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## Policy statement

# **ICC/BIAC Comments on report of the US International Competition Policy Advisory Committee (ICPAC)**

*Prepared by the ICC Commission on Law and Practices relating to Competition jointly with the Business and Industry Advisory Committee to the OECD (BIAC)*

### **I/ General**

ICC and BIAC congratulate the International Competition Policy Advisory Committee (ICPAC) on the balanced, reasonable and comprehensive approach taken in its final report to the US Attorney General and Assistant Attorney General for Antitrust (the Report). They also commend ICPAC for its wide-ranging consultation on the issues raised and the reflection in the Report of the different views expressed. ICC particularly appreciated having the opportunity to participate in the preparation of the section on the exchange of confidential information in the merger context.

The Report is a valuable springboard for discussions on how competition policy should evolve to face the challenges posed today by globalization, and by changes in technology and in business and governmental practices. The debate on the issues raised must now be taken further in the international context, taking into account the different cultures and experiences of the various participants.

ICC and BIAC wish to continue to participate in this debate and offer below their views on the specific issues raised by the Report .

### **II/ Multijurisdictional mergers (chapters 2 and 3)**

ICC and BIAC agree with the factual analysis of multijurisdictional mergers. In particular, ICC and BIAC welcome ICPAC taking into account the serious challenges arising in connection with multijurisdictional mergers, such as the growing number of jurisdictions with merger control laws, with differing notification requirements and substantive standards. ICC and BIAC concur with ICPAC that relief from the heightened uncertainty and increased transaction costs has to be sought in the interest of the parties to a transaction.

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In this respect, strategies for facilitating substantive convergence and the rationalization of the merger review process play a most important role.

### **III/ Strategies for facilitating substantive convergence and minimizing conflict (chapter 2)**

A major challenge of multijurisdictional merger review is the risk of inconsistent outcomes including conflicting remedies being imposed. ICC and BIAC support ICPAC in its belief that substantive harmonization and convergence among merger review regimes are the best means to minimize or even avoid conflict. However, ICC and BIAC believe that strong political efforts are required to achieve such convergence.

#### **Facilitate greater transparency**

ICC and BIAC support ICPAC's recommendations for greater transparency, and believe that most of the recommendations are already in place within the European Economic Area. Improvements could, however, be achieved not only in younger jurisdictions, but also in mature jurisdictions like the United States.

As currently more than sixty jurisdictions have merger control regimes, ICC and BIAC are concerned that while a survey of all jurisdictions with merger regulation including the identification of the separate substantive principles employed (and possibly different notification requirements) would be desirable, it would be almost impossible to achieve.

#### **Develop disciplines for merger review**

ICC and BIAC agree that the following disciplines should govern the merger review process in any jurisdiction concerned:

- Jurisdictions should apply their laws in a non-discriminatory manner and without reference to firms' nationalities.
- In general, non-competition factors should not be applied in antitrust merger review. As to any national security exemptions, these should be limited and not expanded beyond pure defence considerations.
- Political concerns should not play a role in the merger review process.

As to problems which may arise in competitor-driven processes, ICC and BIAC wish to point out that the real issue is not whether competitors or consumers have more influence on merger decisions. In any merger case, authorities should focus on achieving the most pro-competitive solution which is always to the benefit of consumers and competitors.

With respect to tailoring remedies to domestic markets, ICC and BIAC believe that this will not work in the case of global markets. In such cases, substantive convergence can be the only solution.

**Continue to enhance cross-border cooperation**

ICC and BIAC commend ICPAC for setting out the perspectives of the business and legal communities (including those submitted by ICC), as well as of the government agencies, in a fair and balanced way, and appreciate the inclusion of several of ICC's recommendations (see ICC Recommendations to ICPAC on Exchange of Confidential Information between Competition Authorities in the Merger Context no. 225/525 of 21 May 1999 and also ICC Statement on International Cooperation between Antitrust Authorities no. 225/450 rev.3 of 28 March 1996)

**Transparency:** ICC and BIAC particularly welcome the Report's emphasis on the necessity for increased transparency and "appropriate safeguards to protect the privacy and fairness interests of private parties" when competition authorities cooperate with each other. They believe that the proposed "Protocol" setting out a transparent legal framework could go a long way towards obtaining more confidence and support for the cooperation process from companies, provided the substance of the safeguards in place are satisfactory.

