

Trade and Investment

ICC Global Competition Commission

ICC COMPETITION WORK PROGRAMME 2022/2023

The ICC Global Competition Commission (the “Global Commission”) intends to remain the lead voice of business in global competition policy and to develop practical tools and guidance to help companies of all sizes in their daily activities. While the International Competition Network (“**ICN**”) and the Organisation for Economic Co-operation and Development (“**OECD**”) have created common fora for discussion among antitrust enforcers, government and industry representatives, as well as companies and private practitioners at a global level, the Global Commission will provide a space for businesses to engage in constructive discussions on practical/technical issues that could help enhance trade and investments across borders, and thereby stimulate economic recovery globally. It is hoped that the outcomes of these debates among members - and, as appropriate, in consultation with competition enforcement authorities - will enable the Global Commission to enhance convergence among jurisdictions in competition policy areas including antitrust (conduct) proceedings, merger control, damages claims and compliance programmes. The 2022/2023 work programme therefore places a particular focus on advocating for a more consistent and common approach in those areas by mapping out solutions developed by competition agencies all over the world and putting forward a set of recommendations to support them.

1. COMPETITION LAW AND DIGITAL ECONOMY

After a decade of strong antitrust enforcement against digital companies, the European Union has published a proposal for a Digital Markets Act, which intends to draw the boundaries for behaviours of large online platforms. Likewise, the new Biden administration in the United States has expressed its intention to offer better regulation for digital services. In addition, the Covid-19 crisis has contributed to a dramatic change in consumer habits with a significant growth of online sales and services that affects all sectors of the traditional economy.

The Global Commission will consider the creation of a new working group to monitor new reforms and developments related to competition law and digital economy. The Task Force will not endeavour to formulate a position on any particular issue but to keep the Global Competition diligently informed with a view to foster constructive discussions with the relevant authorities, legal practitioners and policymakers as

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necessary.

Some of the substantive questions include :

- Is it appropriate to develop a single regulatory regime for all online platforms? In particular, is it suitable to escape the notion of “dominance” and how can we be sure that prohibited behaviours under the new regulatory regime are really harmful to competition?
- Do new theories of harm in the digital economy leave sufficient room for innovation from the tech industry? In other word, is it really unfair for platforms to build innovations on existing products and services?
- Killer acquisitions in the tech sector: are they real? If so, what should be the appropriate remedy: sector regulation, merger control, or antitrust enforcement?
- 10 years of antitrust enforcement against digital platforms: what is the result? Have infringement decisions really paved the way for more innovative and efficient online markets?
- Digital platforms and distribution: protecting online sales channels for the benefit of consumers.
- Digital platforms and the audiovisual sector: how to maintain competitive and dynamic markets?
- “Fintech”: what is the impact of the rapid growth of digital services?

This new Task Force will report and possibly make initial proposed recommendations for further consideration by members of the Global Commission.

2. MERGER CONTROL TASK FORCE: HOW CAN BUSINESS SUPPORT MORE CONVERGENCE AT GLOBAL LEVEL?

The ICC Task Force on Merger Control will reconvene and address practical merger control issues that directly impact companies’ business transactions and their legal counsels’ daily work. Building on [previous pre-merger notification recommendations](#) issued by ICC in 2015, the Task Force will now hone in on very specific issues with a view to produce:

- i. a **report** which will inform a number of important issues (as follows) in various key jurisdictions (*i.e.* US, EU, China, Russia, Japan, South Korea, Australia, UK, Brazil, Mexico, Argentina, Chile, Canada, India, UK, France, Germany, Italy, Spain, Portugal, Poland, Austria, The Netherlands, and South Africa) and potential solutions to resolve the following questions:
- How are the jurisdictional thresholds defined in your merger control regime? Does it, or did it, include asset-based and/or market share thresholds? Are there any guidelines providing for a clear definition of the notion “turnover”, “asset value” or “market share”? If the survey confirms that only a few countries provide for asset-based thresholds or market share thresholds, and that such thresholds raise a number of practical issues (calculation difficulties, lack of legal predictability), should the ICC Competition Commission encourage the few countries which are still using asset-based or market share thresholds, to consider amending their respective merger control thresholds?
 - Does your merger control system provide for a local nexus requirement (explicitly or implicitly), in particular with respect to international joint ventures? If negative, does your merger control system provide simplified procedure/short form treatment with respect to international joint ventures? Shouldn't we encourage the countries/jurisdictions (in particular, the EU) to adopt local nexus guidelines similar to the guidelines adopted by the Swiss competition authority?
 - Does your merger control system require the notification of the acquisition of minority shareholdings that do not allow the acquirer to exercise any control or influence over the target? Did any such notifications result in any prohibition decisions or remedies? If not, does such a legal requirement make any economic or regulatory sense?
 - Please confirm that your country/jurisdiction does not provide for the payment of any filing fees; if it is confirmed that only two or three countries (in particular, US and Germany) require the payment of filing fees, shouldn't we favor a convergence where no filing fees would be required anywhere?
 - Does the notification form used in your country require the provision of market share information? What would you think of the adoption of a notification form that would be similar to the US HSR form which is extremely straightforward and does not require the submission of market share information?

