Encouraging policy convergence while enhancing inclusive membership? A challenge for the ICN as a transgovernmental network

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Abstract

The International Competition Network (ICN), which is an unofficial global network of competition authorities, promotes the international convergence of competition law and policy. The article examines how this emerging network accommodates increasing diversity among its members. Drawing on key publications of the ICN and secondary sources, the article reveals core elements of the ICN's 'benchmarking' strategy for regulatory convergence among its heterogeneous members. Theoretically, the article contributes to the literature on international public policies by identifying major factors which facilitate international policy convergence even in the absence of a rigorous implementation mechanism based on hard law.

Keywords: competition policy; International Competition Network; policy convergence; benchmarking; transgovernmentalism

Introduction

Competition policy, which is also known as antitrust policy or antimonopoly policy in some countries, is a key element of contemporary global economic governance. Typically through the exercise of legal instruments such as economic and/or criminal sanctions, competition authorities regulate anticompetitive business conduct such as cartels, the abuse of dominance by monopolists, and mega-mergers which would significantly reduce competition in a certain market. A remarkable development in this policy field is an explosion in the number of competition laws and institutions around the world in the past few decades. Only around 20

countries had competition laws in 1990, whereas the figure soared to nearly 120 by year 2010 and still continues to increase (Organization for Economic Cooperation and Development (OECD) 2014: 26-27). It means that competition policy is no longer a luxury of developed countries. Many developing countries are now equipped with competition laws. Some emerging economies have also recently established or substantially updated their competition regimes, often with distinctive characteristics (Calvani and Alderman: 2010). As a consequence, there is considerable variation across jurisdictions in this area in terms of policy goals, institutional settings, and regulatory instruments for law enforcement. This ever-growing diversity in competition regulation poses the problem of interjurisdictional frictions. It is in this context that the International Competition Network (ICN) has emerged as an unofficial, global network of competition authorities, aiming for the international convergence of competition law and policy.

Some existing works on the ICN have addressed a normative question of whether the ICN should eventually be transformed into a full-fledged legislative body (Hollman and Kovacic 2011; Clarke 2006), while others investigate the historical origins of the ICN and its mode of governance (Lugard 2011; Fox 2009; Budzinski 2004). There is also rich academic literature on the question of why influential actors such as the U.S. preferred the ICN to other, more formal and long-standing institutions such as the OECD, the United Nations Conference for Trade and Development (UNCTAD), and the World Trade Organization (WTO) (Papadopoulos 2010; Damro 2006a, 2006b). That being said, the literature insufficiently analyzes the ICN as an actor with its own strategy. Therefore, the article aims to contribute to the literature by analyzing how exactly the ICN pursues its primary goal of international policy convergence.

In terms of the promotion of international policy convergence, the ICN faces a serious dilemma: the more successful the ICN is in terms of attracting new members, the larger the diversity among its members. As will be demonstrated in the following sections, the ICN seems to recognize this challenge and continuously search for remedies. It is therefore important to address the following research question for the better understanding of this network: how does the ICN accommodate its increasing diversity, in line with its main goal of the promotion of voluntary international policy convergence? In this article, ‘diversity’ is discussed in the areas of policy goals, scope, instruments, and institutional settings as well as various levels of expertise on and experience in competition regulation across jurisdictions.

A puzzle here lies in the relative success of the ICN at least in its early years. According to the existing literature on policy convergence, the major factors which facilitate policy convergence are similarities in terms of culture, economic development, and existing institutional settings (Holzinger, Jörgens, & Knill 2008: 25). Interestingly, although the ever-growing membership of the ICN across continents has resulted in greater divergence among its members in all of these three aspects, there is some empirical evidence of policy convergence towards the non-binding best practices published by the network (see Section 1.3 below). In short, this counterintuitive combination of growing diversity, the soft implementation mechanism, and the relative policy achievement vis-à-vis its own goals, makes the ICN an intriguing case for the study of international policy convergence.

