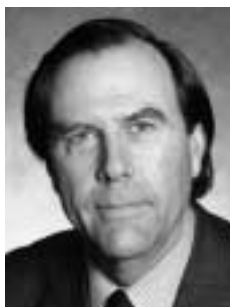


The Global Competition Forum: beyond Ditchley

J William Rowley QC, senior partner and chair of McMillan Binch, Toronto and chair of the IBA's Global Forum on Competition Policy, and **Omar K Wakil**, associate of McMillan Binch, Toronto, discuss the Ditchley Park conference and the development of the Global Competition Forum



J William Rowley

The last six months has seen a sea change in thinking amongst antitrust authorities as to the nature and the manner of addressing issues arising from the proliferation of national antitrust regimes. What is new is the now widely-held view that the time has come for a multilateral institutional initiative rather than a continuing reliance on the bilateral approaches which have been adopted to date. In this context, the endorsement of the concept of a Global Competition Forum¹ (or 'GCF') at a meeting in early February 2001 at Ditchley Park in the United Kingdom constitutes a quantum forward leap. Under the auspices of its own Global Forum for Competition Policy, the International Bar Association (IBA), with support from Fordham University and the ABA's Antitrust Section, convened and hosted a meeting at Ditchley Park of more than 40 of the world's senior competition law officials and professionals, acting in an individual capacity, to discuss the concept of creating such a multilateral Forum. The resulting consensus has set the stage and provided momentum for a formal launch of the initiative as early as the end of 2001.

The need for the Global Competition Forum

In conjunction with economic liberalisation, nations have come to recognise competition as a powerful tool for spurring innovation and economic growth, and the importance of a legal framework to safeguard market disci-



Omar Wakil

plines. The result has been that competition laws have been enacted rapidly over the past decade, many incorporating some form of merger notification requirement and most with provisions on cartels and abuses of dominance. There are now over 80 different laws, with two dozen more in the making, most with differing procedural and substantive standards. The proliferation of these new regimes, coupled with an increasingly globalised economy, presents a serious challenge to all those affected, including regulators and the business community.

The multiplicity of merger control regimes means mergers are often subject to review by numerous agencies in a variety of jurisdictions. Obtaining regulatory clearances on multi-jurisdictional transactions are consequently complex, expensive and time-consuming processes because of different substantive and procedural standards. These costs can be especially burdensome if the number of reviewing jurisdictions is large or if they have seriously inconsistent procedural requirements. Transnational mergers also raise a host of substantive issues, such as the possibility of inconsistent remedies, or the treatment of confidential information in the course of exchanges between competition authorities.

International interaction is also an important aspect in the detection and enforcement of anti-cartel laws. Douglas Melamed told last year's Fordham conference that the most effective means of combating cartels involves a combination of tough laws and "a

sound, non-discretionary leniency program because that combination maximises the likelihood that one of the cartel participants will voluntarily come forward with evidence of the cartel. But the efficacy of [a] leniency program can be significantly impaired if other countries with anticartel laws lack a robust leniency program, because firms might fear that voluntarily coming forward in the US will subject them to increased risk of prosecution abroad."

Alexander Schaub summed up the current state of affairs well in mid-March when he observed that "the transnational character of today's competition cases clashes with the traditionally territorial scope of domestic antitrust rules."

These and similar problems were identified in and formed the heart of the Report of the International Competition Policy Advisory Committee ('the ICPAC Report') released in February 2000. One of the key recommendations of its wide-ranging and comprehensive study was the formation of a 'Global Competition Initiative' ('GCI') to foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and a common culture.

Two elements of such an initiative were, and remain, fundamental. First, membership of the forum was envisaged as being inclusive, with representation of government officials, private firms, non-governmental organisations and others. Second, the formation of the GCI would not and should not preclude the continued use of existing international organisations and venues such as the WTO, the OECD, and the United Nations Conference on Trade and Development (UNCTAD) to address competition policy topics. Indeed, the proposed initiative was seen to be complimentary to these institutions.

Somewhat surprisingly, the ICPAC Report initially received a muted reception, perhaps because of the United States' historic commitment to bilateral co-operative efforts. But all of this changed when Joel Klein endorsed in Brussels the establishment of a new global approach at last September's 10 Anniversary Conference for the EC's Merger Task Force. Klein's directional thinking appears to have been taken up

by both of his interim successors, Douglas Melamed and John Nannes, but ascertaining the new administration's thinking will have to await confirmation of the appointments of Charles James and Tim Muris. However, there is no doubt as to the European position: Competition Commissioner Mario Monti has repeatedly emphasised the need for a multilateral, multi-jurisdictional approach and his strong support for the initiative.

