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Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between.

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I. Introduction.

Cross border merger control has traditionally been a difficult subject for multinational co-operation, non-the less harmonisation. The multitude of interests at stake and the heterogeneous multinational environment mean that attempts to reduce inefficiencies stemming out of multi-jurisdictional merger review face resistance at various levels. This paper examines the domestic nature of merger control and how it affects the feasibility and effectiveness of cooperation and convergence in merger regulation. It explores the role of bilateral and multinational initiatives in merger control and identifies their limits. In doing so, the discussion echoes the challenges for undertakings and agencies operating in the current sub-optimal environment of multiple enforcers and the difficulty of resolving present inefficiencies.

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II. When national (merger control) meets international (business).

The friction generated by the misfit between national merger control and cross border economic activity has long been recognised. Although globalisation processes have strongly influenced national economies and brought them closer to interdependence, the impact of globalisation did not lead to similar results in merger review.

This tension is mostly felt at two levels. At the agencies' level it may result in 'system friction'.[1] As each competition agency conducts its independent analysis the simultaneous application of numerous domestic merger regimes to a single transaction may lead to conflicting decisions and remedies. This is even more so when competition agencies apply different laws, different economic models or involve domestic 'industrial' considerations in the decision. In these cases, even when the transaction has similar effects in all jurisdictions, the agencies may reach inconsistent decisions.

At the undertakings' level, the multitude of merger regimes appraising the same transaction generates costs and uncertainty. The proliferation of merger regimes operating worldwide is a welcome product of states' understanding the significance of monitoring transactions, yet it has resulted in marked over regulation and led to reduction in legal and business certainty. Undertakings are required to identify the relevant jurisdictions, engage in multiple filings and are subject to an array of different regulations. It has become routine for merging parties of large transactions to submit numerous notifications and to go through multiple investigation procedures, losing predictability that is so valuable to all commercial transactions.[2] In practice the most rigorous jurisdiction which reviews the transaction determines, *de facto*, the level of

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[1]On system friction see: MJ Trebilcock & R Howse (2nd. ed 1999), The Regulation of International Trade, Routledge London, 467.

[2] For example, the *Exxon/Mobile* transaction was reportedly subjected to merger review requirements in roughly forty jurisdictions. The *Alcan/Pechiney/Algroup* transaction triggered sixteen merger notifications. Similarly, the *Gillette/Wilkinson* merger needed to be approved in fourteen jurisdictions. These multiple procedures are carried out in different languages, involve notification filing fees and legal and consultancy fees. They involve different procedure and substantive law, different notification requirements and different levels of information.

burden on the undertakings.[3] When the nexus between the transaction's effect and the reviewing jurisdiction is limited, the unnecessary over scrutiny results in significant inefficiencies.[4]

Faced with these sub optimal effects and at the wake of increased merger activity, the international community sprung into action attempting to resolve the friction or at least relax it.[5] Yet the heterogeneous nature of the multinational arena characterised by distinct economic, social and legal policy differences made some initiatives in merger control difficult to advance. Two complementary and interdependent variables should be observed when discussing these initiatives. First, the legal nature of the provisions should be noted. Agreements may include binding provisions or provide voluntary guidelines, they may involve detailed regulation or reflect a minimal approach focusing only on core principles. Second, the scope of membership should be considered. The number of states subscribing to an agreement or joining an initiative is central to its success and its impact on the global arena.

In the domestically oriented area of merger control these two variables tend to cancel each other out. The multitude of incentives and domestic considerations make it difficult to advance an inclusive system with detailed binding provisions. In most cases, due to negotiation difficulties, an increase in the number of participants dilutes the substance of the agreement. Consequently, a move from a multinational arrangement to a focused multinational, regional or bilateral agreement may facilitate finding common ground and achieving a binding understanding. Yet, these efforts may have limited

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[3] SW Waller (2000), 'Bringing Globalism Home: lessons from Antitrust and Beyond', Loyola University Chicago Law Journal, 32, pp. 113, 134

[4] See: DOJ International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), Final Report (ICPAC Report). The ICPAC report referred to most transaction costs imposed by merger regimes as legitimate costs of doing business. However the report highlighted the need to focus on 'unnecessary and burdensome costs that have little or no relationship to antitrust enforcement goals'. See: ICPAC Report Chapter 3, p. 5

[5] It should be noted that competition law is only one of a range of regulations applicable to cross border transactions and thus not the sole cause to the dissonance accompanying merger and acquisitions in a global environment.

impact at the wider multinational level. Additionally, they may lead to fragmentation or result in incompatibility between the regional efforts and wider- multilateral agreements.[6]

Several factors may contribute to the difficulty of negotiating a wide membership agreement on multi-jurisdictional merger review. Naturally, different states may have different views on the role and purpose of competition law and the type of regulation it necessitates. This is especially noticeable when considering the different approaches of developing and developed countries in negotiating such agreements.[7]

Other factors may be traced to domestic considerations which may affect the willingness of states to cooperate. Sovereignty and control over the domestic market are two of the most prominent considerations in this respect. In essence, states are less likely to favour an agreement which would undermine their ability to freely determine the outcome of the merger assessment or to advance domestic non-competition, industrial considerations in their appraisal. Non-competition considerations may include industrial factors used to protect the national market from foreign transactions or strengthen it by not prohibiting an otherwise anticompetitive domestic transaction. They may include a wish to create a "national champion" or protect domestic industry. They may promote the creation of new local employment opportunities, or they may be aimed at increasing domestic welfare. In the multinational scene these tend to reduce transparency and legal certainty and increase the likelihood for friction. Yet, national jurisdictions may refuse to wave the power to consider domestic elements and may therefore oppose joining a framework that would deprive them of such flexibility.