This article makes a twofold argument. First, it argues that a close examination of the ICN's experiences can help to identify core elements of effective policy convergence based on the mechanism of 'benchmarking'. Second, the ICN's non-binding recommendations / best practices have already had some impact on national legislation, at least in the area of merger control, but this relative achievement vis-à-vis its own goals should not be exaggerated. The ICN tackled relatively undemanding areas in its first decade and may well face more difficulty when its focus shifts to other areas such as monopoly control.

Empirically, drawing on key publications of the ICN as well as secondary sources, the article provides a first systematic account of its benchmarking strategy in the face of growing diversity among its members. Theoretically, the article contributes to the literature on international public policies by demonstrating the possibility that policy convergence could work even in the absence of a centralized international organization with a rigorous implementation mechanism based on hard law.

The article is structured as follows. Section 1 firstly explains why the international policy convergence of competition laws and policies is important. Then, it provides background information about a historical context in which the ICN emerged as a major venue for multilateral cooperation in this policy field. Section 2 clarifies the distinctiveness of benchmarking as a heuristic conceptual tool, and also explains why other mechanisms of policy convergence identified in the literature are not directly relevant to the analysis of the ICN. Section 3 points out four key elements which underpin the ICN's strategy for benchmarking,

while Section 4 demonstrates why the ICN's performance against its own goal of policy convergence can be regarded as a 'success' only with reservations. The final part summarizes empirical findings and draws conclusions.

1 ICN: A unique venue for multilateral cooperation on competition

The ICN is an unofficial, transgovernmental network of competition policy officials established in 2001, which also incorporates practitioners, stakeholders and academics into its governance as nongovernmental advisors. It aims to enhance international convergence through the facilitation of bottom-up benchmarking exercises across countries and the publication of non-binding best practices and recommendations concerning competition regulation (ICN 2001). Its original membership was merely 16 competition authorities from 14 jurisdictions, but it jumped to 114 authorities from 100 jurisdictions by year 2010 (Motta 2011: 219). This rapid expansion made the ICN a key institutional component of emerging global competition governance. Today, around 130 authorities from 120 jurisdictions constitute this network.

Before examining the ICN's relevance to the issue of international benchmarking, which is a particular mechanism of policy convergence, it is important to understand why international convergence matters in competition policy in the first place. There are already several international institutions which deal with competition issues to some extent, so it is by no means obvious why the ICN is preferred by many countries as a venue for multilateral cooperation. Thus, the historical context of the emergence of the ICN should also be explained, especially in relation to the deadlock of WTO negotiations on this matter. And this historical analysis leads to the question of the distinctiveness of the ICN as a promoter of international policy convergence.

1.1 Convergence as a response to economic interdependence

Competition policies differ significantly across countries and regions in terms of policy objectives, case analysis methods, and procedures (Gerber 2010: 262-267). In terms of policy objectives, they vary from economic goals (e.g. efficient production and distribution) to social ones (e.g. consumer protection, the protection of small- and medium-sized enterprises) to

political ones (e.g. the facilitation of regional economic integration) (Dabbah 2003: 52-54). Likewise, case analysis methods differ across countries, mainly because of competition authorities' diverse policy goals noted above. For example, some competition regulators put emphasis on the 'abuse' of dominant positions in the analysis of monopoly control, while others regard 'market dominance' itself as a problem. In some countries, mergers are generally regarded as a good thing in the sense that they tend to help the emergence of large, internationally competitive companies ('national champions'), while other countries stress the potential anticompetitive effect of mergers between large market players. To make the situation even more complicated, there is no single international agreement on competition regulation which defines the procedures of, for example, the exchange of confidential business information between competition agencies. Given the reality of such diversity in terms of policy goals, substantive tests, and procedures, it should not come as a big surprise that neither the method of harmonization through international law, nor the method of mutual recognition, have gained wide support. This is why the idea of 'international convergence' has come to the fore as an alternative in response to growing economic interdependence on a global scale.

While such diversity in competition policies is not inherently a negative phenomenon (Budzinski 2008), it becomes problematic when economic globalization goes without comprehensive global competition law. On the one hand, most jurisdictional boundaries are nationally defined in this area, with only a few exceptions such as the European Union (EU). On the other hand, business activities are becoming more and more international. And it is this mismatch that creates demand for international cooperation in this field. More specifically, a high level of divergence across jurisdictions in competition policy may run three risks, namely those of (1) interjurisdictional frictions, (2) impediments to international cooperation in law enforcement, and (3) legal uncertainty.

