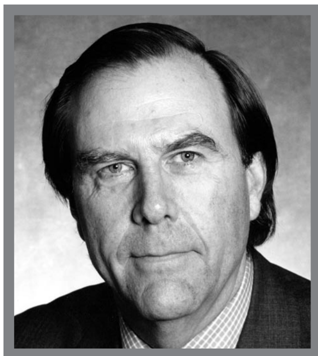
Editorial



Six years ago, the IBA's Global Competition Forum, the World Bank and *Global Competition Review* teamed up to publish 'Policy Directions for Global Merger Review'. This was *GCR*'s first foray into forward-looking competition policy. With this edition we have its second foray: a 'mergers-only' edition of *GCR*. I am pleased to have been associated with both.

Why return to the same subject?

The seeds for the 1999 work were sown by the explosive growth of national antitrust laws. My motivation for questioning the status quo is an apprehension that the divergent processes of merger control represent a sub-optimal global system. Sub-optimal systems should be questioned. The only reason not to is inertia, and I am against inertia.

To the surprise of many (who, 10 years ago, were predicting that the problems associated with multiple regimes would lie on the substantive side), today's issues relate mainly to the inefficiencies and costs arising from divergent processes. Eleanor Fox foresaw this in 1999 when she asked whether merger control had become "an example of a regulation that is excessively burdensome in proportion to its benefits". A year later, the ICPAC Report concluded that "the growing incident of multi-jurisdictional merger review is imposing unnecessary costs in a number of transactions that present little, if any, competitive concerns".
This special issue asks not just whether Fox and ICPAC were right, but whether the current approach is the best that can be hoped for and, if not, how we might all move forward—private sector and enforcement agencies alike.

We have sought to enfranchise the spectrum of stakeholders, ranging from the enforcement community (new and old), to consumers, businesses (with contemporary merger experience), and professional advisers (financial, economic and legal) throughout the edition.

My own take on the problem is as follows.

Of the 80-plus systems now in place, none are identical. That said, two models have emerged, the US and the EU. Of these, more countries appear to be adopting an administrative approach resembling the European system. But whichever system is chosen, mandatory pre-notification is the common denominator.

The genesis for today's various notification systems is, of course, the US's Hart-Scott-Rodino Act of 1976. But, as Joe Sims and Deborah Herman (now Chairperson Deborah Majoras of the US FTC) wrote in 1997, the Act was intended to prescribe modest medicine for a modest problem. It was enacted so the agencies could look at a small number of, so-called, 'midnight mergers' where, if antitrust problems arose, those problems might be difficult to address after consummation. Pre-merger notification, as then contemplated, was only to apply to "the very largest corporate mergers—about the 150 largest of thousands of mergers that take place every year".

Well, the medicine is no longer modest, and has developed something of a bitter taste. In most systems, pre-notification's net has been cast to capture many more transactions than originally intended. In the United States alone, in the heyday of the M&A boom, in 2000, 4,926 transactions were captured, requiring 9,941 filings.

Even the most recent statistics are alarming. With higher thresholds and a less frenzied deal environment, the US agencies reported more than 2,000 HSR filings in fiscal 2003, with filing fees for each transaction ranging between US$45,000 and US$280,000 in the US.

The same picture is repeated in the 60-plus jurisdictions that now require notification. Yet it is a broadly accepted fact that 95 per cent of all transactions notified give rise to no competitive concerns whatsoever. The opportunities to reduce the filing burden in such circumstances should be compelling to all.

If the costs of filing were minor, the problem would be slight. But this is not the case. For example, the PricewaterhouseCoopers 2002 survey (commissioned by the IBA and ABA to measure these costs) reported that the typical multi-jurisdictional deal required eight completed or considered filings and generated on average €3.3 million in external merger review costs. The cost of in-depth reviews average €5.4 million with the most expensive in the survey topping €30 million. Internal costs (quantified in person days) for all transactions averaged 28 days, with in-depth reviews requiring 120 person weeks and top quartile transactions coming in at 389 person weeks. (That equates to one person working full-time on the notification process for seven years.)

The advent of the ICN and its strong work on Merger Review Recommended Practices shows that an appetite to fix the system exists on the enforcement side too. But the ICN has only one voice and it needs help in being heard. I hope that the content in this edition will add to the choir of harmonious voices now emerging and fortify it. Together there is every opportunity to move towards an appropriate yet cost–effective global merger review system. All that is preventing us from doing so is inertia.

J William Rowley QC