Work Programme 2023-2024

ICC Global Competition Commission

Including 2023 achievements

I. Leadership of the ICC Global Competition Commission

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II. About the ICC Global Competition Commission

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, 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.

It is hoped that the outcomes of these debates among members - and, as appropriate, in consultation with competition enforcement authorities - will support **the Global Commission's two key priorities**:

1. **enhance the harmonisation and convergence among jurisdictions in key competition policy areas with the aim to minimise regulatory costs for international companies**; and

2. **increase the efficiency of antitrust enforcement at a global level both from a legal and economic perspective**.

In the coming years, the Global Commission endeavours to become the natural interface between global business and antitrust enforcement agencies around the world. The **2023/2024 work programme** thus places a particular focus on areas, including merger control, State aid, EU horizontal co-operation agreements, antitrust damages actions, antitrust compliance, digital economy, sustainability and non-target RFIs 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 address them.

III. Task Forces of the ICC Global Competition Commission

1. Competition Law and the Digital Economy Task Force

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After decades of antitrust enforcement against digital companies, the European Union has adopted the Digital Markets Act, which is *ex ante* regulation seeking to impose a set of obligations and prohibitions on so-called digital "gatekeepers". Likewise, the new Biden administration in the United States has expressed its intention to adopt ex ante regulation for certain parts of the digital economy. Similar discussions around the need for ex ante regulation for the digital economy to complement ex post antitrust enforcement are under way also in other jurisdictions, including Japan, Australia, and Korea, while other jurisdictions, such as Germany, have chosen to update their existing antitrust laws to better reflect issues presented by the digital economy.

The Global Commission launched the Task Force on Competition Law and the Digital Economy to monitor new reforms and developments related to competition law and the 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 necessary.

In the first instance, the Task Force will produce a report based on the findings from a questionnaire collecting information on merger review, horizontal and vertical agreements, and abuse of dominant markets in jurisdictions including, *inter alia,* the EU, the UK, Brazil, Canada, Italy, France,

Germany, Japan, Mexico, Spain, South Korea, India, the Netherlands, Turkey, and Australia. The report will help the Task Force contribute to international regulatory dialogues with antitrust enforcement agencies and other significant stakeholders.

A copy of the questionnaire is annexed to this document.

2. Merger Control Task Force: how can business support more convergence at global level?

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Timothy Cornell
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Task Force Co-Chair
United States

The ICC Task Force on Merger Control will 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 finalise and promote:

i. A set of **11 draft merger control recommendations** formulated after a joint reflection by members of the Task Force on the best manner to meet the following objectives: (i) ensure that transactions are reported in jurisdictions where they might have an impact on competition; (ii) secure and dedicate resources that are proportionate to the issues at stake in an individual case; (iii) enhance predictability and legal certainty with clear legal tests and consistent sanctions. The draft recommendations (still under active discussions within the Task Force) are as follows:

   - Recommendation 1: The ICC Task Force on Merger Control Reforms recommends that change of control over a business activity should be a common triggering event across all jurisdictions. Control should mean the possibility to exercise decisive influence (legal or de facto) over appointment of senior management (in particular, the CEO), business operations, annual budgets and/or strategic

investments/transactions.

- Recommendation 2: The ICC Task Force on Merger Control Reforms recommends that the acquisition of a minority interest should not be a triggering event, unless such an acquisition results in the acquisition of de facto (sole or joint) control. Alternatively, the ICC Task Force on Merger Control Reforms recommends that the acquisition of a minority interest of less than 25% should never be a triggering event for merger control purposes.

- Recommendation 3: The ICC Task Force on Merger Control Reforms recommends that joint-ventures should only be reportable to antitrust agencies if they meet specific "full-functionality" criteria.

- Recommendation 4: The ICC Task Force on Merger Control Reforms recommends that 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 have adopted turnover thresholds, which are easier to assess and to implement and provide greater legal certainty.

- Recommendation 5: The ICC Task Force on Merger Control Reforms recommends that 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 have adopted turnover thresholds, which are much easier to assess and to implement.