Regarding the risk of interjurisdictional conflicts, the central issue is the idea of extraterritoriality, which was originally developed in the U.S. For example, the EU-U.S. controversy over the GE/Honeywell merger case in 2001 underlined the salience of the problem of extraterritoriality (Gerber 2010: 95-100: Dabbah 2003). In this case, the Antitrust Division of the U.S. Department of Justice approved a merger plan between two giant American manufacturers, GE and Honeywell, with only minor conditions. However, the European

Commission prohibited the deal, highlighting the potential anticompetitive effects of the proposed merger[1]. This disagreement resulted in the politicization of competition regulation, although the two parties had bilateral agreements on enforcement cooperation and exchanged information about the case extensively (Morgan and McGuire 2004).

A closely related issue is that procedural differences make international enforcement cooperation more difficult, even among like-minded competition authorities. Cartel control is a good example here. Nowadays, international cartels such as price-fixing and market-sharing are surprisingly sophisticated. Numerous multinational companies communicate secretly on a regular basis for cartel arrangements and even run their own monitoring system in order to detect rule-breaking cartel members effectively. This is why competition authorities have an incentive to approximate their rules in order to reinforce international enforcement cooperation (e.g. the simultaneous investigation of cartel members by multiple competition agencies).

As for legal uncertainty, national discrepancy creates room for manipulation by enterprises. For example, multinational corporations may notify their cross-border merger plan first to a competition authority which is most likely to approve the request, and then proceed to other authorities concerned. In such a situation, the decision of the first authority may affect subsequent decisions by the others, and the outcome of such forum-shopping by firms is highly unpredictable. This would result in greater legal uncertainty, which affects both regulators and firms.

These risks arise from intense economic interdependence and diverse national and regional competition regimes. This is why there is a wide recognition of the importance of international policy convergence, which would alleviate these problems. Then, the next question is, which international institution is suitable for such international convergence efforts? This is the topic now the article turns to.

1.2 Global multilateral cooperation – but which venue?

To understand the distinctiveness and historical context of the ICN, it is important to consider first why multilateralism is important in competition policy. One may argue that multilateral

[1] Case COMP/M.2220, *General Electric/Honeywell*. See European Commission's decision of 3 July 2001, OJ L48/1, 18 February 2004.

cooperation is essential for effective public regulation in this area for two key reasons. First, multilateralism has a potential for the empowerment of individual states which do not have sufficient problem-solving capacity to tackle transnational anticompetitive business practices alone. Second, although bilateralism remains important in this field, it has a clear limitation simply because cross-border business activities seldom take place in only two jurisdictions. They often involve dozens of jurisdictions.

That being said, it is too naive to believe that multinational cooperation always works. A prime example of failed multilateral cooperation in the area of competition is the WTO. At the WTO ministerial conference in Singapore in 1996, competition policy was nominated as a potential item of the WTO's round negotiation agenda, together with the other Singapore issues[2]. Subsequently, the WTO established a Working Group on the Interaction between Trade and Competition Policy. Despite the enthusiasm of the main promoter of international competition regulation, that is the EU, the idea of competition rule-making met a strong opposition from the majority of developing countries and emerging powers such as India (Papadopoulos 2010: 233-234). Moreover, the U.S. was critical of the EU's proposal because the former preferred a more informal, competition-dedicated network, which would not significantly constrain the sovereignty of its member states (Damro 2006a; 2006b). As a consequence, the issue was dropped from the Doha Round agenda at the Cancun ministerial conference, which was held in 2003.

Given its focus on international rule-making and judicialization, the WTO is not well equipped to deal with the growing membership and associated divergent ideas and interests. This is particularly the case in areas such as competition, in which developing and developed countries have very different opinions. Similarly, while the OECD and UNCTAD have issued some influential non-binding recommendations and a set of principles concerning competition policy, their organizational structures do not allow them to tackle the issue of diversity effectively. Above all, the OECD is dominated by developed countries, while UNCTAD has assigned importance to developing countries since its inception. It should also be noted that the competition issue has never been a top priority in the WTO, the OECD and UNCTAD. It is occasionally discussed only in the broader context of international trade and/or development.