The 'balance of powers' between states may also play a role in their approach toward negotiation. For example, extraterritorial policies may affect the willingness of

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[6] GP Sampson (1996), 'Compatibility of Regional and Multilateral Trading Agreements: Reforming the WTO Process', American Economic Review, pp. 88, 89; P Krugman (1991), 'Is Bilateralism Bad?', in E Helpman and A Razin (eds) International Trade and Trade Policy, MIT Press Cambridge, Mass, pp. 9-24; MW Barrier (2000), 'Regionalization: The Choice of a New Millenium', Currents: International Trade Law Journal, 25.

[7] See generally: WTO Working Group on the Interaction between Trade and Competition Policy (2004) WT/WGTCP/W/246; UNCTAD Annual Report 2004 (2005); also see generally W. Berg and H. Bielesz (2003), 'The WTO and Competition: Options and Perspectives', Int. T.L.R., 9(4), pp. 94-100

jurisdictions to join a multinational effort.[8] States that operate a successful extraterritorial regime may not be inclined to join a wide multinational agreement on merger control and would arguably favour a more selective form of agreement. These jurisdictions may be able to protect their domestic market through unilateral action without the concessions associated with a wide membership cooperative agreement. Extraterritoriality may provide them with a protective tool to block remote transactions when the transactions affect their local market. The costs of such extraterritoriality are mainly felt by foreign undertakings that are subject to additional notifications and associated costs. This burden may not generate much concern for the appraising jurisdiction as it may be less troubled about costs applied to foreign firms.

Linked to this, is the use of extraterritoriality as a vehicle to transfer wealth from consumers and undertakings in one jurisdiction to another.[9] Competition restraints often transfer wealth from consumers to undertakings while reducing economic efficiency. When embedded in a multinational scene, restraints frequently transfer wealth from consumers in one country to owners and producers in another.[10] While a given jurisdiction may strive to protect its local market from a negative transfer of wealth, the other jurisdiction, that receives the positive transfer of wealth caused by the anticompetitive behaviour of local corporations, may be reluctant to act against such behaviour. Subsequently, nations may lack incentive to regulate activities which create externalities felt elsewhere. For the same reason, they may disfavour a wide multinational agreement that would deprive them from obtaining these benefits through unilateral action.[11]

See generally: A.T Guzman (2004), 'The Case for International Antitrust', in R.A Epstain and M.S Greve (eds) Competition Laws in Conflict , Antitrust Jurisdiction in the Global Economy, 99; A.T Guzman (2001), 'Antitrust and International Regulatory Federalism', New York University Law Review, 76, p. 1148 ; A.T. Guzman (2002), 'Choice of Law: New Foundations', Geo. L.J., 90, p. 883.

[9] A. Ezrachi (2002), 'Globalization of Merger Control: A Look at Bilateral Cooperation Through the GE/Honeywell Case', Fla. J. Int'l L., 14, p. 397

[10] DJ Gerber (1999-2000), 'The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective', New England Law Review, 34, pp. 124, 125-126; Guzman n 8 above.

[11] In the absence of other potential benefits achieved through the proposed framework, it may choose to oppose it. See generally A. Ezrachi (2004), 'The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control', Geo. Wash. Int'l L. Rev., 36, p. 433

Overall, this multitude of interests leads to conflicting views on the necessity of agreement. Similarly it results in different views on whether such agreement should aim toward full harmonisation, convergence or more limited coordination and cooperation. This friction has meant that the binding multinational level, despite theoretically being the most adequate to advance initiatives on merger control,[12] is at present too fragmented to provide relief. Several failed attempts of the international community to advance binding agreements on competition law reflect this situation. From the Havana Charter,[13] through the Munich group initiative[14] and to attempts at the World Trade Organisation,[15] the international community was unable to reach meaningful binding agreements on competition law and policy. Merger control, being more domestically oriented and complex has traditionally been left out of these binding attempts.[16] Indeed, the sensitivity of merger control, its direct influence on market structure, economic state and consumer welfare make it an unlikely candidate for a binding multinational agreement.[17]

The heterogeneous environment of multinational merger control dictates a balance point that differs from an optimal wide membership binding arrangement. Similarly, it infers that proposals for a supranational merger agency or a multinational code are not viable. Difficulty in negotiating a binding framework on merger control

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[12] For a proposal to create a limited international merger control regime in the context of the WTO see: A. Fiebig (2000), 'A Role for the WTO in International Merger Control', Nw. J. Int'l L. & Bus., 20, p. 233

[13] See: B Ingham (1998), From ITO to WTO: Trade and Protection in a Changing World; L Moore (1985), The Growth and Structure of International Trade Since The Second World War, 42-50; C Wilcox (1949), A Charter for World Trade, Macmillan Co. New York, 103-113,153-160

[14] The Munich Draft International Antitrust Code; reprinted in (1993) Antitrust & Trade Regulation Report 65, No. 1628; MJ Trebilcock and R Howse (2nd. 1998), The Regulation of International Trade, 472.

[15] J. Drexl (2004), 'International Competition Policy After Cancun: Placing a Singapore Issue on the WTO Development Agenda', W. Comp., 27 (3), pp. 419-457; WTO Working Group on the Interaction between Trade and Competition Policy, n 7 above.