**Consent:** ICC and BIAC also agree with the Report that any change of US legislation to allow the sharing of Hart-Scott-Rodino information without the consent of parties should not be envisaged given the significant concerns surrounding the sharing of confidential information.

**Notice:** ICC and BIAC welcome the Report's recommendation that jurisdictions should commit to providing notice to the companies when sharing their documents with another jurisdiction. However, ICC and BIAC believe that in a merger context, where information and the confidentiality waiver is provided voluntarily, it would be reasonable for notice to always be given before disclosure.

**Statutory exceptions to preservation of confidentiality:** While ICC and BIAC acknowledge that increased transparency concerning domestic rules and practices on protection of confidentiality will go some way towards instilling confidence in the business community, it would disagree with ICPAC's view that measures to change or override exceptions in confidentiality protections are not needed at this stage. As multijurisdictional mergers and the resultant need for cooperation increases, the problems surrounding the protection of confidential information will become increasingly relevant. While not underestimating the potential difficulties involved in making fundamental amendments to domestic legislation, ICC and BIAC nevertheless recommend that serious study should begin on possible solutions to close gaps in the protection of confidential information in jurisdictions such as the US to increase business confidence in and support for interagency cooperation.

**Use of information for other non-merger purposes:** ICC and BIAC disagree with ICPAC's view that information obtained pursuant to a waiver should probably not be limited to use in the merger investigation (see footnote 97) Information is provided voluntarily by companies in a merger investigation and should not be used for any purpose other than that for which it was supplied. Companies could otherwise find themselves in a situation where they could incriminate themselves by voluntarily providing information for a merger, as this might then be used against them in the context of a cartel investigation.

**Waivers:** ICC and BIAC appreciate ICPAC including a targeted waiver among the three models proposed to take into account the business community's recommendations. They reiterate ICC's previously submitted view that use of targeted waivers, rather than blanket waivers, should be the norm to better allow companies to monitor any confidential information being shared. ICC and BIAC also prefer the practice of requesting companies to provide documents directly to each jurisdiction (see second model waiver) to that where the authorities themselves exchange documents, provided that information supplied directly by a company under a waiver is subject to the same safeguards as information obtained from another authority. This would allow companies to make any explanations of the information necessary and allow them more control over sensitive information. ICC and BIAC also suggest that waivers relating to the exchange of documents should set out a timeframe for their destruction or return to ensure companies know the fate of their documents after the end of an investigation.

**Legal privilege:** ICC and BIAC support the exclusion from the waiver of any documents covered by legal privilege under US law. In the interests of convergence, they strongly urge other jurisdictions to extend legal privilege to cover in-house counsel advice to provide the same level of protection as in the US for such information.

**Policy statement:** ICC and BIAC welcome the recommendation that authorities set out their legislation and practices relating to cooperation and information exchange in a publicly available policy statement. They also strongly support the principles which ICPAC recommends should be stated in such a statement i.e. that

- no negative inference will be drawn from a party's decision not to grant a waiver;
- the agency intends to use its best efforts to resist disclosure to third parties and to provide such notice as is practicable before disclosing any information obtained through the waiver to a third party (NB. ICC and BIAC believe however that notice should always be given prior to disclosure in the merger context); and
- the agency will promptly advise other relevant agencies and parties if information has been improperly disclosed so the significance for further information sharing can be assessed.