The Ditchley Park meeting

The meeting at Ditchley Park addressed as its central question the need for such a forum for dialogue, for sharing experience and expertise, and (insofar as possible) for building consensus among competition professionals around the world. The purpose of the meeting was to explore ideas, not to reach formal conclusions on the exact structure or content of a GCF. During the course of two-and-a-half days, both in plenary sessions and working groups, 43 participants representing 23 countries, 20 competition authorities and nine other international institutions considered three separate sets of issues: merger control in the 21st century; competition policy and competition advocacy in developing countries; and structural and process issues that face a new global initiative.

The discussions provided an opportunity to consider a variety of fundamental features of the competition forum, including its governing purpose, organisation and activities. A remarkable degree of consensus emerged on these key issues, discussed below in greater detail.

Purpose

It was envisaged that the core purpose of the GCF should be to draw together a number of combinations of competition professionals to consider transnational competition problems in open and non-binding discussions. Mario Monti has since said that the "end-objective" of the GCF "should be to achieve a maximum of convergence and consensus between participants through dialogue, and exchange of experiences on enforcement policy and practice." It was also seen to be essential that the global initiative should add practical value to the work of existing

Participants in The Ditchley Park Conference

Chair: **J William Rowley QC**, Chair of the International Bar Association Global Forum for Competition Policy and McMillan Binch (Canada).

Co-chairs: **Ky Ewing**, Chair of the ABA Antitrust Section and Vinson & Elkins (US); **Barry Hawk**, Chair, Fordham University Corporate Law Institute and Skadden, Arps, Slate, Meagher & Flom LLP (US).

Conference Rapporteur: **Merit E Janow**, Professor in the Practice of International Trade; Director, Program in International Economic Policy, Columbia University, New York. Former Executive Director, ICPAC (US).

Group Rapporteurs: **Bruce McCulloch**, Vinson & Elkins (US); **Giorgio Motta**, Skadden, Arps, Slate, Meagher & Flom LLP (UK); and **Omar K Wakil**, McMillan Binch (Canada).

Other attendees

Dr Pascual Garcia Alba Idunate, Commissioner, Mexican Comisión Federal de Competencia Económica (Mexico).

Robert Anderson, Counsellor, World Trade Organisation, IPR Division (Switzerland).

Klaus Becher, Chair, ICC Working Party on International Competition Law Convergence (France).

Sir Christopher Bellamy, Competition Commission Appeals Tribunals (UK).

Jacques Buhart, Chair of Section on Business Law, International Bar Association and Coudert Frères (France).

Nadina Calvino, Deputy Director for Legal Matters and Institutional Relations of the Service for the Defence of Competition (Spain).

Angelo Marcelo Cardani, Deputy Head of Cabinet, European Commission (Belgium).

Mark Ellis, Executive Director, International Bar Association (UK).

Dr Kemal Erol, Deputy Chairman, Competition Authority (Turkey).

Professor Allan Fels, Chairman, Australian Competition and Consumer Commission.

Reinaldo Figueredo, Special Advisor to the Secretary General of UNCTAD.

Professor Anna Fornalczyk, COMPER - Competition Development Centre Ltd (Poland).

Alberto Heimer, Director, Research and Institutional Relations, Autorità Garante della Concorrenza e del Mercato (Italy).

Frédéric Jenny, Vice-President, Conseil de la Concurrence (France).

Takashi Koezuka, Deputy Secretary General for International Affairs, International Affairs

Division, Fair Trade Commission (Japan).

Gertjan Lankhorst, Deputy Director General for Fair Trading, Dutch Ministry of Economic Affairs (Netherlands).

Davis Lewis, Chief Judge, Competition Tribunal (South Africa).

Tad Lipsky, Senior Competition Counsel, The Coca-Cola Company (US).

A Douglas Melamed, Former Acting Assistant Attorney General, Antitrust Division, Department of Justice (US).

Mario Monti, Commissioner for Competition, European Commission.

Dr Zoltan Nagy, President, Office of Economic Competition (Hungary).

John M Nannes, Acting Assistant Attorney General, Antitrust Division, Department of Justice (US).

Rufus A Ogilvie-Smalls, Chair, Competition Committee, Confederation of British Industry and Head of GKN Group Legal Department (UK).

Bernard Phillips, Head of Division, OECD Competition Law and Policy (France).

Peter M A L Plompen, Senior Vice President, Philips International BV Corporate Legal Department and Senior Director and Secretary, Business and Industry Advisory Committee to the OECD (Netherlands).

Matti Purasjoki, Director General, Finnish Competition Authority.

Michael Reynolds, Secretary-Treasurer of Section on Business Law, International Bar Association and Allen & Overy (Belgium).

James F Rill, Former Assistant Attorney General, Antitrust Division, Department of Justice; Howrey Simon Arnold & White LLP (US).

João Grandino Rodas, Chairman, Conselho Administrativo de Defesa Econômica (Brazil).

Alexander Schaub, Director General of the Directorate General for Competition (IV), European Commission.

Charles Stark, Chief, Foreign Commerce Section, US Department of Justice (US).

Dr David E Tadmor, Former Director General of the Antitrust Authority, Israel Antitrust Authority.