[16] Referring to the role of the WTO in advancing agreement on multi-jurisdictional merger control, Frederic Jenny, chairman of the WTO Working Group, commented that a solution was unlikely to come from a global one-stop-shop run by the WTO. The role of the WTO in this context would be limited to overseeing consistency between regimes and ensuring that merger control was not used for political ends; M Pesola (2001), 'Merger Control: the Search for Harmonisation', Global Competition Review, pp. 20, 21; reporting from the IBC conference on International Merger Control, February 2001

[17] On the different approaches toward bilateral and multinational co-operation see: DP Wood (1999), 'Is Co-operation Possible?', New England Law Review, 34, p. 103; DP Wood (1995) 'The Internalization of Antitrust Law: Options for the Future', DePaul L. Rev, 44; SW Waller (1996 - 1997), 'National Laws and International Markets: Strategies of Co-operation and Harmonization in the Enforcement of Competition Law', Cardozo Law Review, 18, p. 1111; Mr. Jean–Francois Pont, deputy Director-General, DG IV, European Commission, 'International Co-operation Between Competition Authorities' [Speech, 26.9.1995] Conference "Competition Policy in Transition Economies". Moscow.

shifts the emphasis to two complementary dimensions. At the wide multinational level, non-binding, voluntary arrangements were found to provide a useful vehicle to advance cooperation and convergence in merger control. At the bilateral and regional levels, selective binding bilateral or focused multinational agreements between states which shares commonality of interests, provided useful platforms for high volume cooperation. Although in theory both inferior to a binding multinational agreement, these currently provide the main vehicles to advance convergence and cooperation in merger control.

Reflecting back on the two interdependent variables, of the legal nature of the agreement's provisions and the agreement's membership, it is easy to see the strengths and weaknesses of each of these approaches. The binding bilateral agreement although likely to facilitate high quality cooperation, extends only to two jurisdictions. On the other hand, the multinational non-binding framework although including numerous participants, involves voluntary provisions and may fail to result in wide compliance.

In what follows, we assess the contribution of these two vehicles to the global environment of merger control.

III. Non binding multinational initiatives.

The complexity of achieving a multinational harmonised system for merger control serves as the fuel for the adoption of non-binding recommendations. The striking benefit of voluntary frameworks is their inclusiveness. 'Soft law' initiatives enable more jurisdictions to take part in the development and consideration of guidelines without undermining their sovereignty. As such, voluntary initiatives bypass the difficulties associated with binding frameworks and allow jurisdictions to jointly reflect on the law and procedure surrounding merger control and their impact at the national and multinational level.

On the other hand, the limits of voluntary frameworks lie in the difficulty of transforming general non-binding guidelines into actions. At the implementation stage,

voluntary frameworks may face similar resistance as binding frameworks. Selective implementation echoes the difficulties in achieving meaningful agreement at the multinational level. The roots of this selectiveness may vary. Some states may disagree with the legal merit of the provisions. Others may not see the merit in converging toward the agreed benchmark. This may be the case when for example the proposed guidelines override domestic interests or undermine the sovereignty of the state. On a practical level, difficulties in implementation may also hinder compliance. In general, recommendations which may be adopted within the existing legal framework may be easier to implement than more fundamental changes which affect the domestic regulation. In this respect it is worth noting that procedural differences which may seem easy to assimilate may in fact reflect different administrative or judicial regimes and may be difficult to bridge over. [18]

With this theoretical background in mind it is interesting to review the recent non-binding multinational initiatives.

Three forums have particularly dominated the multinational scene, advancing non-binding guidelines and frameworks in competition law. These are the United Nation Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). In the area of cross-border merger control, most noticeable are efforts undertaken by the OECD and ICN.[19]

Since its inception in 2001, the ICN has provided a significant contribution in the area of cross border merger control. The network and its activities emerged out of an understanding that competition authorities and specialists working together could best

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[18] R Pitofsky (2000), 'EU and US Approaches to International Mergers – View from the U.S. Federal Trade Commission', in IBA (eds) EC Merger Control: Ten Years On, IBA London, 47.

[19] In the area of cross border mergers and acquisitions work conducted by UNCTAD has been limited to studies on foreign direct investments, the stimulation of discussion and the creation of a Database on Cross-Border Mergers and Acquisitions. Note however UNCTAD's Model Law on Competition (2004) (Doc TD/B/RBP/CONF.5/7/Rev.2) which deals in Chapter VI with 'Notification, investigation and prohibition of mergers affecting concentrated markets'. Also note generally extensive work conducted by UNCTAD on other areas of competition policy; The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (5 December 1980) (Doc. TD/RBP/Conf.10/Rev.1), UNCTAD Annual Report 2004 (2005)

promote effective competition in a global environment.[20] Members of the ICN are national and multinational competition agencies that are joined by representatives from the private sector and play an important advisory role.[21] The composition of the ICN, the work at the agencies' level and the voluntary nature of the recommendations relax some of the difficulties associated with binding multinational agreements and allow a wide membership on a professional, rather than a political basis. Additionally, the flexibility of the network and its focus on working groups permits 'frequent, informal and low cost interaction which can produce concrete results far more quickly than the periodic formal meetings that have characterised the work of more traditional international organizations in the past.'[22]

In the area of merger control the ICN merger working group has engaged in extensive work aimed at promoting guidelines on best practices in the design and operation of merger review. These initiatives are aimed, among others, at facilitating procedural and substantive convergence between jurisdictions and reducing costs and inefficiencies stemming from multi-jurisdictional merger reviews. The working group, through various sub groups, has developed a range of guidelines and recommended practices. These include amongst others Guiding Principles and Recommended Practices for Merger Notification and Review Procedures, Recommended Practices for Merger Notification and Review Processes, Recommended Practices on Remedies and Competition Agency Powers, and discussion papers on Waivers of Confidentiality and Merger Notification Filing Fees.