They suggest however that, to increase trust in the cooperation process, the following statements of principles should also be made:

- the agency will only generally request a waiver if this would speed up the merger review process and benefit all parties;
- the agency will keep any information exchanged to the necessary minimum;
- the agency will not request for information from another jurisdiction, especially in documentary form, unless it has exhausted its own administrative possibilities for obtaining the information independently; and

- the agency will not share any information with another jurisdiction unless it is satisfied that the information will be subject to conditions of confidentiality in that jurisdiction at least as stringent as its own.

ICC and BIAC also welcome ICPAC's recommendation that a policy statement should explain legislation and practice with respect to various areas such as applicable domestic confidentiality legislation/regulation re disclosure of confidential information and specific gaps in the protection of confidential information, as this will greatly increase transparency for companies. While ICC and BIAC fully agree with the areas which the Report suggests the statement should cover, they believe some guidance as to specific measures which should be taken in some of these areas would be useful as follows:

- *Definition of confidential information*: any information designated by a company to be confidential should be classified as such;
- *Marking of confidential documents*: confidential information should be logged, appropriately marked and segregated from other materials, and any copies made should be limited to the minimum necessary; and
- *Destruction or return of documents*: notes and copies of documents received through a waiver should be returned to the company or destroyed to prevent institutional knowledge after a period determined in the waiver.

#### **Develop work-sharing arrangements**

ICC and BIAC share ICPAC's objective of reducing burdensome duplication and welcomes the work-sharing proposals to the extent that these would help to reduce duplicate or multiple efforts. ICC and BIAC question, however, whether in practice different jurisdictions would be prepared to relinquish control of cases sufficiently to permit such advanced cooperation.

### **IV/ Rationalizing the merger review process through targeted reform (chapter 3)**

ICC and BIAC support the objective of reducing unnecessary and unduly burdensome costs. Whereas in the long term such a reduction should be achieved through a higher degree of convergence and work-sharing, ICC and BIAC agree that, as a short-term solution, transaction costs can be reduced by ensuring that each jurisdiction refrains from unduly burdening those transactions which do not have a sufficient nexus to the respective jurisdiction.

#### **Casting the merger review net appropriately: notification thresholds**

ICC and BIAC support transparent and objectively-based notification thresholds. The appropriate criteria are the world-wide turnover as well as the turnover in the jurisdiction and the turnover of the assets of the target.

ICC and BIAC do not agree with ICPAC's recommendation that competition authorities should have the authority to pursue potentially anti-competitive transactions under merger

rules if transactions do not satisfy notification thresholds. This creates unacceptable legal uncertainty for companies involved in a merger. If transactions which do not fulfill the notification thresholds do prove to have anti-competitive effects, these effects should be investigated under other rules such as the abuse of a dominant market position.

### **Reducing burdens on transactions that come within the merger review net**

ICC and BIAC agree that merger review should be conducted in a two-stage process so that authorities may identify and focus on transactions that raise serious competitive issues while allowing those that present no or only minor issues to proceed expeditiously.

### **Review periods and timing**

The recommended two-stage procedure should not be an open-ended process. The total two-stage procedure should not last more than five months.

ICC and BIAC welcome ICPAC's proposal to harmonize the rules pertaining to when parties are permitted to file premerger notifications. Filings should be permitted at any time after the execution of a letter of intent, contract, agreement in principle or public bid.

### **Notification forms and information requests**

It is also ICC's and BIAC's observation that some jurisdictions impose very substantial and unnecessary burdens through the use of very detailed filing forms. Thus, ICC and BIAC support ICPAC's recommendation that the initial notification should require only the minimum amount of information necessary to make a preliminary assessment of the competition issues arising out of the transaction.

ICC and BIAC also concur with ICPAC that the legal and factual issues presented by mergers should be narrowed as early in the review process as possible.

In multijurisdictional merger review processes, a common framework for merger notification through the Organization for Economic Cooperation and Development (OECD) may indeed lead to soft procedural harmonization. However, according to ICC's and BIAC's experience, there is an inherent risk that all the different requirements of the participating jurisdictions will be combined in such a common framework so that the objective of minimum notification requirements is not achieved.