[2] The other Singapore issues are investment, public procurement, and trade facilitation.

1.3: The ICN: its key characteristics and impacts

In contrast to the case of these international organizations, multilateralism seems to have worked in the context of the ICN. Thus, it is essential to understand key features of this network, and its impact on the member states in order to illustrate the significance of this institution. The ICN is a program-oriented network, which was established in October 2001 by 16 competition authorities from 14 jurisdictions: Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, the Republic of Korea, Mexico, South Africa, the United Kingdom, the U.S., and Zambia. The network possesses neither a permanent address nor a dedicated secretariat. It financially relies on contributions from member authorities and lacks a legal personality. In addition to such informality, voluntarism characterizes this network. In order to encourage voluntary convergence to substantial and procedural regulatory standards, the ICN facilitates information and experience sharing among its member authorities, while issuing various non-binding recommendations on a consensus basis (ICN 2001: 1; 2012: 5). The idea of this unofficial, voluntary structure largely derives from the influential report of the International Competition Policy Advisory Committee (2000), which was appointed by the U.S. Department of Justice in 1997. The ICN also aims to support competition advocacy and to facilitate intergovernmental cooperation, while these objectives are regarded as secondary and complementary to the primary goal of convergence (ICN 2001: 1; 2012: 5). As noted above, a major difference from the WTO, the OECD and UNCTAD is that the ICN dedicates itself to the issue of competition policy.

Despite its short history, the ICN has already had an impact on its member countries' competition rules. So, it should not be simply dismissed as a mere talking shop. Since the ICN's publication is most extensive in the field of merger control, it is worth assessing the impact of the ICN in this area to understand the relevance of this network. During the period from 2002 to 2006, 13 recommended practices in merger control have been agreed by the ICN members on a unanimous basis. They cover major areas such as notification thresholds, the timing of notification, and substantial analytical methods. The Merger Working Group periodically conducts surveys for the assessment of national implementation and for the better quality of work products. According to this working group's report published in 2010 (ICN 2010: 30), 35

agencies (65% of 54 respondents) answered that they had already changed their merger rules based on the work products of this group. In addition, Coppola (2011: 225; see also Coppola and Lagdameo 2011) provides quantitative data concerning regulatory convergence in merger control. For example, among 87 ICN members with merger control regimes, 44 jurisdictions were in conformity with recommended practices concerning review periods in 2011. 27 out of these 44 jurisdictions conducted reforms which brought them into compliance with the recommended practices. With regard to the recommended practices concerning thresholds, 39 members had rules which were in line with these recommendations. 18 out of these 39 jurisdictions experienced legislative or administrative reforms for this, while the rest (i.e. 21) had ICN-compatible rules from the beginning.

While these quantitative data show a correlation between ICN membership and changes in members' competition rules, there is also some evidence of causality. For example, the ICN's document, which is entitled 'State of Achievements 2001-2012' (ICN 2012: 13; see also 2005: 5-6), provides concrete examples of the impacts of the ICN's merger-related products. These examples are important in the sense that their changes are clearly attributable to ICN publications because the national authorities concerned voluntarily assert the influence. Reportedly, the Czech, Swedish and Finnish agencies used the ICN's recommended practices when conducting reforms to their merger thresholds, while Colombia and Costa Rica utilized the ICN's recommended practices regarding review periods to reform their procedural rules.

Likewise, Eduardo Pérez Motta, a former president of the Federal Competition Commission of Mexico, provides concrete examples of an impact that the ICN had on his country. According to him, Mexico made major amendments to the 1993 Federal Law of Economic Competition in 2006, and it was the ICN's recommendations that inspired these amendments, including higher sanctions for monopolistic practices, the Competition Commission's power to conduct on-site searches, and the launch of a cartel leniency program[3] (Motta 2011: 221). Even in such a country like Belgium, which has been heavily influenced by EU law and OECD recommendations, the ICN's recommended practices gave an inspiration to the Belgian Competition Act of 3 April 2013 concerning the strict time constraints on merger control[4].