Dr Roland von Buren, President, Commission de la Concurrence (Switzerland).

Konrad von Finckenstein QC, Competition Commissioner, Competition Bureau (Canada).

Edward Whitehorn, Director, Competition Policy Coordination, UK Office of Fair Trading (UK).

Rachel Youngman, Deputy Executive Director, International Bar Association (UK).

institutions and not duplicate existing activities; in particular, the remit of the Forum would not duplicate the competition work of the WTO, the OECD or UNCTAD.

The overall objectives of the Forum, and the importance of the need to add value to existing work, received strong support at the Ditchley Park meeting. Importantly, the nine international organisations that attended the conference were, in the words of Ky Ewing, “not trying simply to protect their turf, but agreeing that the new Initiative would be a useful addition.”

Organisational design

Although there was general agreement that competition authorities would make up its core constituents, it was thought that the Forum must be an inclusive organisation in which the legal community, academics, and business interests would be appropriately represented. Mario Monti recently confirmed this consensus when he noted that the Global Forum “should be first and foremost a competition authority forum, but would draw together all interested parties – both public (for example other international organisations) and private (for example, business, professional, consumer and academic bodies), who could all be appropriately associated with the forum, as participants and ‘facilitators’.” Such a combination of participants was seen to be a unique feature of the GCF, one which could add real value relative to existing organisations.

Participants also saw it as crucial that the new initiative should be able to attract broad and active participation from countries with new and developing competition regimes. The Ditchley Park meeting itself took an important first step in this direction in bringing together participants from Japan, Australia, Brazil, Argentina, Mexico, South Africa, Israel, Hungary, Turkey and Poland, as well as a host of other countries. It is clear, however, that every effort will have to be made to make subsequent events even more inclusive.

Another idea floated at the conference, and recently reiterated by Alexander Schaub, was a ‘main event’ consisting of an annual conference, perhaps coupled with peripheral or re-

gional workshops and mandated task forces. The workshops and task forces could consider specific issues and perhaps involve a more limited range of participants appropriate to the particular subject under consideration.

Finally, it seemed clear that the GCF should not be a ‘bricks-and-mortar’ organisation. One possibility might be to guide ongoing activities through a secretariat staffed by interim secondment from sponsoring agencies (perhaps with a very limited number of people employed on a more permanent basis).

Activities

Participants were open-minded about the precise activities of the GCF and the topics that it should address. Initial topics might include multijurisdictional merger review, multijurisdictional cartel enforcement, and challenges associated with cooperation and information exchanges among competition authorities. Several participants emphasised that resolving procedural issues involved in multi-national merger review (eg divergent notification thresholds, timing and filing requirements) required urgent attention, but discussion was not limited to procedural issues. Participants also recognised that merger control was only one of numerous subjects worthy of international consideration. It was also thought that the Forum should make a particular effort to focus on competition issues of concern to developing countries and of those countries with fledgling competition law regimes. The Forum could also play a role in legal education and in identifying the forms of assistance of benefit to jurisdictions. With many developing countries in the process of establishing competition law frameworks, the advent of the Forum is all the more timely given the importance of ensuring, as far as possible, the adoption of commonly agreed principles.

Next steps

Participants agreed that further work on a variety of issues, including projects, participants and possible structure, was required before the initiative could be launched formally. However, it did appear that it would ultimately be necessary to put in place some form

of a Steering Committee to oversee the Forum’s formal birth and ongoing management. In the meantime a small number of participants were asked to serve as an informal interim planning group to address start-up questions, including the identification of potential candidates to serve on such a Steering Committee, once formed, and the time and place of a more inclusive ‘formal’ launch meeting towards the end of the year.

It is clear that to ensure a successful launch, the concept of the GCF will require at a minimum the support of the leading European and American agencies. Given the increasingly urgent need for “some standardisation of the confusing patchwork of merger regulations across the globe”, it is to be hoped this support will be forthcoming.

In the meantime, the IBA has volunteered to facilitate further meetings and provide such other services as may be necessary to move the initiative from a concept to a reality. Participants from other organisations (such as the American Bar Association, the International Chamber of Commerce, the WTO and the OECD) have also indicated their individual support, and interest in being involved in the process in the future.

While the broad-ranging discussions at Ditchley Park did not result in the formal launch of the new organisation, it is now clear that the meeting moved the Global Competition Forum one important step closer to reality. For all those affected by the internationalisation of antitrust, this is indeed a welcome development. 🍷

¹ European regulators have recently shown a marked preference for the term ‘Global Competition Forum’ rather than the ‘Global Competition Initiative’ favoured by the authors of the ICPAC Report. We have used both terms interchangeably in this article.

Our overview of the Ditchley Park meeting draws on the official report of the meeting, “The Initiative for a Global Competition Forum”, prepared by Merit E Janow and available through the International Bar Association’s website, <http://www.ibanet.org>