



# ICC/DG COMP Meeting

*12 December 2022, Brussels*

# 1. SUSTAINABILITY

- ICC White Paper on Competition and Sustainability and real life examples featured in the paper as presented at COP27 on 15 November 2022;
- how, in relation to real life projects, it is very helpful to have from the European Commission (i) a quick informal steer in many cases, (ii) published informal guidance in some cases, and (iii) and very exceptionally an Article 10 decision.
- a safe harbour for agreements where sellers commit not to procure or to sell goods based on inputs that were produced using illegal/ illicit methods.

## 2. MERGER CONTROL

## 2.1 Purpose of the Study

- Enhance convergence among merger control regulations with the aim to (i) harmonize local regulations, (ii) favor best legal “approaches” and (iii) minimise regulatory costs for international companies
- Focus on practical issues (e.g. reportable transactions, merger control thresholds, local nexus, filing fees, gun-jumping) and their possible harmonization on a global basis
- Promote an efficient dialogue between the business world and the relevant antitrust authorities

## 2.2 Methodology

- Identification of key issues to be reviewed and establishment of National Country Teams (NCT) in **20 key jurisdictions**
- Preparation of “**national reports**” by each NCT, and intense discussions about possible legislative amendments
- Drafting of a detailed report to present our **11 draft recommendations**
- Launch of an **advocacy campaign** to have a discussion about our 11 draft recommendations with key Competition Authorities, such as DG Comp, the US FTC/DOJ, JFTC (Japan), German BKA, French Competition Authority, ACCC (Australia), Brazilian CADE and antitrust regulators in Mainland China, Spain, Italy, South Korea and Portugal

## 2.3 Draft ICC Merger Control Recommendations

Our 11 draft recommendations on merger control currently refer to the following issues:

- change of control, minority interests, JVs
- market share thresholds, asset-value thresholds, local nexus thresholds
- simplified notification forms
- filing fees
- guidelines
- gun jumping sanctions

## Draft Recommendations 1 to 3

- Change of control over a business activity should be a common triggering event across jurisdictions.
- The acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of a sole or joint control.
- Joint-ventures should only be reported to antitrust agencies if they meet specific “full-functionality” criteria.

## Draft Recommendation 4

The few countries which have adopted *market share thresholds*, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries (more than [90%]) have adopted turnover thresholds which are easier to assess and to implement.



## Draft Recommendation 5

The few countries which have adopted *asset-value thresholds*, should consider the possibility of abolishing such thresholds, taking into account the fact that most countries (more than [90%]) have adopted turnover thresholds, which are much easier to assess and to implement.

## Draft Recommendation 6

For any acquisition of control by one or several acquirers, there should be a local nexus threshold providing that the target (or the joint venture being created as a result of the transaction) achieves a significant local turnover.

## Draft Recommendation 7

*Simplified notification forms* should be available at least for transactions where:

- (i) the parties activities do not overlap and / or are not vertically related;  
or
- (ii) the parties market share are below a de minimis 25% threshold that allow the parties to presume that the transaction is unlikely to restrict competition.

## Draft Recommendation 8

The countries with filing fee systems, should:

- (i) consider the possibility of abolishing such a filing fee system (unless the fee is minimal, i.e. less than USD 6,000), or
- (ii) at least ensure that the filing fee be strictly proportionate to (a) the actual administrative costs supported by the regulator and/or (b) the actual likely economic impact of the transaction on the territory of the country concerned

## Draft Recommendation 9

Antitrust agencies should publish *guidelines available both in their respective language(s) and in English* on the following issues: (i) definition of a reportable merger; (ii) notification thresholds; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; and (vii) gun jumping.

## Draft Recommendation 10

The parties should have the possibility to apply for *a waiver to close the transaction* before the outcome of the merger control process under pressing circumstances (economic turmoil, financial crisis, financial jeopardy) and (ii) to carve out the business(es) that is (are) under review for merger control process in order to speed up the implementation of the transaction.

This is particularly needed in jurisdictions where the review period is long, unpredictable, or difficult to predict.

## Draft Recommendation 10

Similar to Draft Recommendation 10, the International Competition Network (ICN) Recommended Practices for Merger Notification and Review Procedures suggest certain modifications to establish timely review periods, particularly in suspensive jurisdictions.

Among other suggestions, the ICN underlines the establishment of timely review periods by competition authorities, *i.e.* six weeks or less for an initial review to be followed by an extended review taking up to six months or less, along with definitive expiration dates specified for each review period. Accordingly, the parties would consummate the notified transactions without infringing any competition law rules and within a reasonable time.

## Draft Recommendation 11

Sanctions for gun jumping should be limited to a fine amounting to a share of the target's revenues in the jurisdiction concerned



## Next Actions

- **December 2022:** Presentation of our 11 draft recommendations to DG COMP
- **By March 2023:** finalization of our draft report and launch of our global advocacy campaign
- **2023/2024:** ICC meetings/ videoconferences to discuss draft ICC merger control recommendations and proposed reforms with other key antitrust regulators (in particular, US FTC/DOJ, JFTC of Japan, German BKA, French competition authority, Brazilian CADE, etc.)