[3] He specifically refers to Chapter 2 of ICN Anti-cartel Enforcement Manual, entitled 'Drafting and Implementing an Effective Leniency Program', as the recommendation which had an impact.
[4] Interview to an official of the Belgian Competition Authority, 27 November 2013.

In short, the ICN's recommendations have inspired numerous changes to national competition rules, primarily in the area of merger. It is therefore worth considering the ICN's strategy for international policy convergence in further details from a theoretical perspective.

2 Benchmarking as a heuristic conceptual tool for the analysis of policy convergence

At times, policy convergence as a 'concept' is used as a synonym to policy transfer and policy diffusion, albeit their different focuses. To avoid conceptual ambiguity, one may assert that the analytical focus of policy convergence is the effect of independent variables on policy outputs and outcomes (an increase or decrease in similarity over time), whereas policy transfer and diffusion are mainly concerned with processes (adoption patterns) (Knill 2005: 765). For example, a phenomenon like 'diffusion without convergence' is possible according to this distinction because diffused ideas might be adapted in various ways depending on local political contexts (Radaelli 2005: 927).

While this distinction is useful for conceptual clarification, what is more significant in this article is policy convergence as a 'theoretical framework' accommodating various accounts for the causes of convergence. The literature identifies five key mechanisms of cross-national policy convergence (Holzinger, Jörgens and Knill 2008: 22): (1) independent problem solving; (2) imposition; (3) harmonization based on binding international law; (4) regulatory competition among jurisdictions; and (5) transnational communication. The following parts first argue that transnational communication is the most relevant mechanism for the analysis of the ICN, and in addition elaborate on its subcategory, benchmarking.

2.1 Which mechanism of policy convergence?

The first four mechanisms of policy convergence are not directly relevant to ICN governance. The mechanism of independent problem solving refers to the process of convergence, which occurs as a consequence of mutually independent governmental efforts responding to similar, pervasive problems. This first mechanism is the least relevant to collective efforts for convergence, and therefore has little to do with the ICN's function. It is also very far from the mechanism of imposition because the ICN's decentralized, voluntary nature does not allow for

such a mechanism based on hierarchical relations. The third category, international harmonization, refers to the convergence of national and regional laws towards international laws. This is exactly what the WTO's Working Group on the Interaction between Competition and Trade Policy aimed for since 1996 based on the EU initiative, as explained above. Yet, the ICN denies any ambition of making binding rules (ICN 2011), so the logic of international harmonization does not apply to the ICN. The fourth pattern, regulatory competition, means the market-driven process of policy convergence. Some researchers hypothesize that national competition policies tend to converge to the lowest common denominator due to transnational market forces seeking for minimum regulation, while others provide some empirical evidence of convergence to the highest common denominator (Vogel: 1997). The analytical focus of the debate over regulatory competition is the direction of convergence. Yet, since the very beginning, the ICN takes the benchmarking approach dealing with the facilitation of the race to the highest standard. So, the most relevant theoretical issues relating to the ICN are the degree rather than the direction of convergence. Moreover, the logic of regulatory competition is not prevalent in competition policy because, in contrast to some other areas such as company law, numerous national and regional competition laws may simultaneously apply to individual companies (Fox 2006: 355).

By contrast, the fifth category, transnational communication, is directly relevant to the ICN. The former concerns policy convergence through communication rather than imposition, bargaining and competition (Holzinger, Jörgens and Knill 2008). It is particularly useful for the analysis of informal, decentralized networks such as the ICN whose primary function is the facilitation of exchange of ideas and experience among participants. Yet, transnational communication is an umbrella concept and takes various forms. Therefore, it is important to situate the mechanism of benchmarking in this literature and to clarify its features.

2.2 Benchmarking as a distinctive form of transnational communication

The ICN encourages information exchange and experience sharing among policy makers and transnational actors. So, its activities involve the process of lesson drawing, which is one form of transnational communication (Holzinger, Jörgens and Knill 2008). Yet, the real driving force of policy convergence facilitated by the ICN is a 'legitimacy pressure' rather than mere copying

or emulation (Budzinski 2004), and this is the key feature of benchmarking (Holzinger and Knill 2008: 47-48). Benchmarking is a method of governance, which promotes superior policy models. It occurs when governments copy a certain model of public regulation promoted by other actors (e.g. international organizations) as best practices / benchmarks based on cross-national comparisons and peer-reviews. Benchmarks may serve not only as a constraint, but also as an opportunity for regulators. In fact, international recognition would help them to promote these rules in their own jurisdictions vis-à-vis other governmental bodies and the general public. This is the main reason why numerous regulatory agencies join benchmark-building international networks.

