not an easy task. For example, the Unilateral Working Groups' Report on Predatory Pricing underlines different views of members (ICN 2008: 31-43).

In short, there is modest convergence toward ICN merger best practices. By contrast, other areas such as monopoly / unilateral conduct are still in the experience-sharing stage or in transition to the benchmarking stage. Therefore, in these areas, it is possible to assess ICN activities in terms of output, but it is difficult to assess them in terms of impact on national rules at this moment. This short evaluation of ICN impacts is far from comprehensive. Yet, one can at least say that the Network is already more than an impactless 'talking shop' as it is often caricatured as.

### **Reflection on a prescriptive ICN-transformation argument**

Some researchers assess those partial achievements of the ICN in a prescriptive way. According to them, ICN recommendations are still too soft for global governance on competition. They even recommend the ICN make obligatory rules in the near future. For example, Clarke (2006: 39-40) argues that '[f]ormal agreement on procedural convergence is not only desirable, it is a realistic means by which the regulatory burden currently experienced might be mitigated'. According to Hollman and Kovacic (2011: 90), with the gradual international convergence achieved so far, we 'would expect that the ICN network can continue to serve as a vehicle... for developing consensus positions that become the platform for a progression that begins with voluntary opting in and may extend to binding commitments'. Did the ICN accept those pieces of suggestion, it would mean the abandonment of the abovementioned strategy to accommodate diversity, namely restricting agenda. Thus, it is worth reflecting on those comments here based on the empirical evidence presented above.

Behind these prescriptive comments probably lies persistent scepticism to soft law in international law studies. A common critique from this perspective is that soft law results in soft implementation. At best, soft law is meaningful as long as it works as a stepping-stone to hard law (Dehousse and Weiler 1990)<sup>12</sup>. However, such a metamorphosis scenario for the ICN is highly unlikely for four reasons. First of all, the failure of competition rule-making attempts at the International Trade Organization and the WTO are by no means forgotten by policy-makers. In particular, the historical context in which the ICN emerged as an alternative to the WTO Working Group on Trade and Competition is crucial (See Souty 2011 for the origin of the ICN).

Secondly, the ICN asserts that it continues to stick to its original approach based on informality and voluntarism. As its Steering Group members concisely stated at the 10th annual conference at Hague, goals of the ICN remain the same since its birth: the Network aims 'to advocate the adoption of superior standards and procedures in

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<sup>12</sup> There is an alternative view which regards soft law as a distinctive method of governance. From this perspective, soft law is an alternative to hard law. For a critical overview of these two contrasting streams, see Cini (2001: 193-196).



competition enforcement and 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' (ICN 2011: 4-5).

Thirdly, there are already some concrete ICN outputs and, moreover, some evidence of their impacts on domestic rules. This partial achievement of goals in the first decade seems to have reinforced rather than weakened ICN member's confidence in its soft law approach, as documented just above. Lastly, the ICN would continue to enlarge and welcome even more members. This is partly because of the attractiveness of the ICN. Besides, inclusiveness is an identity of the Network given potential competition with other international institutions such as the OECD and the UNCTAD. Especially, the OECD takes a similar approach of non-binding best practices. Therefore, the ICN is unlikely to adopt a harder governance mode, which is incompatible with its spirit.

All in all, even if we accept a fact that soft law tends to result in hard law in general, the ICN-with-hard-law hypothesis is seriously flawed. The indications of convergence among members strengthened ICN belief in its various strategies to accommodate increasing diversity, and soft law in general.

## Conclusions

The present article has done two intellectual exercises. Firstly, it applied convergence theories to the competition issue and demonstrated how different topics within the issue concern different mechanisms of policy convergence. It was also argued that the goals of the ICN are by definition networking and benchmarking, which are particular kinds of transnational communication. Secondly, this article has attempted to advance the understanding of ICN governance in face of increasing diversity among its members.

Overall, the ICN has performed well in the short run vis-à-vis its own goals, but it would face more difficult, postponed tasks in the long run. It makes sense that the ICN began with relatively easy areas. Concrete evidence of success would enhance the credibility of the ICN as a benchmarking promoter. In turn, better credibility might encourage further alignment with the Network's recommendations by its members. When we researchers evaluate the ICN's convergence endeavour, this organizational strategy should be taken into account. In short, concrete impacts of ICN recommendations on national rules should not be underestimated. At the same time, it is important to remember that the ICN 'has already picked the low hanging fruit' (Coppola and Lagdameo 2011: 315) and would therefore face more challenging areas such as business-conduct-specific rules in monopoly policy.

As Eleanor Fox (2009: 165-168) rightly points out, a fact that the ICN partially achieves its goals does not necessarily mean the Network is sufficient and legitimate for global competition governance. As explained above, ICN goals are modest and its agenda is far from exhaustive. This strategy is understandable because different topics within the competition issue involve different underlying logics and do not necessarily fit to the working method of benchmarking well. This is why the ICN is not and does not aim to be comprehensive. Concerning legitimacy, as global governance institutions becomes more relevant and influential, they face more demands for legitimacy, be it

normal (an institution has the right to rule) or sociological (an institution is perceived to have the right to rule) (Buchanan and Keohane 2006: 406-407). The ICN is not an exception. All issues ranging from inclusiveness and transparency, clarity of procedures of steering-group member selection, to name a few, may upsurge in the Network.

One thing clear at this moment is that the transformation of the ICN into a binding rule-making body is unlikely. Such attempt, which is prescribed by some commentators, would mean a loss of ICN distinctiveness. By contrast, the degree of task expansion in the coming years remains uncertain. It is uncertain partially because it depends on other international institutions' activities. For example, there is no consensus among ICN members whether sector-specific debate can be better developed at the OECD or not. Despite some initial success, absorbing ever-growing diverse demands from the members remains a big and fundamental challenge for the ICN.

This article has focused on policy convergence in terms of scope and degree. In other words, it concentrated on results rather than processes. Yet, process-oriented research (policy transfer, policy diffusion and so on) tracing the way ideas are diffused, crystalized as best practices, and adopted in various local political contexts might be not only interesting but also complementary to this research.

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