### **Targeted reform efforts in the United States**

ICC supports ICPAC in its efforts to suggest reform efforts in the United States to improve the current merger review system. The recommendations contained in the ICPAC report are a good starting point for a detailed further discussion.

**Notification thresholds:** ICC agrees with ICPAC that the current size-of-transaction threshold as well as the foreign person exemptions should be substantially increased and periodically reviewed. In this context, ICC concurs with ICPAC that filing fees should be de-linked from funding for the agencies.



***Review periods and timing:*** Based on the experience of ICC members, ICC commends ICPAC on its criticism on the second-stage review process. However, ICC believes that the current US "second request" system has to be reviewed in principle with a goal of limiting the burden on the undertakings concerned and of providing legal certainty in a defined time frame.

***Notification forms and information requests:*** ICC also agrees with ICPAC's conclusion that the Har-Scott-Rodino notification form should be better focused. In particular, merging parties should be invited to provide specific data on the affected markets in order to allow the Federal Trade Commission (FTC) and the Department of Justice (DoJ) to quickly identify non-problematic transactions.

As to the current system of a second request, this system should be reviewed in principle as stated above. In the interim, the FTC and the DoJ should tailor their requests for additional information to the issues prompting the need for further review. Currently, according to the experience of ICC members, overly broad second requests are being issued. In this respect, ICC agrees with ICPAC's statement that the level of willingness to engage in productive negotiations to limit the scope of a second request appears to vary among staff members and counsels for merging parties, and modification requests are sometimes not resolved in a timely fashion.

***Multiple review of mergers:*** As in the case of international multijurisdictional merger review regimes, ICC commends ICPAC on its conclusion that concurrent jurisdiction among multiple domestic agencies should be avoided for the benefit of consistent policy approaches within a single jurisdiction.

## **V/ International cartel enforcement and interagency enforcement cooperation (chapter 4)**

ICC and BIAC fully support increased international cooperation to pursue cartels which are deleterious to the fair conduct of business and harm law-abiding companies. Nevertheless, the pursuit of this worthwhile objective does not negate the need for legal safeguards and protections for companies under investigation (which may or may not be proved guilty), especially as penalties for antitrust offences are becoming increasingly serious. Overall, however, ICC and BIAC commends ICPAC for what it regards as a realistic and reasonable approach to international antitrust enforcement and cooperation.

### **Improving knowledge about international cartels**

ICC and BIAC agree with ICPAC's conclusion that it is unclear whether the recent surge in US prosecutions means that there are more international cartels in operation now than in the past. The available information rather suggests that companies take great care to comply with all the requirements of antitrust laws when operating internationally, including in particular

avoidance of cartel activity and other hard core offences. ICC and BIAC therefore would welcome further examination and assessment of the relevant facts regarding this issue.

ICC and BIAC also agree with the recommendation that the US expand its efforts to increase public awareness of the deleterious effects of cartels and share its experiences with foreign enforcement authorities. Such efforts and further interagency cooperation should help to reduce friction over extraterritorial enforcement of US antitrust laws. ICC and BIAC believe that better international understanding and cooperation would be achieved if national enforcement authorities were prepared to share more responsibility for investigation and enforcement with foreign agencies which are closer to the suspected anticompetitive activity.

### **Increased transparency in handling confidential business information**

ICC and BIAC appreciate ICPAC's recognition that the exchange of confidential information between competition authorities continues to be of concern to the international business community. They agree completely with the recommendation that such exchanges should feature appropriate safeguards to prevent leaks, and greater transparency to improve business confidence, avoid adverse commercial consequences and protect the rights of companies targeted for investigation. ICC and BIAC do not agree, however, that business concerns about interagency sharing of protected information is less germane in cartel enforcement than in multi jurisdictional merger review.