- Recommendation 6: The ICC Task Force on Merger Control Reforms recommends that, for any acquisition of control by one or more 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 in the relevant jurisdiction.

- Recommendation 7: The ICC Task Force on Merger Control Reforms recommends that simplified notification forms be available at least for transactions where: (i) the parties' activities do not overlap horizontally and / or are not vertically-related; or (ii) the parties' combined market shares are below a de minimis 25% threshold and the same de minimis 25% threshold applies to any vertically-affected market.

- Recommendation 8: The ICC Task Force on Merger Control Reforms appreciates the absence of merger control filing fees in a number of jurisdictions (e.g., Turkey, Chile, China, France and EU) and observes that competition authorities in those jurisdictions are well-functioning and well-resourced without imposing any filing fees in connection with merger control filings. In light of this, the ICC Task Force on Merger Control Reforms recommends that the jurisdictions with a filing fee system consider abolishing merger control filing fees.

  If this is not possible, the ICC Task Force on Merger Control Reforms further

recommends that the countries with a filing fee system ensure, at least, that the filing fee be based on transparent criteria and be strictly proportionate to the actual administrative costs of resourcing the regulator and do not include any tax element. The ICC Global Competition Commission stands ready to engage in any discussions about the practical implementation of such a proportionality principle with any antitrust regulator willing to have such discussions. More transparency on this critical issue should be a priority.

- Recommendation 9: The ICC Task Force on Merger Control Reforms recommends that antitrust agencies 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 and calculation thereof; (iii) statutory deadlines; (iv) information requests; (v) substantive assessment criteria; (vi) remedies; (vii) gun jumping; and (viii) calculation of penalties. The ICC Task Force on Merger Control Reforms acknowledges that this is already the case for a number of regulators.

- Recommendation 10: The ICC Task Force on Merger Control Reforms recommends that the transaction parties should be able 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) or in cases where the transaction is approved in all jurisdictions but a few jurisdictions in which the target generates less than 10% of its consolidated turnover, in order to speed up the implementation of the transaction. This is particularly needed in jurisdictions where the review period is long or difficult to predict.

- Recommendation 11: The ICC Task Force on Merger Control Reforms observes that the Dutch Competition Authority (ACM) has issued a fining policy according to which the fine for gun jumping is calculated as a percentage of the turnover of the undertakings concerned in the Netherlands. The Task Force is of the view that such an approach would not prevent regulators from introducing minimum amounts of penalty, or special fine calculation rules, when the transaction is a killer acquisition, i.e., the acquisition of an innovative company achieving little or no turnover to eliminate such a target as a source of future competition.

ii. **a report, to serve as an annex to the ICC merger control recommendations,** which will inform a number of important issues (as follows) in various key jurisdictions (in particular, US, EU, China, Japan, South Korea, Australia, UK, Brazil, Mexico, Argentina, Canada, India, France, Germany, Italy, Spain, Portugal, Poland, Austria, The Netherlands, Brazil, Turkey, Mexico, Switzerland, 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 s? 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 implictly), 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?

In 2023/2024, the Task Force will lead an advocacy campaign by organising a number of meetings/videoconferences to exchange views on the draft ICC merger control recommendations and proposed reforms with key National Competition Authorities (US FTC/DOJ, JFTC, BKA, FCA, CADE, etc). The outcomes of these discussions will contribute to the streamlining and publication of the ICC recommendations.

3. Antitrust Damages Claims Task Force: the business perspective on fostering a more balanced framework between public and private enforcement

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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. The ICC Compendium is in the process of being updated and we envisage that the 2nd edition of the Compendium will be published around June 2023 and will then be published by Concurrences.

Following publication of the 2nd edition of the Compendium, the Task Force will spend 2023 evaluating the relationship between leniency/immunity and private damages claims. In particular, the Task Force will consider (i) whether the development of damages claims has disincentivized companies from applying for leniency in antitrust proceedings, (ii) the treatment of leniency/immunity applicants in private damages claims in key jurisidictions, and (iii) best practice for balancing public and private enforcement, through the treatment of leniency/immunity applicants.