According to Lundvall and Tomlinson (2002: 209-210), successful benchmarking needs to avoid simplistic goals and take contexts into account because best practices in one area could be totally irrelevant or even have negative impacts in another. This is an important point, as will be revisited below, but it still does not answer the question of how to manage diversity while enhancing convergence. In this light, the following case study of the ICN not only demonstrates the importance of a bottom-up approach, but also reveals the actual strategy of the ICN for the accommodation of growing diversity without hard law.

3 Benchmarking as a strategy of the ICN: limited scope, extensive interactions

Given the evidence of the impact of the ICN's recommendations on its members' competition laws, one may wonder why international policy convergence can be facilitated by unofficial decentralized institutions such as the ICN. More specifically, what does the ICN's method of benchmarking look like, and how does it accommodate the growing diversity among the members?

3.1 A bottom-up approach to experience sharing

One crucial component of the ICN's strategy for benchmarking is its bottom-up approach. For example, the ICN's initial focus on merger control was a bottom-up initiative based on specific demand from the EU and the U.S. (Janow and Rill 2011: 26-27). Another example is the ICN's continuous engagement in advocacy and capacity-building efforts, which reflect the particular

need of the members, especially developing countries.

This bottom-up approach is also evident in the fact that these convergence efforts focus on specific technical issues and procedures rather than general norms. After the establishment of the ICN, a leading American lawyer E. Fox (2006: 290-291) observed that '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. This does not necessarily mean that the ICN's work products are value-free. On the contrary, they tend to stress the positive aspects of market competition, while referring to general norms such as transparency and fairness (ICN 2002). Nevertheless, they mostly do so in specific contexts, particularly in discussion over regulatory procedures.

3.2 Maximization of interactions

This bottom-up approach is impossible without extensive interactions among the ICN members on a regular basis. And it is clear that most day-to-day activities of the ICN are about information and experience sharing. The members of this network frequently contact each other via emails and phone calls, and hold online video seminars on various topics concerning competition law enforcement. One source reports that approximately 90 percent of interactions among the members are conducted by email and telephone conferencing (Damro 2006b: 146). Because of the project-oriented nature of the ICN, it is not always easy to recognize and follow all its publications even for insiders. Therefore, a product catalogue is downloadable on the ICN website. Templates are also important for information pooling. First, working group coordinators distribute templates for country profiles to the member agencies. And then, the latter fill in requested information about the statutory and administrative rules of their countries. Finally, these documents are uploaded to the website so that all members can get access. In these ways, the ICN encourages interactions among its members not only for networking but also for knowledge accumulation.

3.3 Keeping delegates' profiles homogeneous

While both extensive interactions and experience sharing through a bottom-up approach are of

great importance, they are insufficient to guarantee effective benchmarking. They work effectively when coupled with two other elements. One of them concerns membership, and the literature on transgovernmental networks is directly relevant here. The literature on transgovernmental networks shows that there is a growing number of unofficial global networks of government officials. These networks usually focus on particular policy areas. These officials may include not only senior 'diplomats' of the ministry of foreign affairs, but also judges, legislators, and officials of various government departments and agencies. For example, one case study of the seminar work of Slaughter (2004: 65-103) on this subject is a rapidly growing network of constitutional judges across countries. Similarly, Raustiala (2002: 26-50) underlines the emergence of issue-specific networks of regulators in the areas of securities regulation, competition policy, and environmental policy. Their empirical findings indicate that these unofficial, non-hierarchical networks benefit from the homogeneity of their members, and this is exactly the case in the ICN.