ICC and BIAC therefore welcome and support ICPAC's recommendation that US authorities provide notice of their intent to disclose information to antitrust authorities in other jurisdictions. They respectfully submit that the general rule should be that notice will be given before the fact in all civil matters and whenever possible in criminal investigations to permit companies to take appropriate action to protect their rights. This should apply in all cases, except where prior notice clearly would violate a treaty obligation of the United States or a court order or jeopardize an ongoing investigation into a hard core cartel. It should be noted, however, that this opinion is divided and some ICC and BIAC members believe that prior notice and the opportunity for judicial review should always be provided before exchange, and this without exception. Nevertheless, if prior notice is not given, notice after the fact should be given as promptly as possible, and when information is voluntarily provided to enforcement authorities, restrictions on use or disclosure should be respected. The issue of notice has important implications for companies and merits further discussion. In any event, whether notice is provided before or after the fact, it is essential that adequate safeguards are applied to ensure the protection of any confidential information exchanged (see ICC Statement on International Cooperation between Antitrust Authorities no. 225/450 rev.3 of 28 March 1996 and ICC Recommendations to ICPAC on Exchange of Confidential Information between Competition Authorities in the Merger Context no. 225/525 of 21 May 1999)

ICC and BIAC heartily support ICPAC's position that confidential information should not be shared with the enforcement authorities of other jurisdictions which have not enacted appropriate safeguards for the protection of such information under their own laws or which have not demonstrated a commitment to protect confidential information.



ICC and BIAC are disappointed that ICPAC did not accept suggestions for limitations on the use by US enforcement authorities of confidential information which has been produced voluntarily to foreign agencies for a different purpose in an entirely different legal context<sup>1</sup>. They urge, for example, that further study should be made of whether and under what circumstances it may be improper for US authorities to use for purposes of criminal prosecution in the US information which has been voluntarily submitted to an agency in another jurisdiction in the context of a civil administrative proceeding. Without some such limitations, companies will hesitate to provide information to foreign authorities, hindering their proceedings. This is counterproductive to increased cooperation.

### **Positive incentives**

ICC and BIAC wholeheartedly support ICPAC's recommendation that US authorities expand the jurisdictions with which they have cooperation agreements and deepen cooperation with competition authorities in other jurisdictions. They also support positive incentives and increased technical assistance to foreign agencies. The goal should be to develop a shared culture of sound competition policy around the world, increase public confidence in interagency enforcement cooperation and to reduce tensions associated with US extraterritorial enforcement. Where suspected anticompetitive activities clearly are centred in other jurisdictions, US authorities should utilise the positive comity provisions and rely on the local enforcement agencies to investigate and bring appropriate actions under their own laws.

With that in mind, ICC and BIAC agree with ICPAC's recognition of the need and desirability of addressing differences in national approaches to competition that have international consequences. It believes that this would help both to avoid unnecessary tensions and to promote sound antitrust policy in the international arena. ICC and BIAC further support ICPAC's proposal for continued efforts to achieve greater harmonization of procedural and substantive features of nonmerger enforcement as well as of merger notification.

## **VI/ Where trade and competition intersects (chapter 5)**

### **Relevant practices**

ICC and BIAC agree with ICPAC's recognition that anticompetitive restraints in international trade stem from not only private restraints of trade, but from governmental practices and restraints of a mixed private and public nature as well.

### **Bilateral agreements with positive comity**

Until such time that there is international consensus on competition rules that establish a strong rules regime, and recognizing the risk in committing prematurely to a rules regime, ICC and BIAC support ICPAC's recommendation calling for further development of bilateral agreements with positive comity to address anticompetitive restraints affecting trade. They

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<sup>1</sup> See European Community case law: Spanish Banks: C-67/91[1992]ECR I-4785; SEP: C-36/92P[1994]ECR I-1991

thus endorse the specific recommendation that the US-EC positive comity agreement may serve as a model for future agreements in additional jurisdictions.