The results of this review will serve as a basis for the drafting of a **policy paper** advocating in favour of the best practices among jurisdictions by the end of 2023.

In 2024, the Task Force intends to consider (i) the treatment of pass-on in key jurisdictions, and (ii) the mechanisms for bringing collective actions for competition damages claims in key jurisdictions, with a view to publishing policy papers advocating in favour of the best practices among jurisdictions by the end of 2024.

National high level conferences will also be organised in key jurisdictions covered by 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 Task Force

Alex Nourry, Partner, Clifford Chance, Task Force Chair, United Kingdom

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 whichh fall outside the scope of the HBERs.

The HBERs were due to expire on 31 December 2022 and the Commission has prolonged them until 30 June 2023. This extension of the HBERs will allow the completion of the review exercise taking full account of the feedback received in response to the public consultation, including from ICC. The current HBERs and HGL will remain in force while the Commission finalises its review process, with the aim of adopting the new HBERs and HGL in June 2023.

The proposed new HBERs and HGL should bring clarity and legal certainty to certain aspects of horizontal agreements, covering information exchange, R&D and specialisation agreement, purchasing and commercialisation agreements, standardisation agreements as well as new guidance on sustainability agreements.

In March 2022, the Commission published the initial drafts of the revised HBERs and HGL for consultation. These followed the Inception Impact Assessment previously published by the Commission,[1] which provided an initial overview of the key policy issues and areas that the authority was planning to address in the revised HBERs and HGL.

An ICC Task Force was set up with a view to commenting on the Commission's initial drafts of the revised HBERs and HGL. Overall, as noted in the paper produced by the Task Force (the "ICC Paper"), ICC supports the changes proposed by the Commission, which will increase clarity and legal certainty, and will provide an updated framework to deal with trends and developments that have emerged since the adoption of the current rules.

However, the ICC Paper also highlighted, among other things, the areas of improvements, the anticipated practical challenges in the application of the new rules, as well as any potential areas of uncertainty. The key points and areas of suggested improvement include, in particular, the following:

- Joint Ventures and Information Exchange
  - Further suggested clarifications and amendments to the new section concerning the application of Article 101 TFEU to agreements between parents and their controlled joint ventures would be advisable in light of recent EU case law;
  - The new test for establishing a 'by object' infringement in the context of information exchanges is complex and less clear than the existing one;
  - The new guidance on raw data and unilateral disclosures seems unduly restrictive, and should be softened;
  - The reference to "customers" in the context of assessing hub-and-spoke information exchanges should be removed;

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

- R&D agreements
  - Likely practical difficulties arising from the new concept of 'innovation markets' and reference to three competing and comparable R&D efforts under the new 3 plus 1-rule;
  - Despite the added clarifications, the definition of "potential competitor" would remain challenging to apply in practice and lead to uncertainties in the application of the safe harbour provided by the block exemption;
  - The catalogue of hard-core restrictions with respect to R&D efforts should be removed or reduced, at least for SMEs;

- Specialisation agreements
  - The market share threshold for the application of the Specialisation BER should be increased, in line with the Commission's approach in assessing horizontal mergers. Moreover, the associated rules for market share calculation should be further simplified (or, alternatively, a presumption that agreements between SMEs fall below the relevant threshold could be introduced);
  - Further clarifications with respect to the definition of joint production, the concept of 'potential competitor', and the circumstances in which resale price restriction would be acceptable in the context of joint distribution, could be contemplated;
  - Certain technical aspects in the section dealing specifically with mobile infrastructure sharing agreements should be considered more carefully to ensure that the HGL remain relevant throughout the next decade;

- Purchasing agreements
  - The market share threshold below which competition concerns are deemed unlikely to arise according to the HGL should be increased;
  - The reasons why purchasing “cartels” are sufficiently harmful to competition so as to be viewed as object infringements should be addressed in more detail;
  - The interplay between sustainability objectives and purchasing agreements should be further articulated;
  - Aside from retail alliances, which do not of themselves engage in purchasing activities, the HGL should recognise that there are other forms of retailer co-operation;