As noted above, ICN membership has nothing to do with the level of economic development. What is required is that its members must be competition authorities. This condition increases the homogeneity of the delegates' profiles because they need to be competition officials, and not officials working in other related fields such as trade policy, development policy, and industrial policy. In other words, the rapid expansion of the ICN's membership may result in divergent interests and ideas, but the members still share the same perspective, that is competition.

3.4 Restrictive agenda

In addition, in order to accommodate diverse members, the ICN selects its agenda restrictively. Regarding the scope of the agenda, there are currently five working groups at the ICN: advocacy, agency effectiveness, cartels, mergers, and unilateral conduct (monopoly control). Yet, the discussion of the ICN has not gone much beyond these traditional areas of regulation. For example, there is no working group on private enforcement or criminal sanctions in competition policy. There are no substantial debates on state aid control either. There are also issues which are not even discussed in the ICN. One example of this is the issue of export cartels, which proved highly controversial in the WTO's Working Group on the Interaction

between Trade and Competition Policy.

Likewise, the issue of regulation of public sectors is seldom discussed in the ICN. Rather, it focuses on the regulation of private sectors' anticompetitive conduct. The issue of expansion of competition policy to publicly regulated sectors (e.g. the telecommunications sector) is put on the table. Yet, the recommendations of the ICN in this area remain quite general and vague concerning the control of state-owned enterprises. On the one hand, this can be regarded as a major limitation of the ICN because there are numerous countries in which the state plays a significant role in the economy. On the other hand, if the agenda of regulation of state-owned enterprises were included in the agenda, it would have been much more difficult for the ICN to attract those countries in which public actors play a major role in their economies. Another explanation of the narrow scope of the ICN's agenda is that the inclusion of competition-related issues such as public procurement could trigger a spill-over of ICN works to other areas. That is a consequence that would be regarded by the ICN's members as an impediment to its 'competition all of the time' principle (Janow and Rill 2011: 37).

4 Major challenges to further convergence

The case of the ICN is insightful because it shows the key elements of a successful benchmarking. However, it is a 'success' with two important reservations. It is important to highlight them in order to make a balanced assessment of the ICN's performance.

4.1 The center of gravity remains in domestic politics

First, the ICN cannot directly tackle the issue of implementation because of its non-hierarchical and voluntary nature. Rigorous competition policy is often in conflict with more interventionist public policies such as research and development policy, regional policy, and employment policy. Thus, even if like-minded members of the ICN agree on certain recommended practices, this does not automatically guarantee the domestic adoption of these international standards. The real people competition authorities need to persuade are not their counterparts in other jurisdictions, but government departments and agencies of their own countries with a more interventionist orientation. In short, since there is so far no comprehensive global competition

law which effectively binds states, the center of gravity remains to be in domestic politics.

That being said, the ICN indirectly deals with the issue of implementation through the promotion of advocacy and capacity building. The significance of these issues in the ICN is evident in the fact that they constituted one of the two pillars of the first and second ICN Annual Conferences together with merger control. It means that these issues were incorporated into the agenda earlier than more established areas of competition regulation such as cartels and monopoly. For competition policies, advocacy which targets other government departments and agencies is significant because it has a potential for enhancing the autonomy of competition authorities from more powerful departments in related fields. It would also foster a domestic basis for cross-jurisdictional policy convergence towards international regulatory practices. Some ICN members have already referred to the ICN's recommended practices in order to convince legislative bodies of their reform proposals' credibility (ICN 2012: 14)[5]. This fact confirms the claim made in the theoretical part that internationally recognized best practices could empower competition authorities in domestic politics. Likewise, capacity building potentially leads to more effective enforcement, and to the greater visibility and presence of competition authorities within their own governments. This is not a place to assess the impact of advocacy and capacity-building activities of the ICN in details. Yet, one may at least say that the ICN's constant focus on this aspect of competition policy is an indication of its members' continuous political struggle with the domestic adoption of international regulatory standards, including those promoted by the ICN.

