

Trade and Investment

ICC Commission on Competition

Meetings of the ICC Commission on Competition

22 November 2019, ICC Global Headquarters, Paris

Executive Summary

Meeting of the ICC Task Force on Court Proceedings in Damages Actions (10h-12h)

The ICC Task Force on Court Proceedings in Damages Actions met for the second time this year to discuss the draft database on litigation proceedings in antitrust follow-on actions. Based on the contributions from leading antitrust and litigation practitioners from 20 countries spanning Asia, EU, Latin America, and the US, the database strives to provide law practitioners and companies that are potential victims of a cartel with a clear overview of the legal practices and key judgements in different jurisdictions. With this publication, the Task Force also endeavours to facilitate intellectual debates between antitrust experts and practitioners as well as judges, economists, and academics on practices and trends related to damages actions globally.

Johannes Holzwarth, Policy Officer, ECN (European Competition Network) and Private Enforcement at DG COMP, attended the meeting and gave his feedback on the draft and suggestions on how it could further help ECN members.

Also present was Frédéric Jonglez de Ligne, former Director Litigation EU Middle-East & Africa at Johnson Controls, who will provide the final recommendations so that the database can be a useful reference for business.

A copy of the [full summary](#) of the meeting is provided herewith.

Plenary of the ICC Commission on Competition (14h-17h)

1. Introductory remarks

Commission Chair Paul Lugard welcomed participants to the meeting and noted that the plenary was the first gathering of the Competition Commission since the re-organisation of the Knowledge Solutions Department. ICC is changing which requires that Competition members

start to think about how the commission functions. There is so much expertise and knowledge within the Competition Commission in areas such as Merger Control, Cartels, Compliance, Private Enforcement that there needs to be a reflection on how this knowledge can best be applied in the interest of ICC as an organisation, but also, in the interest of the Competition Commission. Mr Lugard closed his introductory remarks by noting that the meeting agenda was elaborated in a way to enable a brainstorming exercise on this particular point. Before opening the floor for discussions, he introduced Emily O'Connor, Director for Trade and Investment and invited her to explain the new Knowledge Solutions structure and priorities.

2. ICC Trade & Investment Knowledge Hub and the work programme of the ICC Commission on Competition led by Emily O'Connor

- The Knowledge Solutions Department has gone under a year-and-a-half long transformation which was spurred by the appointment of ICC Secretary General John Denton who has a lot of modernizing ideas to keep the organisation more forward-looking and relevant to the challenges of the 21st century. The re-organisation of the Knowledge Solutions Department led to the creation of five knowledge solution hubs, each linked to a specific campaign.
- The Competition Commission is anchored in the Trade & Investment Knowledge Hub which houses six other commissions (Trade & Investment, Customs & Trade Facilitation, Commercial Law and Practice, Taxation, Marketing & Advertising, and Arbitration) and the Global Alliance for Trade Facilitation.
- The [new work programme](#) of the Knowledge Solutions Department has been launched on 14 October 2019 and includes over 90 projects. A new digital system for registration and participation in the different projects has been created and NCs now have broader options to choose the projects with members. ICC encourages members to reach out to their NCs and ask to join the different initiatives.
- As regards internal management more generally, two main points were addressed: due to limited resources at ICC, members were asked to think about how labor intensive to the ICC Secretariat before they proceed with their projects. It was also advisable to a draft one page memorandum explaining the purpose and value of a project and submit it for pre-approval to the Policy Commissions Committee (PCCOM). ICC decided to establish a more flexible approval system and reinforce the role of PCCOM. The ICC Executive Board gave PCCOM a mandate to review and assess all official ICC documents before going the Board which only meets three times a year.
- Comments: A member inquired how to reflect ICC's new priorities into their current projects. Ms O'Connor invited members to check the ICC official website which addresses the key five campaigns.

3. Brainstorm session on the future of Competition law and policy and how the ICC Competition Commission can remain fit-for-purpose

Patrick Hubert, Competition Commission Vice-Chair, led this session. The comments/concerns/suggestions made during these exchanges are summarized below.