- Commercialisation agreements
  - The definitions of 'bidding consortium' and 'competitors' should be further clarified. Moreover, the market share threshold below which competition concerns are deemed unlikely to arise according to the HGL should be increased;

- Standardisation agreements
  - With reference to the criteria to assess the 'openness' of standards development processes, the HGL should draw inspiration from US rules which clearly define the term “standards development activity”;
  - The requirement that “all competitors” should have an opportunity to be involved “at major milestones” may not be sufficient to prevent anticompetitive effects; instead, reference should be made to the criteria set out in relevant WTO rules and EU legislation;

- Sustainability

- The new guidance on sustainability agreements is helpful and welcomed; however, the HGL could go further, for example by outlining further categories of sustainability agreements that fall outside Article 101;
- The HGL should be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable, goods;

- Procedural aspects
  - Comfort letters and other appropriate measures should be adopted by the Commission to minimise risks as far as possible with respect to novel and developing areas, such as sustainability agreements.
  - In October 2022, the Commission adopted a revised Informal Guidance Notice that will allow businesses to seek informal guidance on the application of the EU competition rules to novel or unresolved questions. The revised Informal Guidance Notice provides for more flexible conditions and aims at increasing legal certainty.

Once the HBERs and HGL have been published, the Task Force will prepare a memo as well as organise webinars focusing on the main points arising from the Commission changes to the measures, in close coordination with the Sustainability Task Force.

5. Antitrust Compliance Policy Harmonisation Task Force

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This Task Force will focus in 2023-2024 on the second edition of the ICC's well-regarded ICC Antitrust Compliance Toolkit – and the Task Force Co-Chairs are looking to recruit new members for members who are willing to assist in the process. This will not be a major rewrite, but rather an update (e.g. to include AI violation detection tools). It is planned to launch the updated Toolkit at the ICN in 2023 in Barcelona.

- proactively identifying and contacting large groups that have made their antitrsut compliance programs public to discuss these programs and recruit new members for the Task Force;

- identifying a number of key agencies with which to start or deepen the dialogue on compliance programmes and organise in-person or virtual meetings (as appropriate) in

collaboration with the national ICC Competition Commissions or local expert members in countries where the national committee has no mirror competition commission;

- participating in public consultations launched by such key agencies on antitrust compliance (e.g. by providing feedback and suggestions to the Canadian Competition Bureau's ongoing public onsultation);

- exploring opportunities to promote convergence (on criteria for credible antitrust compliance programs and recognition of such programs in antitrust decisions/sanctions) around competition authorities' practice at international fora such as OECD, ICN, and by leveraging the ICC global network;

- discussing and advising the Global Competition Commission 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 "trebble 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. Non-Target RFIs Task Force

John Taladay, Partner, Baker Botts, Task Force Chair, United States

As the global economy continues to develop in new and (sometimes) unexpected ways, competition authorities are increasingly utilising RFIs as an investigative tool. In particular, there has been an increase in the number of RFIs issued to non-target companies (i.e., third parties in investigations or as part of a broad market study). In recent times, a profusion of sectoral inquiries and market studies have been sent to companies by various authorities on topics ranging from supply chain issues to online advertising to social media and beyond.

These RFIs are often issued with insufficient concern for the significant burden such requests can place on companies and with little attempt to tailor the requests to a recipient's likely knowledge or data. Companies often find themselves on the receiving end of multiple RFIs from different competition authorities on the same underlying topic and must expend significant resources to comply under tight timelines and in formats imposed without regard for individual record-keeping practices or feasibility. The recipient companies are not ones suspected of any antitrust law violation, but must nevertheless comply or face stiff penalties.