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[20] Support for the creation of this independent framework was found in the ICPAC Report, the EC Merger Control 10th Anniversary Conference, and the 2000 Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy. See: ICPAC (n 4 above); J Klein (2000), 'Time for a Global Competition Initiative?' in IBA (eds) EC Merger Control: Ten Years On, 59, 60– 64; AD Melamed (2001), 'Promoting Sound Antitrust Enforcement in the Global Economy', Fordham Corporate Law Institute 1; M Monti (2001), 'European Competition for the 21st Century', Fordham Corporate Law Institute 257, 264-266

[21] Id

[22] W J Kolasky 'The International Competition Network Guiding Principles for Merger Review' (September 20, 2002) Presented at the International Bar Association Sixth Annual Competition Conference, Italy.

The work of the ICN led to consensus that arguably would not have been achieved through a binding framework. The contribution of these studies and recommendations is noticeable; the discussion which accompanies them stimulates interaction between different jurisdictions and improves understanding between agencies. Similarly, the common voluntary guidelines have significance in the long run as they provide a norm-generating vehicle and a valuable benchmark which agencies can relate to and gradually assimilate into their national regimes.[23] These developments are significant both at the substantive and procedural levels as they reduce likelihood for conflicting decisions and remedies and contribute to reducing costs and inefficiencies stemming from multi-jurisdictional merger reviews and notifications.[24]

Beyond the benefit which stems from the interaction between competition agencies, the question of compliance with recommended guidelines is a key to the success of the ICN's activities. A report on the Implementation of the ICN Recommended Practices for Merger Notification and Review Processes was presented at the Fourth Annual ICN Conference which took place in June 2005 (ICN Report).[25] The ICN Report, based on interviews with officials and members of the private sector in twenty seven jurisdictions reviewed the implementation of guidelines by members and set forward recommendations to facilitate compliance. The study highlighted the contribution of the guidelines as a benchmark for competition agencies and a catalyst for change.[26] It additionally underlined the role of all stakeholders, including the agencies, the practitioners and academics in promoting implementation and building consensus. Implementation may be selective and at times difficult, yet the ICN supported by the

[23] This process of convergence is particularly significant for new or young merger regimes that can assimilate and bring closer their emerging regulation to the multinational agreed benchmark. The effect of voluntary provisions on domestic jurisdictions may be linked to the maturity of the regime. Developing countries and economies in transition, once committed to adopting competition legislation, may find it easier to adopt competition laws that are consistent with multinational guidelines, as they would be filling a relative void. Jurisdictions with a mature merger regime may find it more difficult to introduce far-reaching changes that may conflict with existing regulation and policy.

[24] On the positive effect these guidelines may generate if implemented, see (May 2005) Global Competition Review p. 24

[25] Available online: http://www. internationalcompetitionnetwork.org/bonn/Mergers_WG/SG1 _Notification_Procedures/Implementation.pdf

[26] See also presentations at the implementation session, Fourth Annual ICN Conference: Maria Coppola, US Federal Trade Commission; Ron Stern, General Electric, Washington D.C.; Available online: http://www.internationalcompetitionnetwork.org/

OECD and other stakeholders has placed emphasis on devoting resources to promote successful compliance. Reportedly, a large number of ICN members appear to be taking steps to implement the recommended practices for merger notification and review processes: 'As of April 2005, 46% of ICN member jurisdictions with merger laws have made or have proposed changes that bring their merger regimes into closer conformity with the Recommended Practices; an additional 8% are planning to make such changes.'[27]

Evaluating implementation may not always be easy and perceived compliance rates may differ between the private sector and competition agencies.[28] Similarly, compliance by some regimes may be the result of them being successful in promoting their domestic regime as the agreed benchmark rather than a willingness on their behalf to conform to agreed principles. Still, the encouraging report from the ICN highlights willingness to move toward common principles. Illustrating in this respect are comments made by the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel. Announcing changes to the Australian Competition and Consumer Commission's informal merger clearance guidelines, the Chairman stressed that the new guidelines are underpinned by the ICN Recommended Practices and Guiding Principles for Merger Reviews: 'we acknowledge our own practices must measure up to the world's best practice, as spelled out in the ICN recommendations. To that end we are in the process of developing additional guidelines that address the ICN recommendations.'[29]

The work of the ICN adds to existing activities of the Organisation for Economic Cooperation and Development which has been promoting non-binding recommendations

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[27] See ICN Report p. 4 (n 25 above). The report highlights developments achieved worldwide by various agencies including the Mexican Federal Competition Commission, the Australian Competition and Consumer Commission, The US Department of Justice and the European Commission.
[28] S.J Evenett ' "Soft Law" and International Economic Regulation: The Case of Mergers and Acquisitions' (paper, 4 February 2005)
[29] For the full text of the speech see: http://www.accc.gov.au/content/index.phtml/itemId/510720/fromItemId/8973; Also see comment on the announcement in Maria Coppola's presentation at the implementation session, Fourth Annual ICN Conference. (n 26 Above).

in the area of competition policy for many years.[30] Through its Committee on Competition Law and Policy, the OECD has pursued international cooperation and convergence since the 1960s.[31] In addition, since 1991 the OECD Global Forum on Competition has provided an inclusive venue for wide membership discussion and further increased the OECD's contribution in fostering convergence in both developed and developing countries.[32]