- ICC Competition Commission's strengths and added value
 - ICC is seen as being the private sector counterpart of ICN with mirror working groups on cartels, mergers, advocacy, etc. The most important event of the Competition Commission is the ICC Pre-ICN Forum as it brings together business and enforcement agencies to exchange on important international antitrust issues and reinforces the ICC/ICN collaboration.
 - ICC helps shape the international competition system by contributing to the drafting of different guidelines and by influencing reforms. Some of the most important legislations (e.g. EU merger guidelines) were drafted by the private sector.
 - ICC has gained tremendous credibility in the antitrust world, in particular vis-à-vis ICN and other key antitrust enforcement agencies. It would be a tragedy if ICC loses that credibility.
 - ICC's practical tools for business (e.g. ICC antitrust compliance Toolkits and ICC Leniency Manual) have become a reference to the antitrust agencies. These tools enable the Competition Commission have strong collaborations with antitrust agencies while helping business comply with the law. This increases the credibility of ICC.
 - At a time a lot of companies are focusing on specific industry associations, ICC's broad spectrum of issues and campaigns is an added value.
- Members' concerns
 - The Competition Commission needs to be galvanized through a full revitalization programme. There are not enough resources within the commission and task forces. While some task forces have a large group, the number of members who are actively contributing and taking part in meetings remains relatively low. In the past, the commission membership included more in-house counsel than private practitioners and today the numbers are inversed. The Competition Commission has to attract more companies from countries outside the EU and US, in particular members with provocative ideas who are willing to work and stay engaged.
 - An increasing number of competition law associations have emerged at national level, more competition commissions are being created within business associations. The Competition Commission needs to regain market shares and

reflect on what distinguishes ICC from other organizations.

- There is a success record that ICC can shape the mindset. If a good project is created then the German constituents will be ready to come onboard.
- Today the voice of business is not heard on big debates like digital services. If ICC engages on these issues, then more companies will join the Competition Commission.
- ICC should be more involved in the work of ICN.

As per Mr Hubert's first round of remarks, members felt that the Competition Commission needs to be more active and that the support of ICC was essential in recruiting new members.

○ Proposed solutions

- Put the revitalisation programme and recruitment at the top of the Competition Commission's agenda.
- The ICC Competition Commission is highly respected outside of ICC, in particular by business and institutions such as ICN, OECD, and other business associations. ICC Portugal looked at membership as a whole and contacted the antitrust experts within the member companies. As a result, there are now more companies than private practitioners within the ICC Portugal Competition Commission.
- Suggestions were made that each member bring one or two new countries onboard. If ICC is perceived as being credible with the authorities, then companies will join the commission.
- Reach out to companies at national level following ICC Portugal's example.

○ New topics for consideration

- Big data and sustainability/climate
- The increasing conservatism in trade and how to address it from an antitrust perspective (ICC Turkey)
- Big tech/digital platforms
- Competition agenda in the digital field. The competition authorities have been focused on digital-related legislation and regulations and the role of ICC is to join this discussion and represent the voice of business.

- Comments: On creating a new project on big data/digital platforms, the question on whether a consensus could be reached within the Competition Commission was raised. Members have different interest in their organizations, so can the commission find a position?

Leadership response: There are many topics in competition law and policy where the business community is divided. Even if interests are not aligned there are points where the business community agrees on: clear analytical framework, more simplified procedures to avoid too many administrative burdens, and find common points and themes.

It was felt that if ICCs stay away from these debates, the organisation will lose credibility.

Action items:

- The Commission Leadership will reflect on the thoughts and ideas from this session and propose a way forward.
- The Commission Leadership will draft a message to be sent by ICC HQ to the NCs. The commission will focus on a few countries and follow up with a phone call.

4. Compliance & Advocacy

- New US DOJ Compliance Guidance: Anne Riley, Chair of the ICC Task Force on Compliance and Advocacy, reported on role of ICC in helping the DoJ review and reverse its former policy and give credit to companies for their compliance programmes. Ms Riley invited members to read the new guidelines that were published on 11 July 2019. As a result of these achievements, ICC was honoured by the Society of Corporate Compliance and Ethics for its role and work in compliance and advocacy.
- 2nd Edition of the ICC Antitrust Compliance Toolkit: It has now been seven years since the publication of the ICC Antitrust Compliance Toolkit and it would make sense to update the Toolkits. The second edition will be much shorter and will include more practical issues. To align with the new policy of ICC, the Task Force will prepare a proposal to submit to PCCOM. Ms Riley will reach out to members for their contributions and comments.
- Possible partnership with Concurrences on a joint publication on antitrust compliance in 2021: While Concurrences will be responsible for the bulk of the work, the implications for ICC need to be discussed.

5. Court Proceedings in Antitrust Damages Actions

- Task Force Meetings with DG COMP: François Brunet, Chair of the Damages Actions Task force reported on the two meetings with DG COMP's Private Enforcement Unit led by Johannes Holzwarth. The 25 September meeting confirmed DG COMP's support for and interest in the ICC database on Damages Claims. The 22 November meeting afforded more specific feedback to improve the database (please see above for summary of the meeting).
- Draft database on Antitrust Damages Actions: Looking ahead, the Task Force will refine the country overviews and include an introduction to explain the objective and scope of the publication. A glossary will be prepared to help users navigate through the terminology. The release date is expected in Spring 2020 with a launch event envisaged in Paris.
- Comments: The database will be useful in educating judges and the legal profession on practices related to damages actions. The overviews will serve as a reference for practitioners interested to know the situation in a country where these practices are not well-developed. The array of key national judgements could serve as inspiration in elaborating solutions for practitioners.