- What is the penalty in your jurisdiction for failure to notify? If it is confirmed that countries impose penalties with great disparity, should we encourage a convergence regarding the penalties?
- ii. a **policy paper** supporting a higher level of convergence in the merger control area based on the findings of the above report.

This Task Force will also offer practical guidance to its members on procedural aspects of merger control, such as avoiding gun jumping and ensuring compliance with agency requirements on responding to requests for information. At the same time, the Task Force will endeavour to advocate that agencies recognise that their requests should be reasonable and not unduly burdensome.

3. ANTITRUST DAMAGES CLAIMS TASK FORCE: HOW TO USE THE NEW GLOBAL DATABASE TO FOSTER THOUGHT-PROVOCATIVE DISCUSSIONS TOWARDS A MORE BALANCED FRAMEWORK BETWEEN PUBLIC AND PRIVATE ENFORCEMENT?

In 2018 - 2020, the Global Commission conducted an in-depth review of antitrust damages national regimes which led to the publication of the [ICC Compendium of Antitrust Damages Actions](#) in March 2021, which has been recognised as an unprecedented database of leading antitrust damages cases in more than 20 key jurisdictions. In that respect, the Global Commission will explore opportunities to organise conferences (or webinars) in each key jurisdiction and present the results and findings of this research. It is hoped that these exchanges with local experts and enforcers will spotlight some of the challenges encountered by national regimes and help the ICC Task Force on Damages Actions canvass a strategy in the development of the 2nd Edition of the Compendium.

In that respect, the Task Force considers **launching a consultation of leading academics** to assess new areas of investigation for the 2nd Edition. It will also issue a **quantitative analysis report** of the ICC Compendium to present most common features among jurisdictions in terms of procedural rights and awards.

Moreover, the development of damages claims, which has accelerated over recent years, may have disincentivized companies from applying for leniency in antitrust proceedings. The Task Force will ponder on how to advocate for a more balanced framework between public and private enforcement, starting with the launch of a **comparative review** of the following issues:

- Does your country provide for any kind of legal mechanism that “improves” the legal position of a defendant that has been granted immunity or

leniency? Should the Competition Commission claim that any company that has been granted immunity or leniency with a significant fine reduction should be exempted from a joint and several liability in connection with subsequent damages claims proceedings? Do you have any other reform or any similar “improvement” to suggest?

- Should the Competition Commission claim that any information and documents submitted in the context of antitrust immunity or leniency application should be absolutely protected from disclosure to third parties, and that any such disclosure should be defined as a criminal offense?

The results of this review will serve as a basis for the drafting of a **policy paper** advocating in favour of the definition of best practices among jurisdictions.

National high level conferences will also be organised in all jurisdictions covered by the ICC Compendium and provide a forum to engage directly with local antitrust communities. Through these events, the Task Force strives to introduce and disseminate more broadly the key findings that will result from its work. In particular, conferences to be held in Japan, the United States, the European Union and Brazil shall reflect the work performed in respective regional spheres of influence.

4. NEW EU HORIZONTAL COMPETITION RULES

The EU Commission ("Commission") is in the process of revising the EU competition rules on horizontal cooperation agreements, which cover arrangements in connection with R&D, production, purchasing, commercialisation, and standardisation, as well as information exchange. The current rules include: (i) two Horizontal Block Exemption Regulations, *i.e.* Commission Regulation (EU) No 1217/2010 (the Research & Development Block Exemption Regulation) and Commission Regulation (EU) No 1218/2010 (the Specialisation Block Exemption Regulation) ("HBERs"), which came into force in 2011, are due to expire on 31 December 2022; and (ii) Guidelines on horizontal cooperation agreements ("HGL"), which provide binding guidance on the Commission for the interpretation of the HBERs, and for the application of Article 101 of the Treaty to other horizontal agreements which fall outside the scope of the HBERs.