In the area of merger control the OECD has engaged in developing voluntary tools and recommendations. In 1999 the OECD released a Report on Notification of Transnational Mergers, which included a non-binding common filing form to assist in notifying transnational mergers.[33] The report partially implemented recommendations of the Whish and Wood study published by the OECD in 1994. This study examined merger control procedures and provided several recommendations to facilitate multi-jurisdictional merger review. Among them were the utilisation of a common filing form with common information requirements and the convergence of time periods for appraisal of transactions.[34] In 2005 the OECD issued a set of Recommendations on Merger Review.[35] The recommendations included reference to the work conducted by the ICN and are in conformity with its Recommended Practices for Merger Notification and Review Processes. In addition to the work on merger notification and review the OECD fostered debate on a range of subjects including, portfolio effects in conglomerate

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[30] See for example the *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade* (C(95)130/FINAL) and the Recommendation on Co-operation Against Hard-Core Cartels (1998).

[31] See generally: Terry Winslow (2001), 'The OECD's Global Forum on Competition and other Activities', 16-Fall Antitrust 38

[32] Established in 2001, the forum set to stimulate policy dialogue beyond the OECD membership. The Fifth Global Forum on Competition meeting took place in February 2005 and was attended by approximately 80 delegations, representing 70 countries and economies, international and regional organisations, the business and labour communities, consumer groups, civil society organisations and the donor community. See Opening remarks of Mr. Richard Hecklinger, OECD Deputy Secretary General, available online: http://www.oecd.org/dataoecd/3/15/34461680.pdf

[33] OECD Committee on Competition Law and Policy (1999), Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL.

[34] R Whish and D Wood (1994), Merger Cases in the Real World – A Study of Merger Control Procedures, OECD Competition Policy Workshop, Paris.

[35] OECD Recommendation of the Council on Merger Review (23 March 2005) C(2005)34.

mergers,[36] merger remedies,[37] media mergers,[38] and merger review in emerging high innovation markets.[39]

Beyond the contribution of the debate within the OECD to stimulating discussion and cross fertilisation and the benefits stemming out of the OECD peer review process,[40] work of the OECD in the area of merger control was reported to contribute to the initiating and shaping of merger reform efforts in Brazil, Canada, Mexico and Poland.[41] Additionally, work conducted at OECD helped the development of the ICN Recommended Practices for Merger Notification and Review Processes.[42]

Without underestimating the significant contribution of the ICN and OECD activities to fostering convergence of thought and analysis and providing a valuable forum for interaction between different jurisdictions, it is worth noting again that the success of each voluntary initiative depends on a critical mass of members endorsing it. The encouraging ICN report signals a positive development. Nonetheless, it only heralds the beginning of a process. The substance of the recommendations adopted, the number of states endorsing them, and the real level of compliance will determine the future impact of these voluntary initiatives.

IV. Bilateral cooperation in a multinational setting.

Moving from the wide multinational level to more focused arrangements, it is interesting to consider the contribution of binding bilateral agreements to multi-jurisdictional merger review.

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[36] OECD Best Practice Roundtable on Portfolio effects in conglomerate mergers (January 2002) DAFFE/COMP(2002)5.

[37] OECD Best Practice Roundtable on Merger Remedies (Dec-2004) DAF/COMP(2004)21.

[38] OECD Best Practice Roundtable on Media Mergers (September 2003) DAFFE/COMP(2003)16.

[39] OECD Best Practice Roundtable on Merger review in emerging high innovation markets (January 2003) DAFFE/COMP(2002)20.

[40] Peer review constitutes a unique OECD activity which involves the monitoring of individual members' policies, laws, regulation and institutions. The process aims to improve policy making and compliance with agreed principles.

[41] See ICN Report p. 5 (n 25 above).

[42] See ICN Report pp. 5,6 (n 25 above).

From a multinational perspective, bilateral agreements may be regarded as inferior to multinational frameworks. The focus on a limited number of jurisdictions, although valuable, provides limited relief to cross-border inefficiencies stemming from the multitude of enforcers. However, it is precisely the limited membership to the agreement which enables states to reach detailed agreement on competition law and merger control. Countries with similar economic strength and trade patterns, which share similar legal systems and maintain reciprocal trading, will arguably share incentives for cooperation. When the intensity of trade with a potential partner justifies it, bilateral agreements provide a valuable platform for detailed cooperation.[43]

Although in principle the contribution of a bilateral agreement, even a very successful one, in the multinational scene is limited, some bilateral agreements may generate value beyond their realm. This will be the case when the agreement links two powerful mature regimes which are backed by extraterritorial policies. The unequal distribution of merger transactions and commercial activity across the globe also increases the dominance of some merger regimes. Noticeable are the three economic powers, the United States, the EU and Japan, often referred to as the Triad.[44] For example, from the world's largest 500 multinational enterprises, more than eighty percent are based within the triad.[45] These largest 500 multinational enterprises account for 90 per cent of the world's foreign direct investments and carry out half of all trade, often in the form of inter-company sales between subsidiaries.[46]

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[43] See illustrating comment from the European Commission Competition Directorate: 'While we have considered going further and concluding further bilateral agreements, we are not inclined to do so where it would be a waste of scarce resources, particularly for countries with whom we would only cooperate concerning one or two cases a year.' JF Pons 'International Cooperation Between Competition Authorities' (Speech, Competition Policy in Transition Economies, Moscow, 26 September 1995) sp1995_040_en.html