ICC and BIAC also agree that efforts should be undertaken to strengthen communication and transparency in the positive comity process, and that positive comity be used as an initial policy response, rather than unilateral action.

### **Extraterritoriality**

The issue of "extra-territorial" application of national laws raises great sensitivities in the international business community, both within the antitrust field and in other areas. ICC and BIAC believe that the matter involves two distinct questions: First, to what extent does public international law recognize national jurisdiction over conduct occurring abroad? Second, to the extent that such jurisdiction exists, when is it appropriate to exercise it in antitrust cases? Given the long history of international friction over issues of "extra-territoriality", ICC and BIAC believe that the first question needs to be more carefully addressed.

With regard to the second question, ICC and BIAC endorse ICPAC's recommendation that the preferred approach to cross border antitrust enforcement should focus on cooperation and consultation between authorities. However, even where jurisdiction exists, ICC and BIAC believe that the use of antitrust laws as a lever to encourage other nations to pursue particular enforcement action, or in export foreclosure cases, is particularly sensitive and potentially divisive.

ICC and BIAC support continued empirical analysis of global trade problems that stem from private, governmental, or mixed anticompetitive restraints, and analytic efforts to evaluate the magnitude and effects of transnational anticompetitive practices.

### **Role of international organizations**

ICC and BIAC agree the WTO is not an appropriate forum for the review of private restraints and that the WTO should not develop new competition laws under its framework at this time. ICC and BIAC also agree that a dispute settlement mechanism within the framework of a multilateral agreement on competition laws raises many complex issues and is premature at the current time. At the same time, it believes that ICPAC should clarify its suggestion that additional efforts be made to "[d]evelop improved ways of resolving disputes."

ICC and BIAC welcome the continuing work of the WTO Working Group on the Interaction between Trade and Competition Policy regarding market access and other aspects of the interaction between trade and competition policy and its role in providing a multilateral forum for continued discussion and convergence of competition policy norms. They therefore endorse ICPAC's view that the WTO can serve as a deliberative and educational body.

The ICPAC report notes that "the WTO may be called upon to resolve disputes between nations that hinge on whether private practices that foreclose access to markets are ultimately attributable to governmental practices" and that the "line between public and private restraints" is an important area for attention by trade and competition policymakers. ICC and

BIAC believe that the issue of whether there is sufficient government conduct to amount to a justiciable "measure" under the WTO Agreements is not specific to the trade and competition interface debate. However, hybrid anticompetitive restraints arising from both private and government action are an appropriate subject for further discussion within the WTO Working Group.

## **VII/ Preparing for the future (chapter 6)**

ICC and BIAC commend ICPAC for taking a longer term view and for addressing issues of emerging importance for international competition policy.

### **Global competition initiative**

While this is an intriguing and interesting proposal, it is rather vague and the scope and purposes of such a mechanism require much more clarification, study and debate. ICC and BIAC support the reasoning that many international competition policy issues need to be discussed separately from other policy issues and that the participation of all interested countries as well as the private sector in the debate is desirable. ICC and BIAC question however whether the ambitious work programme proposed could realistically be carried out by an ad hoc structure as described.

ICC and BIAC also agree that the work of the OECD, WTO and UNCTAD on competition policy, despite the institutional limitations of each organization, has together made a valuable contribution to the development of international competition policy and that their work should be encouraged to continue. While WTO allows a broad-based educational process, the OECD can foster soft convergence of more specific issues. Work on even more specific issues could take place among smaller groupings of like-minded jurisdictions.

### **International mediation of competition disputes**

While a mechanism to facilitate the resolution of conflicts between competition authorities would be welcomed by the business community to the extent that this would avoid conflicting decisions and help accelerate the regulatory process, ICC and BIAC question the extent to which governments would be prepared at this moment in time to submit to mediation as proposed in the Report.

### **Electronic commerce**

ICC and BIAC agrees that the impact of electronic commerce on competition policy is a subject worth further study and commend ICPAC for identifying some of the key issues.



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