The Task Force will produce a report aimed at describing the new rules to the ICC global membership. The report will seek to highlight in particular the areas of improvements, the anticipated practical challenges in the application of the new rules, as well as any potential areas of uncertainty.

Presently, the Commission has published an Inception Impact Assessment which provides an initial overview of the key policy issues and areas that it is planning address in the revised HBERs and HGL.¹ The Commission is expected to publish first drafts of the revised HBERs and HGL in Q1/Q2 2022².

It is anticipated that the report will consider, in particular, the following topics and areas of concern raised by stakeholders, insofar as addressed by the new rules:

Information exchange

- Updated guidance on information exchange, including as a result of market developments such as digitalisation, as well as developments in the EU and, where relevant, national case law and enforcement practice over the last ten years;

R&D agreements

- Clarification of the relevant definitions that apply to R&D agreements so as to facilitate the compatibility assessment, including by small and medium sized enterprises (“SMEs”);
- Clarification/simplification of the relevant requirements and conditions for exemption, including to facilitate the conclusion of R&D agreements by a wider pool of market participants;
- Amendments/clarifications regarding the application of the market share threshold, including with respect to R&D agreements concluded in high-technology markets and SMEs;

Specialisation agreements

- Amendments/clarifications regarding the applicable market share threshold and safe harbours;
- Widening of the scope of the Specialisation BER to include further types of agreements;
- Clarification/simplification of the relevant requirements and conditions for exemption, as well as other clarifications requested by stakeholders (e.g., in connection with subcontracting agreements);

Purchasing agreements

- Amendments/clarifications regarding the applicable market share threshold and safe harbours;
- Amendments/updates in light of the digitisation of the economy and the emergence of retail alliances in the EU;

¹ Commission, *Inception Impact Assessment*, 7 June 2021, Ref. Ares (2021) 3714309.

² Timing to be confirmed.

- Clarifications of the boundaries between joint purchasing agreements and buyer cartels;

Commercialisation agreements

- Amendments/clarifications of the guidance on joint bidding and consortia;
- Amendments/clarifications regarding the applicable market share threshold;

Standardisation agreements

- Improved guidance on standardisation, including on topics such as the interpretation of FRAND licensing terms and how to address licensing disputes in practice; cooperation outside of standardisation bodies and in the standard-setting process; meaning of the safe harbour condition to provide a commitment to offer to license essential IPR 'to all third parties' on FRAND terms;

Major trends and developments

- Guidance on horizontal cooperation resulting from new market developments, including in particular the pursuit of sustainability goals, digitisation (e.g., data pooling and data sharing arrangements), and potentially other developments identified by respondents to the public consultation, such as recent developments in the EU case law as regards the concept of single economic entity, the changing standardisation landscape; the need for infrastructure sharing to roll out new technologies, or the emergence of dual distribution.

5. ANTITRUST COMPLIANCE POLICY HARMONISATION TASK FORCE

The Compliance programmes task force will focus on promoting international convergence around competition authorities' practice of encouraging corporate compliance programmes, and/or providing credit for robust antitrust compliance programmes at the charging stage and/or the sentencing stage. Starting with the DOJ, the task force will proactively seek to engage with other competition agencies on the topic of compliance programmes with an aim towards facilitating in-house competition counsels' compliance efforts. This includes actions such as:

- identifying a number of key agencies with which to start or deepen the dialogue on compliance programmes and organize in-person or virtual meetings (as appropriate) in collaboration with the national ICC Competition Committees or local expert members in countries where there is no mirror commission;
- exploring opportunities to promote convergence around competition authorities' practice at international fora such as OECD, ICN, and by leveraging the ICC

global network;

- discussing and advising the ICC Commission on Competition on leading the development and scope of international guidelines to enhance antitrust compliance by in-house counsels globally;
- maintaining an open communication channel with competition agencies on the challenges of compliance programmes; and
- preparing a short report identifying the jurisdiction providing credit for robust antitrust compliance programmes – at the agency level or through specific civil liability rules such as the absence of “treble damages” in the US – and explaining what businesses mean by “robust compliance programmes” and the types of “credit” they would like to be established.