[44] See generally: R. Narula and A. Zanfei (2003), 'Globalisation of Innovation: The Role of Multinational Enterprises', DRUID Working Paper, No 03-15; AM Rugman (8 January 2001), 'The Illusion of the Global Company', Financial Times - Mastering Management, 8; L Fontagne, T Mayer, S Zignago (2004), 'Trade in the Triad: How Easy is the Access to Large Markets?' Discussion Paper No. 4442, Centre For Economic Policy Research

[45] 176 of the companies are located in the US, 161 in the EU, 81 in Japan. From the other 82, 13 are located in Canada, 11 in North Korea, 11 in Switzerland and 16 in China; *The Fortune Global Five Hundred* (July 25, 2005)

[46] AM Rugman (n 44 above)

The central position of the United States and the European Union, both in commercial terms and in the application of their competition laws naturally focus attention on the cooperation between these two leading jurisdictions and its effects.[47] Virtually any sizeable transaction involving international businesses these days is likely to be subject to review under both the US and EU merger regimes.

The EU/US cooperation in merger control has been remarkable in its effect on cross-border transactions scrutinised by both jurisdictions and has often been referred to by officials from both sides of the Atlantic as a notable success.[48] On a case by case level, the close cooperation yields significant efficiencies. It facilitates exchange of information between agencies,[49] coordination of requests for information[50] and coordination of action. The agencies routinely notify each other of ongoing investigations, exchange views on the relevant markets and the impact the transaction may generate and coordinate remedies when appropriate.[51] The close cooperation between the agencies also led to remarkable convergence of thought and analysis and resulted in a high degree of consistency and increased legal certainty for the undertakings involved.[52] The increased convergence between the jurisdictions was also reflected in the reform of the European merger regime

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[47] Agreement between the Government of the United States of America and the Commission of the European Committees Regarding the Application of their Competition Laws (23 September 1991) [1995] OJ L95/47; By a joint decision of the Council and the Commission on 10 April 1995, the agreement was approved and declared applicable. See: [1995] OJ L95/45; Also note the positive comity agreement (1998) which is not applicable to merger transactions.

[48] M Monti (2001), 'European Competition Policy for the 21st Century', Fordham Corporate Law Institute, 257; R Pitofsky (2000), 'EU and US Approaches to International Mergers – View from the U.S. Federal Trade Commission' in IBA (eds) EC Merger Control: ten years on, IBA London, 47, 48; Also see generally: J.J. Parisi, US Federal Trade Commission Counsel for European Affairs, 'Recent Developments in EC Competition Law and Policy', remarks before the American Bar Association Washington DC (March 2003).

[49] *MCIWorldcom/Sprint* (Case IV/M.1741) [2000] Initiation of Proceedings OJ C143; See also action brought by WorldCom against the Commission before the CFI, Case T-310/2000 *WorldCom v Commission* [2000] OJ C355/35; For the US perspective see: *US v. WorldCom, Inc.* & Sprint Corp. (D.D.C., June 26, 2000); DOJ Antitrust Division 'Justice Department Sues to Block WorldCom's Acquisition of Sprint', news release, 27 June 2000

[50] See for example: *WorldCom/MCI* (Case IV/M.1069) [1999] OJ L116; Also see: DOJ Antitrust Division 'Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell its Internet Business', news release, 15 July 1998

[51] See for example: GE/Instrumentarium, DSM/Roche**,** Bayer/Aventis, Solvay/Ausimont, Hewlett-Packard/Compaq, Carnival/P&O Princess Cruise. See: J.J. Parisi (n 48 above) pp. 35-42.

[52] See for example work conducted by the joint EU/US working group on merger remedies, procedures and the analysis of conglomerate mergers. Also note work carried out by the working group on the treatment of intellectual property issues in competition cases. See R. W. Tritell (2005), 'International Antitrust Convergence: A Positive View' , 19-SUM Antitrust 25

which took place in 2004.[53] For example the substantive test in the revised European Merger Regulation was reworded and extended beyond the concept of 'dominance'.[54] This change eliminated the potential gap which existed between the US 'substantial lessening of competition' test[55] and the previous European 'dominance' test and brought the substantive tests in both regimes closer together. Also noteworthy are the Horizontal Merger Guidelines issued by the European Commission as part of the merger reform. The Guidelines too reflect marked convergence in analysis between the two jurisdictions.[56] Additionally, the reform of the European merger regime introduced changes to the triggering event for which notification is sought and to the time limits for investigation. These changes introduced greater flexibility to the European procedure and potentially facilitate parallel simultaneous investigation by both US and EU authorities.[57]

As part of their mutual efforts to facilitate coordination, the US Federal Trade Commission, the US Department of Justice and the European Commission, issued best practice guidelines on cooperation in merger review.[58] The guidelines outline the methods used by the agencies to facilitate coordination. They are 'intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties and to increase the overall transparency of the merger review processes.'[59]

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[53] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ (2004) L 24/1; See also Green Paper on the review of Council Regulation (EEC) No 4064/89 COM (2001) 745/6 final [11 December 2001].