6. Due Process

Jennifer Patterson and Sergio Sorinas, Co-Chairs of the ICC Task Force on Due Process, spoke of the draft due process paper on Due Process in EU Proceedings. Mr Sorinas who recently took on this role started off with some general recommendations on how to improve the draft while complying with ICC's internal protocol:

- Identify key aspects of EU Competition procedure that the task force would like to change (eg access to the file, right to be heard, the scope of the review by the court)
- Split the original document into pieces: To make easier to receive comments from various stakeholders and get approval by the ICC Executive Board, the Due Process Task Force will draft shorter papers focused on these specific topics.
- Make the contents more practical and reader-friendly.
- Comments:
 - The paper could cover other countries beyond Europe.
 - Perhaps aligning with ICN CAP initiative: the ICN community has confirmed the importance of due process principles.

Action items:

- The Task Force Leadership will discuss with Commission Leadership to confirm next steps and a dissemination method.
- The Task Force aims to finalize the drafts by the end of 2020.

7. Merger Control

Patrick Hubert, Chair of the Merger Control Task Force reported on the response to the The General Authority for Competition of Saudi Arabia's (GAC) a consultation on the draft Implementing Regulations of the Competition Law. ICC strongly suggested that the GAC reaches out to a number of established competition enforcement agencies, academics, practitioners and other knowledgeable institutions and persons and requests an impartial review of the proposed provisions with a view to assessing whether, and how, the rules could be improved upon.

The Task Force will continue to advocate for a harmonization of merger control regimes using existing ICC material and possibly by collaborating with other organizations such as ABA, ITF and the like.

8. Cartels & Leniency

Cartels & Leniency Task Force Co-Chair Marcin Trepka spoke on the following points:

- 3rd edition of Leniency Manual: The 3rd Edition of ICC Leniency Manual is expected to be released in 2020 and will cover 11-12 additional jurisdictions. The new edition will feature the African continent with countries such as Kenya and South-Africa.
- One-marker system for leniency applications: Subject to members' views, the task force plans to rethink and update the first discussion paper published in 2015.
- New project – "Digital Competition Roadmap": The main objective of this project is to provide a broad spectrum of knowledge on the current status of particular issues. It aims to cover various issues including the big platforms, e-commerce and big data. The Task Force team is currently working on the teaser that will explain the concept, scope and approach.

Action Item:

- Circulate teaser of Digital Competition Roadmap to members.

9. International Competition Network (ICN)

Caroline Inthavisay spoke on the ICC Pre-ICN Forum which is the annual conference of the ICC Competition Commission that occurs on the day before the Annual ICN Conference. Since 2009, the Competition Commission has organized a number of successful roundtables for business and agencies to exchange on important international antitrust issues. The ICC Pre-ICN events have garnered the support of the ICN and are well attended by local business, agencies, academics, and ICN delegates. They also serve as a showcase for ICC's work in competition and a mean to bring international attention to local antitrust issues. This year's

event took place in Cartagena on 14 May and focused on Emerging Trends in Antitrust Enforcement and Policy in Latin America and Beyond. The event received very positive feedback from attendees and ICN.

ICC has been teaming up with IBA over the last few years. The next ICC/IBA Pre-ICN Forum will be held in Los Angeles on 11 May 2020 and will provide the Competition Commission with an opportunity to discuss with large technology companies e.g. Google, Amazon, Facebook, Netflix, Uber, etc. ICC and IBA are working on a programme and identifying speakers from the tech industry and regulators.

10. New initiatives for consideration for the next biennium (2021-2022)

- ICC to comment on UNCTAD's Guiding Principles and Procedures under Section F of the UN Set on Competition.
- ICC to contribute to the new vertical & horizontal BER as well as the upcoming regulation on digital economy services.

Action items:

- Ask relevant members about their interest in providing comment on UNCTAD's guiding principles and procedures.
- Reach out to UN team on UNCTAD issue.

11. Any other business

- Guilherme Misale, Executive Secretary of the Competition Commission of ICC Brazil, briefed members on the Competition Day event organized by ICC Brasil in the summer with remote keynote by Margrethe Vestager. The event was attended by over 120 participants and focused on the intersection between competition law and international trade. ICC Brazil has developed a guideline to help Brazilian senators further understand the complexities of competition law and policy.
- Eva Hampl, Senior Director, Investment, Trade and Financial Services at USCIB, shared the USCIB Competition Committee's interest to work with the ICC Task Force Compliance and Advocacy and engage in advocacy to encourage other enforcers to recognize and give credit for compliance programmes (similar to what the US DoJ has done recently).