On the other side of the equation, overly-broad RFIs may result in overly-broad responses, wasting valuable agency resources as busy competition authorities search for useful needles in an

information haystack. Disproportionately broad RFIs may also undermine the credibility of issuing authorities by creating the expectation of follow-up action (e.g., enforcement actions) or opening an agency up to criticism that its priorities are misplaced or resources are being mishandled. With few "checks and balances" in place, overly-broad RFIs erode confidence in the integrity of the investigative process.

The Task Force on Non-Target RFIs will study and prepare recommendations to agencies on the proper scope of RFIs to help maximise resources by reducing associated burdens and costs on business while also conserving agencies resources. The Task Force will build on the work done in this area in making recommendations that balance the needs and resources of competition authorities against the burden on companies.

The goal of this project is not to prescribe a uniform process or bright line limit on RFIs, but rather to develop a set of workable principles that can guide agencies as they contemplate and tailor future requests. This may include guidance on balancing the necessity of information with the burden on companies as well as discussion and broader incorporation of best practices from individual jurisdictions. Potential solutions may include a well-defined set of requirements for when RFIs can be issued, clear procedural steps for negotiation of scope and time limits, and recommended practices for data production. Recommendations will be composed as best practices in line with the ICN's Market Studies Good Practices Handbook and similar guidance.

By bringing the experience of companies and competition agencies in key jurisdictions together, the Task Force seeks to facilitate mutual understanding and establish clear, practical guidance for the use of RFIs. This effort will reduce costs—both by promoting proportionality and reducing time spent drafting overbroad requests that require further refinement—and encourage continued dialogue and trust between companies and competition agencies.

7. 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 Task Force:

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Partner, Antitrust & Competition, Orrick	Partner, Morais Laiteo
Task Force Chair	Task Force Vice-Chair
France	Portugal

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Task Force Vice-Chair
China

Over the past year, the EU Commission ("EC") has been working on a new proposed instrument to regulate foreign[2] 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 under the Treaty on the Functioning of the European Union unless they are notified and authorised by the EC or subject of an exemption under a block exemption regulation. This new regulation on foreign subsidies ("FSR") will 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, with suspensory effects, the subsidies when a company acquires the control of another (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 EU's co-legislators are now in the process of concluding the FSR, as the European Parliament is expected to vote on the proposal prior to the end of 2022, following negotiations with the Council on the FSR wording.

The Task Force, following the approval of the FSR, shall comment on the Guidelines to be approved under the FSR, including those related to (i) the criteria for determining the existence of a distortion on the internal market, (ii) the balancing test on negative and positive effects, (iii) its power to request prior notification of any concentration which is not notifiable or foreign financial contributions received by an economic operator in a public procurement procedure, and (iv) the assessment of a distortion in a public procurement procedure ("**FSR Guidelines**").

ICC will produce comments on the basis that global business is not against the FSR so long as the control mechanisms applied to foreign subsidies are implemented in a sensible and careful manner.

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

- support of a level playing field in international trade for all companies and preserve economic sovereignty, even within the FSR;
- foster predictability for companies when confronted with local or regional blocs rules applicable to international trade, including FSR rules;
- potential WTO reactions to the FSR;

[2] Here to mean "non-EU".

- the role of public procurement rules at global level to preserve economic growth while maintaining a welcoming environment for foreign investments.

The Task Force aims to actively participate in the EC consultations 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 implementation of the FSR as much as on the geopolitical implications for trade and investments across the globe. ICC views may also be conveyed to the WTO on the FSR and other trade barriers.

Equally, the Task Force shall engage with national ICC Competition Commissions, starting with Brazil, China, Mexico, South Korea, and Japan, and organise a series of virtual dialogues to explain the FSR and collect corporate and legal views on the local and regional impact of the FSR, including other potential trade barriers.

ii. Competition Policy and Environmental Sustainability Task Force

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Task Force Co-Chair, Brazil

Simon Holmes
Competition Appeals Tribunal
Task Force Co-Chair
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Marceline Tournier
Global Head of Antitrust
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In 2022 at the 27th session of the Conference of the Parties of the UNFCCC (COP 27), the ICC Global Competition Commission released a white paper on the adverse impact of competition policy on the development of sustainability-related partnerships between companies which received coverage from a number of top-tier media outlets. The white paper was built on previous work published by ICC on the role of competition policy in accelerating climate action and continues to alert the international antitrust community on the following points:

- Businesses can, need, and want to work together to help fight climate change.
- Current competition policies are chilling this.
- Competition authorities and law makers can, and must, do more to reduce this chilling effect.
- This can (largely) be done within current legal frameworks for competition law.
- Business, in turn, should take real-life examples of the chilling effect to the competition authorities.