[54] Article 2, EC Merger Regulation. The new substantive test reads: 'A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular by the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'

[55] Sec. 7A of the Clayton Act (as amended 02/01/2001) 15 USC, Ch. 1, Sec. 18a

[56] See: 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' Official Journal, C 31, 05.02.2004, pp. 5-18; US DOJ & FTC (1992, revised 1997), Horizontal Merger Guidelines. Also note the treatment of efficiencies under the revised ECMR, see Recital 29 and the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

[57] Articles 4, 6, 10 EC Merger Regulation

[58] US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations <www.usdoj.gov/atr/public/international/docs/200405.htm>

[59] ibid

Due to the central position held by the EU and US in economic and legal terms, the bilateral cooperation between the two jurisdictions and the convergence it fostered, generate marked efficiencies in cross border merger control. Arguably, these efficiencies are not restricted to the bilateral level. First, these processes potentially affect jurisdictions which modelled their laws on either the EU or US regimes.[60] Second, these processes which bring the EU and US regimes closer together potentially facilitate negotiations at the multinational level, in which both jurisdictions set the tone and pace.

Beyond the EU/US relationship, the existence of various bilateral agreements on competition law creates a 'web of agreements'. Such web, although far from a multinational initiative, facilitates, cooperation, discussion and information exchange on a bilateral level, and thus has an overall positive effect on the wider multinational level.[61]

In order to complete the picture on the contribution of bilateral agreements to the wider multinational scene, the inherent limits of bilateral cooperation should be noted.

First, as mentioned above, the contribution of bilateral agreements is limited as it does not resolve inefficiencies stemming from multiple enforcers in the area of merger control.[62]

Second, some bilateral or regional efforts risk being sub-optimal from a global perspective if they promote principles that are potentially incompatible with multinational agreement or complicate the adoption of multilateral principles in the future.[63] Similarly,

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[60] See for example the contribution of US bilateral technical assistance programme. See submission to the OECD 'The United States Experience in Competition Law Technical Assistance: A Ten-Year Perspective (2002) CCNM/GF/COMP/WD(2002)20; Also see ICN Report p. 6 (n 25 above).

[61] See for example the wide range of bilateral agreements signed by both the European Union and the United States. The European Commission web site: http://europa.eu.int/comm/competition/international/bilateral/bilateral.html; The US Department of Justice website: http://www.usdoj.gov/atr/public/international/int_arrangements.htm

[62] Note that bilateral cooperation does not infer harmonisation of procedure and law. Subsequently differences in procedure, rights of third parties, timetables as well as in the substantive analysis remain.

[63] GP Sampson (1996), 'Compatibility of Regional and Multilateral Trading Agreements: Reforming the WTO Process', American Economic Review, 88, 89.

they may result in externalities or a protectionist approach aimed toward those who do not take part in the agreement.[64]

Third, bilateral agreements coordinate the work of two domestic agencies but do not substitute the independent analysis or harmonise their laws or their appraisal process. Focusing back on the EU/US bilateral agreement, although the cooperation contributes significantly to coordinating the investigation and reducing the risk of divergent decisions, it cannot completely eradicate conflicts and inconsistencies. As parties retain independent analysis and decision-making and as they focus on different markets, conflicts although relatively infrequent may be inevitable. A few examples from the successful EU/US cooperation may best exemplify this point.

The *General Electric/Honeywell* transaction which was reviewed by both EU and US competition agencies is very illustrative in this sense. While closely coordinating their actions, each of the jurisdictions held an independent review and relied on different economic theories in its decision-making or at least on different interpretations of theory put into practice.[65] The different approach taken in each of the jurisdictions led to conflicting decisions. The transaction was cleared by the US Department of Justice subject to minimal disposals but was later blocked by the European Commission which found it to severely reduce competition in the aerospace industry. Commenting on the European Commission *GE/Honeywell* decision, Charles A. James, then Assistant Attorney General for Antitrust, US DOJ, issued a statement backing the DOJ decision and stating that clear and longstanding US antitrust policy holds that the antitrust laws protect competition, not competitors, thus stressing the EU's more intervention-minded

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[64] P Krugman (1991), 'Is Bilateralism Bad?' in E Helpman and A Razin (eds) International Trade and Trade Policy, MIT Press Cambridge, Mass, pp. 9-24

[65] *General Electric/Honeywell* (Case IV/M.2220)[1997] Prior notification OJ C 46; DOJ News Releases (2 May 2001); On the transaction see generally: WJ Kolasky (2002), 'GE/Honeywell: Continuing the Transatlantic Dialogue', University of Pennsylvania Journal of International Economic Law, 23, p. 513; D.K. Schnell (2004), 'All Bundled Up: Bringing the Failed GH/Honeywell Merger in From the Cold' Cornell Int'l L.J., 217.

decision reflects a significant point of divergence.[66] The case, although unique in its circumstances, reflects the potential limits of cooperation.[67]

Arguably, bilateral cooperation may also fail to eliminate possible divergence flowing from differences in domestic perspectives. Even when reviewing the same markets, domestic considerations may find their way into the assessment and lead each jurisdiction to pull in a different direction. Linked to this may be the political debate which at times surrounds high profile transactions. The *Boeing/McDonnell Douglas* transaction provides an example of such domestic political intervention.[68] The merger, which sparked much attention and criticism, was actually handled by the US and EU in close cooperation. Yet it was accompanied by noticeable political pressure and aggressive lobbying.[69] At the end the transaction was cleared by both the European Commission and the US Federal Trade Commission but it shows how in an arguably domestic oriented assessment of a high profile transaction pure competition analysis may become entwined with political debate despite the existence of close cooperation.[70]

In *Boeing/McDonnell Douglas* both jurisdictions assessed the same global market. Absent domestic considerations or divergence in policies or assessment, such

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[66] Statement by Charles A. James, Assistant Attorney General for Antitrust on the EU's decision regarding the GE/Honeywell acquisition. <www.usdoj.gov/atr> (18 January 2001); The *GE/Honeywell* decision has created a rift between the competition agencies as the EU regarded the public DOJ reaction and criticism as inappropriate. In addition the EU disapproved the US vocal criticism that was heard in the OECD as part of the discussion on the portfolio effect doctrine. See: P Spiegel 'US Calls for More Antitrust Agreement With Europe', Financial Times, 26 October 2001, 11; Also see B Wootliff 'Bush Under Fire over GE' Daily Telegraph, 9 June 2001.