### **3. EU REGULATION ON FOREIGN SUBSIDIES**

ICC views and recommendations

## In a nutshell

- ICC has set up a task force whose members come from all the continents
- ICC welcomes the idea of a level playing field where an economic block regulates all State aids, not only the ones granted by its own Member States
- But there are limitations in the Regulation
- Some are intrinsic, and will now be difficult to overcome
- Others could be mitigated in practice, which are the ones we will focus on

## The general concepts need clarification

- The vocabulary of the regulation is not always the same as the one used for State aid. Examples of new wording: "**third country subsidy**", "**financial contribution**"
- The very notion of "**foreign public entity**" is unclear
- In the traditional State aid field and in other comparable fields (anti-subsidies duties) there are guidelines
- ICC advocates the publication of guidelines, without waiting for precedents and case law

# The assesment of distortions needs a precise methodology

- Again, some concepts need clarification: "**nature of the subsidy**", "**purpose of the subsidy**", "**situation of the undertaking**", "**level of economic activity**"
- The balancing test between the distortive and the positive effects of subsidies is still a mystery since the Regulation does not provide reasons for justifying a distortion

# Remedies

- Extreme remedies like divestments or publication of the R&D results should be avoided or limited to extreme situations
- Which implies a larger use of financial remedies but how they will be calculated needs clarification

## Specific tools

- **Mergers:** the new tool will come in addition to merger control (with its extension resulting from the new use of Article 22 EUMR) and the proliferation of FDI control regimes. A careful use would be welcome, otherwise the EU will cease to be attractive to foreign (and even to European) investors
- **Public procurement:** the intertwined time schedules of the new tool and of the public procurement procedures might be difficult to handle; a general qualification of companies wanting to respond to public tenders would be useful

## General investigations

- Time limits in order to avoid lengthy procedures would be welcome
- What the interim measures could be would be useful to know



# The most important point: overlaps and intertwining of procedures

- The main point is the multiplicity of procedures that are apparently independent even if they aim at the same goal.
- First, the three procedural tools of the Regulation itself: it would be useful that when one of them has produced an outcome, the latter should apply to the others instead of having to conduct them independently (e.g., a positive outcome of the merger tool should protect against an investigation during a period of time or be used under the public procurement tool).
- Second, the three procedures will co-exist with others like traditional merger control, WTO procedures, anti-subsidies duty procedures. Replication or inconsistencies should be avoided. Transposition of outcomes, when relevant, would be welcome.

## **4. COMPETITION AND DIGITAL ECONOMY**

# Our upcoming Global report on regulatory developments

- The Task Force is developing a global report which aims to monitor new reforms and key regulatory developments related to competition law and digital economy
- In July 2022, the Task Force on Competition Law and Digital Economy distributed a questionnaire to its over 90 members representing 28 countries
- The questionnaire aims to map the important issues related to antitrust enforcement in the digital sector, including:
  - **merger control;**
  - **horizontal agreements;**
  - **vertical agreements; and**
  - **abuse of market dominance.**
- Our global report hopes to:
  - **further the understanding of the key players within the digital realm, including ICC members and constituencies; and**
  - **contribute to the international regulatory dialogue and promote greater consistency in regulatory approach, to the benefit of business and the economy.**

## Our questions to DG COMP

- What role do you see for international cooperation and cooperation with EU Member States to achieve consistency in digital antitrust enforcement?
- What do you expect to be the biggest challenges in the day-to-day enforcement of the DMA? What do you expect the role of DG COMP's Chief Technology Officer to be in antitrust enforcement and DMA enforcement?
- The Commission has made it clear that the DMA does not mean the end of Article 102 TFEU enforcement. Which types of cases does DG COMP expect to still seek to pursue under Article 102 TFEU and is it considering amending the Article 102 Guidance paper?
- Will there be any changes to the draft Horizontal Guidelines regarding the digital aspects (data pooling, data sharing, info exchange) in order to foster collaboration in ecosystems, on platforms etc?

## **5. ANTITRUST COMPLIANCE POLICY HARMONIZATION**

# Antitrust compliance

- **Background:** Competition agencies and private antitrust lawyers work together to improve compliance
- 2013 ICC Antitrust Compliance Toolkit
- **Looking forward:** Updating the ICC Antitrust Compliance Toolkit (e.g. to include AI violation detection tools)
- **Working together:** DG COMP and ICC members can work together to improve compliance by
  - **International harmonisation of criteria for credible antitrust compliance programmes (e.g. ICN)**
  - **Mentioning antitrust compliance programmes in Commission decisions (Articles 7/9) and closing statements**
  - **Recognition for credible compliance programmes**

## 7. ICN

# ICN

- **Background:** ICC has supported the ICN for years. See e.g. “ICN at 20” press release (2021); ICC endorses ICN Framework for Competition Agency Procedures
- Multiple ICC leaders are ICN NGAs
- **Looking Forward:**
- ICN Project idea: Harmonising criteria for credible antitrust compliance programmes
- Pre-ICN event in October 2023
- How can the ICC support the ICN and ICN work product better? How can we favor more cooperation and productive discussions between ICN and ICC?



# **8. “ANTITRUST ENFORCEMENT BETWEEN GLOBALISATION AND DEGLOBALISATION”**

21 July 2023, Tokyo

# ICC Antitrust Conference in Tokyo

- High-level international conference on competition law “**Antitrust enforcement between globalisation and deglobalisation**”
- Organized with the support of the **French Competition Authority** (FCA), **the Japan Fair Trade Commission** (JFTC), possibly the **Directorate General for Competition of the European Commission** (DG COMP), and the US Federal Trade Commission [tbc].
- Other partners might also include ACCC, the South Korea antitrust regulator, and the competition authority of New Caledonia
- The Tokyo Conference will be a one-day event, on **21 July 2023** at the Tokyo Chamber of Commerce and Industry



## **ABOUT ICC**

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

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