In addition to a series business cases, the paper also sets out **6 key recommendations for international antitrust agencies** on what business needs to their sustainability initiatives:

1. **Clear guidelines** about what are the safe harbours and what level of reduction in competition (if any) agencies are willing to accept, in favour of a greener economy.
2. **Case-law**: assessment of individual cases will allow business to draw the lines of what is permitted and what will be considered unlawful.
3. **Convergence of incentives**: in order to drive business in one clear direction, avoiding conflicting goals.
4. **An agreed approach among competition authorities globally** (e.g. through the ICN). In the context of efforts to make dynamic changes to market behaviours, the chilling effect of the need to engage with multiple regulatory processes – involving potentially significant delays and material costs for the companies involved – should not be underestimated.
5. **Shifting the burden of proof**: there is a need for international recognition that pro-sustainability initiatives, such as those championed by the UN under the Race to Zero, should be *presumed* to generate benefits outweighing any harms to competition, unless it is proven not to be the case. [3]
6. **Pre-authorisation processes for agreements capable of producing anti-competitive effects should be reconsidered,** to prevent genuine sustainability efforts needing to go through pre-authorisation processes, which cause material delay and cost, and deter collective action. At the very least they need to be speeded up and simplified.

The ICC Task Force on Competition Policy and Sustainability will continue the debate beyond the European Union and explore opportunities to engage with a number of agencies, including US, Canada, Mexico, Brazil, China, and Japan. Inside the block, the Task Force will broaden its outreach to members of the European Competition Network (ECN) using the white paper as a tool to encourage appropriate changes to antitrust policies in as many jurisdictions as possible. Finally, a third joint webinar with the OECD on competition and sustainability in scheduled in Q3 2023.

iii. International Competition Network (ICN) Task Force

Dina Kallay	Marcin Trepka
Head of Antitrust, Ericsson	Partner
Task Force Co-Chair	Baker McKenzie
United States	Poland

The ICN Task Force of the Global Competition Commission will continue to reinforce the longtime ICC and ICN collaboration. In 2019, the ICC supported the ICN Framework for Competition Agency

[3] The Austrian government passed legislation making it easier to meet the conditions for an exemption under Austrian law in the case of agreements with demonstrable ecological benefits. [Kartell und Wettbewerbsrechtsanderungsgesetz (KaWeRAG) 2021, Austrian Federal Law Gazette I 2021/176].

Procedures as an encouraging step towards a more sound and fair competition enforcement across the globe. In 2021, the ICC issued the press release "ICC and ICN: Celebrating Two Decades of Collaboration" marking the ICN's 20th anniversary and highlighting the close ICC-ICN collaboration throughout the ICN's first two decades.

Now in its soon to be 16th edition, the Pre-ICN Forum organized by ICC on the eve of the ICN Annual Conferences is a high-level event enabling a unique dialogue between global business and international antitrust agencies on current antitrust trends and hot topics.

This year, the projects of the ICN Task Force include:

- **ICC NGA Group**. Identifying ICC members who are ICN NGAs, setting up a monthly call for them until the Barcelona ICN Annual Conference for NGAs interested in working together on ICN related work stream (including planning the pre-ICN conference);

- **Increasing NGAs' role at the ICC**. Promoting opportunities for NGAs to participate in ICN work, and have better contact with their appointing agencies. Reviewing the ICN NGA Toolkit (2020) with an eye as to whether it needs to be revised;

- **Liaise with the ICN for a Best Practices for Robust Antitrust Compliance Programs**: Building on the 2022 ICN Advocacy WG (AWG) Report on Competition Compliance, encouraging the ICN to laungh work on "Best Practices" criteria for robust and credible antitrust compliance programmes;

- Together with the ICC Task Force on Antititrust Compliance Policy Harmonization, plant seeds regarding a future project promoting harmonization re recognition for compliance programmes.

iv. Public consultations at regional and national level

In 2023, the Global Commission contributed key consultations This year it will continue to monitor regional and national public consultations 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 Global Competition Commission could add value to the reforms.