6. NEW TRENDS IN COMPETITION POLICY: STAYING ENGAGED IN DEBATES THAT COULD CHANGE THE CURRENT COMPETITION REGULATORY LANDSCAPE

As they may trigger significant changes in regulations, the Global Commission will continue to monitor new trends and to participate in ongoing policy debates within the antitrust community and beyond:

i. International Trade and State Aid:

Over the past year, the EU Commission (“EC”) has been working on a new proposed instrument to regulate foreign³ subsidies that cause distortions and undermine the level playing field in the Single Market. In the EU, subsidies granted to companies by EU Member States, known as State Aid, are in principle forbidden unless they are notified and authorised by the EC. This new regulation on foreign subsidies would allow the EC to apply the EU State Aid principles beyond Europe: companies receiving financial support from a non-EU country may face scrutiny from the EC if these foreign subsidies are considered to have a distortive effect on the EU internal market. The current draft regulation includes: (i) the right for the EC to investigate *ex-officio* and to impose redressive measures, (ii) the obligation to notify the subsidies when a company acquires the control of another one (independently of EUMR filings), and the (iii) the obligation to notify the subsidies when a company decides to participate in a public procurement procedure within the EU.

The new trend in EU State Aid and foreign subsidies will raise serious considerations for businesses operating, or planning to operate, in the EU, on the one hand. On the other, what is viewed as a major legislative development

³ Here to mean “non-EU”.

occurring in Europe could influence the way countries outside the block will respond to preserve their economies and regulate trade, adding more complexity to the global regulatory landscape while creating a chilling effect on foreign investments.

The Task Force will produce a paper on the basis that global business is not against the entry into force of the new EU regulation so long as the control mechanisms applied to foreign subsidies are implemented in a sensible and careful manner.

The Task Force will look at the following issues through a geopolitical lens:

- the renewal of state aid law in the European Union in relation to the [proposed regulation on foreign subsidies in the EU](#) to support companies and preserve economic sovereignty.
- the role of public procurement rules at a global level to preserve economic growth while maintaining a welcoming environment for foreign investments.

The Task Force aims to publish a paper by Q3 2022 encapsulating the views and concerns of the global business community and engage with the EC, antitrust enforcers and practitioners, governments and intergovernmental organisations on the practical issues raised by the new EU proposal as much as on the geopolitical implications for trade and investments across the globe.

ii. Competition policy and environmental sustainability:

After the publication of [a first paper](#) on the role of competition policy in accelerating climate action, the Global Commission intends to establish a new working group which will continue to support the debate regarding the application of competition law and environmental sustainability. As part of the [Green Deal](#) initiative, the European Commission has invited the antitrust community to reflect on the role of competition law in an economy shifting towards sustainable development. A similar debate has arisen in the US with what is now referred to as “Hipster Antitrust”. The new working group will therefore invite the relevant authorities, legal practitioners and in-house lawyers to a dialogue. It will concentrate its efforts on the following substantive questions:

- What should be the interplay between competition law and

environmental regulation?

- Should sustainable development objectives be directly taken into account by antitrust enforcers or should we adapt procedural rules to allow governments or agencies to review antitrust decisions based on environmental grounds?
- Under what conditions should companies be allowed to cooperate in order to achieve environmental objectives even though they may reduce consumer welfare in the short run? Are “environmental agreements” subject to Article 101 (3) of the Treaty on the functioning of the European Union?
- To what extent does the sustainable development shift commend a new approach toward market definition, both in its material and geographic scope?
- Does merger control have to pay more attention to environmental efficiencies?
- Are traditional ways to protect innovation under competition law appropriate to ensure sustainable development objectives?
- Are traditional competition law remedies appropriate to achieve environmental objectives in antitrust proceedings?

The Global Commission will prepare a **policy paper** to support the view that antitrust should not hinder the ability of companies to cooperate to take part in the environmental transition.

- iii. **Public consultations at regional and national level.** The Global Commission will continue to keep track of the launch of public consultations by antitrust agencies in order to contribute global business views and experiences as relevant. It is felt that national Commission Commissions would play an essential role in this process by bringing international focus on local issues/challenges where a joint submission with the ICC Competition Commission could add value to the reforms.

7. COMPETITION COMMISSION'S ANNUAL MEETINGS AND EVENTS: ENGAGING THE NETWORK AND BUILDING GLOBAL PARTNERSHIPS

Traditionally, the members of the Global Commission meet several times a year on different occasions and locations to exchange (i) amongst themselves on current workstreams and new priorities, and (ii) with local or regional authorities on mutual areas of interest where a collaboration with ICC could support/advance their work programmes and special projects. The following events will remain on the Global Commission's annual planning, but their timings and formats are subject to change.

- **The USCIB/ICC Competition meeting**, virtual, 13 April 2022 (tbc)
- **Annual ICC/IBA Pre-ICN Forum**, at the ICN Annual Conference venue, Berlin 3 May 2022
- **ICC Global Competition Commission plenary meeting**, virtual, November 2022
- **ICC/DG COMP meeting**, virtual, December 2022