4.2 A reality behind the rhetoric of 'informed divergence'

Another point which deserves a critical evaluation is the rhetoric of 'informed divergence' used by ICN officials. According to the ICN's report of 2011 entitled 'Vision for its Second Decade' (ICN 2011: 5-6), in areas where differences between the members' rules are relatively narrow (e.g. leniency programs and the time frame of merger review), the ICN aims for the publication

[5] For example, according to the ICN's document of 2012 'ICN Statement of Achievements 2001-2012', German and Irish competition authorities have cited the ICN's recommended practices on mergers in their official documents in order to demonstrate that the reforms they are proposing are in full conformity with international standards.

of recommended practices and guidelines in cooperation with national competition agencies. By contrast, in areas where the differences are greater (e.g. the area of regulation 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) (emphasis in the original).

The ICN does not openly admit its limitations, but the rhetoric of informed divergence essentially means a policy failure. The above-mentioned 2011 report, among others, indicates that the ICN's Steering Committee foresees difficulties in further policy convergence, especially in areas such as monopoly control. In contrast to merger control, the impact of the ICN in other areas is ambiguous so far. First of all, except for the area of merger control, there is little comprehensive data concerning the domestic implementation of the ICN's recommended practices. Secondly, the majority of the working groups are still at the experience-sharing stage rather than the model-promotion stage. One interesting area which is in transition between these two stages is the Unilateral Conduct Working Group, which focuses on the regulation of monopolists. For example, this working group has adopted two sets of recommendations, namely Recommended Practices on the Assessment of Dominance and Substantial Market Power, and Recommended Practices on the Application of Unilateral Conduct Rules to State-owned Monopolies. Although this is a noticeable development, there is no comprehensive dataset concerning the member's alignment with these recommendations. It is safe to say that future consensus building on specific monopolistic business conduct is not an easy task because the ICN's members have divergent viewpoints regarding monopoly control.

Conclusion

Debates on the convergence of competition policies often lead to a very broad question of whether competition policy is inherently a good thing or a bad thing. Rather than rehearsing these debates, this article has problematized the fact that different countries understand competition policy in different ways. The number of competition authorities around the world has increased exponentially in the last few decades. Subsequently, multilateral cooperation and coordination have become essential. This is the main reason for the establishment of the ICN as

a global platform for policy convergence. Its rapid expansion is remarkable. However, the increase in the number and diversity among its members is at the same time a fundamental challenge to this young network of competition regulators. This article has revealed key components of the ICN's strategy for benchmarking in the face of this challenge. While existing works tend to treat the ICN as a factor in the deadlock of WTO negotiations on competition law, this research has analyzed the former as an incipient actor with its own strategy for benchmarking. Specifically, the research has identified four distinct and interconnected elements of the strategy taken by the ICN's Steering Committee: (1) the bottom-up approach; (2) the provision of ample opportunities for interactions among its members; (3) the maintenance of the homogeneous profiles of delegates; and, last but not least, (4) the restrictive selection of agenda.

Overall, one may conclude that the ICN's performance is remarkable vis-à-vis its own goals in the short run. Nevertheless, it would face more difficulties in the long run due to remaining, more controversial issues such as rules for monopoly policy for specific business conduct. As Coppola and Lagdameo (2011: 315) succinctly put it, it seems that the ICN 'has already picked up low hanging fruit'. Initially, the ICN dealt with relatively undemanding areas seemingly because the concrete evidence of success would enhance its credibility as a promoter of benchmarking exercises. When one evaluates the ICN's performance, this organizational strategy should be taken into account.

These empirical findings have theoretical relevance beyond the area of competition because the governance mode of bottom-up benchmarking based on non-binding recommendations is becoming increasingly prevalent in transgovernmental networks across a wide range of areas (Hale and Held 2011). Therefore, a comparison with transgovernmental networks in other policy fields may be useful to ascertain the key findings of this single case study. In that case, issue-specific factors such as potential competition between these networks and existing international organizations should be taken into account.

One of the reasons why the WTO dropped the competition issue from the Doha development agenda before starting official negotiations is the growing assertiveness of emerging powers such as India, aside from the EU-U.S. disagreement. In this sense, a shift in power balance is important in competition policy, just as it is in many other areas. However, neither the logic of

imposition nor that of harmonization have much space in highly decentralized institutions such as the ICN. As demonstrated throughout this research, the ICN's main activities are characterized by trangovernmental networking and communication, which would facilitate bottom-up benchmarking practices.

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