8. 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 are planned to take place in 2024:

- **Annual ICC/DG COMP Meeting:** 20 February 2024, Brussels
- **Concurrences Annual Private Enforcement Conference in collaboration with ICC:** 26 March 2024, Paris
- **ICC/OECD webinar series on competition and sustainability – abuse of dominance** (date to be confirmed)
- **Meeting of the ICC Global Competition Commission**, Paris (date to be confirmed)
- **ICC/ICC China Antitrust Conference**, Beijing (date to be confirmed)

IV. Contacts

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Annex 1

Questionnaire for the ICC Global Report on Antitrust Enforcement in the Digital Sector

I. MERGER REVIEW

1. Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.

2. How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? If so, please describe it (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?

3. For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?

4. What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?

5. Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.

6. If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioral conditions in digital sector transactions?

7. In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standards for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?

8. Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the

cases, provide details of any fines imposed, and provide a summary of the authority's analysis.

9. Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?

10. To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? If so, what types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?

II. HORIZONTAL AGREEMENTS

1. Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?

2. Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field ? If affirmative, please refer to the types of collaboration the authority has analysis and provide a summary of the agency's approach.

3. Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.

4. What is the view of the competition authority in your jurisdiction on 'hub and spoke' arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority's analysis.

5. Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency's analysis.

6. Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?

III. VERTICAL AGREEMENTS

1. On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?

2. What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.

3. What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat "wide" and "narrow" MFNs in the same way? If so, on what is the rationale behind this approach?

4. Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify what the scope of the investigated platform MFNs was. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)

5. How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?

6. Is there any safe harbor/presumed exemption mechanisms for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbor/presumed exemptions. Are parties active in the digital sector treated differently in the context of applying these safe harbors?

7. Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?

IV. ABUSE OF MARKET DOMINANCE

1. Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.

2. Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?

3. Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?

4. Please describe how 'platform' is defined for these purposes.

5. What are the criteria used to determine whether a platform falls under the regime?

6. What are the main requirements that the relevant legislation or regulation impose on platforms with market power?

7. Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?

8. Do you think these conduct requirements provide sufficient legal certainty to market participants?

9. Please summarize any penalties provided for non-compliance.

10. If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?

11. Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?

12. If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defenses or objective justifications accepted?

13. Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behavior by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defense be acceptable?) In cases of per se prohibitions, what justifications are the company allowed to present, if any?

14. If your jurisdiction imposes specific competition rules to digital companies with market power , are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.

15. How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?

16. Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.

17. Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?

Annex 2

2023 Achievements

Policy papers and reports

1. **ICC Comments on the European Commission Foreign Subsidies Regulation (FSR) Draft Implementing Regulations** (March 2023)
2. **ICC paper on the new EU Horizontal Guidelines** (July 2023) and related **FT article**
3. **ICC Global report on antitrust enforcement in the digital economy** (September 2023)
4. **ICC Global report and recommendations on non-target RFIs** (October 2023)
5. New ICC paper on competition and sustainability **"Taking the chill factor out of climate action: A progress report on aligning competition policy and sustainability goals"** and related **FT article** (November 2023)