[67] In the context of EU US cooperation the case should be viewed as a unique transaction that triggered an uncommon difference in competition analyses rather than a transaction which reflects the majority of decisions.

[68] The case involved two international corporations located within the US and active in the market for large commercial jet aircrafts. The FTC cleared the transaction. On the other hand, the Commission raised concerns about the effect of the proposed merger. Following a high profile investigation and increasing tension between the EU and US, the Commission cleared the transaction subject to conditions. See: *Boeing/McDonnell Douglas* (Case IV/M.877)[1997] OJ L/336; See also opinion of the Advisory Committee on the case: [1997] OJ C 372; For the US decision see: *In re The Boeing Company/ McDonnell Douglas Corp*., FTC File No. 971-0051 (July 1, 1997) *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,295

[69] Editorial 'Brussels v Boeing', The Economist, 19 July 1997; Editorial 'Peace in our time: Boeing v Airbus', The Economist, 26 July 1997

[70] On the substantive differences in analysis see remarks by T.J. Muris, 'Merger Enforcement in a World of Multiple Arbiters', before the Brookings Institution Roundtable on Trade and Investment Policy (December 2001) Washington, DC.

circumstances would in most cases increase the probability for comparable decisions. At the risk of stating the obvious, this will not be the case when the transaction generates different effects on different regional or domestic markets. Dissimilar market realities are likely to trigger different competition concerns and result in different decisions and remedies. In such cases, cooperation between agencies may ease the burdens associated with information requirements and coordination of appraisal, but may not prevent different rulings which stem from different market realities.[71]

Reflecting back on the role of bilateral cooperation in the wider global environment of merger control it is evident that these agreements although highly beneficial at the bilateral level serve only partially to reduce multinational inefficiencies.[72]

On the positive side, bilateral agreements proximate the work of different jurisdictions, facilitate investigation and information gathering and relax some of the inconsistencies in analysis and procedure. With respect to the unique EU/US cooperation, the benefits of the agreement are noticeable due to high the level of commerce and domination of the merger regimes. Additionally, processes of convergence between the two jurisdictions have a positive impact on the wider multinational scene.

On the downside, when faced with significant overlap across multiple jurisdictions, the limitations of bilateral cooperation are clear as such cooperation does not prevent the multiple notifications, the duplicative proceedings and externalities between different jurisdictions.[73] From a multinational perspective, one may regard

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[71] See for example, the *Air Liquide/BOC* transaction (Case IV/M.1630)[1999] Prior notification OJ C 239; FTC file not published; Also see the Glaxo Wellcome/SmithKline Beecham (Case IV/M.1846) [2000]; FTC File No. C-3990; *Ciba-Geigy/Sandoz* transaction (Case IV/M.737)[1997] OJ L 201; *In re Ciba-Geigy Ltd*., FTC File No. 961-0055 (April 8, 1997) *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,182; UPM-Kymmene/Morgan Adhesives (Case IV/M.2867) Prior notification OJ C 229., *U.S. v. UPM-Kymmene Oyj*, (July 25, 2003) *reported in* (2003-2) Trade Cas. (CCH) ¶ 74,101.

[72] At the bilateral level, these agreements provide the most adequate platform for detailed case by case cooperation.

[73] Externalities may still occur under a bilateral agreement when a cooperative decision made by two jurisdictions has a negative effect on third countries. The two cooperating jurisdictions are likely to focus on the decision's effect within their markets and ignore negative spillovers on other nations.

bilateral agreements as a supporting vehicle which fosters selective cooperation and convergence between leading agencies but such vehicle only partially relaxes the inefficiencies present at the multinational level both for undertakings and agencies.

VI. Conclusion.

The domestic nature of merger assessment undermines comprehensive attempts to resolve the friction associated with multi-jurisdictional merger review. It additionally highlights the inherent limits of cooperation and convergence through bilateral agreements and multinational voluntary frameworks. These, even when successful can relax, but not eradicate the burden felt at undertakings' and agencies' levels.

Looking ahead, voluntary frameworks, although sub optimal, provide the international community with the greatest promise for advancing convergence in the area of multi-jurisdictional merger control. The current agenda predominantly focuses on non-contentious elements which stand a good chance of being endorsed by a large number of jurisdictions. By its nature, this process is slow and limited and all involved should set their expectations accordingly.

Likely catalysts to these processes are developments at the EU and US fronts. The unique position held by the two jurisdictions, the level of trade between them and their dominant merger regimes enable their bilateral relations to affect nations beyond their direct parties. Increased convergence and agreement between the two would arguably facilitate further dialogue at the multinational level.

In the meantime the existing costs and uncertainties stemming from multi-jurisdictional merger review remain. Some of these costs and uncertainties may be unavoidable even with further progress in this field as they are inherent to conducting

business in the multi-jurisdictional realm. Others reflect distinct and avoidable inefficiencies and provide a worthy goal for further convergence.[74]

[74] For example convergence in the areas mentioned in the ICN Recommended Practices for Merger Notification Procedure, focusing on procedural and jurisdictional issues surrounding merger notifications.