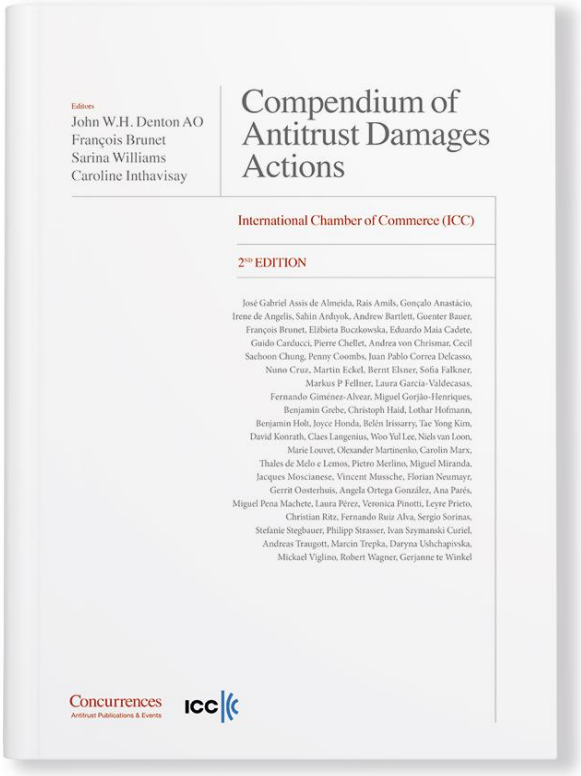
Meetings and events

- Virtual meeting of the ICC Task Force on Competition and Sustainability with the **Federal Economic Competition Commission of Mexico (COFECE)**, 9 March 2023.
- Virtual meeting of the ICC Task Force on State Aid and International Trade with **Christof Schoser, Head of Unit for Third Country Subsidies, at the Directorate General for Competition of the European Commission (DG COMP)**: 13 March 2023
- **Roundtable discussion with the CMA on their Draft Sustainability Guidelines:** 24 April 2023, London
- **ICC Global/Concurrences Conference on Private Enforcement 2023:** 18 April 2023, Paris
- Virtual Meeting with **Nuno Cunha Rodrigues, Chairman of the Portuguese Competition Authority (*Autoridade da Concorrência*)** on Merger Control Reforms: 11 July 2023. To view meeting slides.
- ICC Conference on **"Antitrust Enforcement: Between Globalisation and Deglobalisation",** 21 July 2023, Tokyo. To view conference slides, and related press coverage: Mlex articles on sustainability and enforcement in the tech sector, PaRR article and an article by Yusuke Nakano published by the Fair Trade Institute
- Meeting of the ICC Global Competition Commission. Keynote presentations by **Gwenael Muguet-Poullennec, Referendar, General Court of the European Union**, and **Thibaud Vergé, FCA Vice-President**, 29 September 2023, Paris/hybrid. To view Mr Muguet-Poullennec's slides and Mr Vergé's slides
- **ICC/IBA Pre-ICN Forum 2023 on "Antitrust Trifecta: Enforcers, the Courts, and the Private Sector":** 17 October 2023, Barcelona.
- ICC antitrust panel at COP28: "**Aligning Competition Policy with global sustainability goals to enable private sector cooperation**" 8 December 2023, Dubai.

- **ICC meeting of the Global Competition Task Forces** to discuss 2024 work plan, 12 December 2023, Virtual. To view slides on the 2023 Activities Reports and 2024 work plans.

New publication

2nd Edition of the ICC Compendium of Antitrust Damages Actions, jointly published with Concurrences



Antitrust litigation has become extremely complex and not all jurisdictions have adopted the same rules. The Compendium of Antitrust Damages Actions (the "Compendium") was developed to bring clarity and guidance in an area of law that is in constant evolution. It aims to profile the legal regime related to antitrust damages actions in a variety of important jurisdictions by providing an overview of the key legal principles - organized around nine topics and completed in some jurisdictions by an additional section highlighting key issues - that are illustrated by a selection of leading cases across various economic sectors and industries.

With nearly 350 court cases, including salient facts and insights on important judgments, the Compendium is a unique tool for all economic actors - antirust experts and non-experts alike - and was designed to address the concerns of both multinational companies and SMEs that may be exposed to, or already involved in, antitrust litigation. It provides details on the method of calculating damages in numerous jurisdictions as well as the amount of damages awarded, to increase companies' understanding and awareness of the issue.