

Merger reform needs words *and* actions

Reducing the international merger control thicket requires leadership from leaders, argues **J William Rowley QC** of *McMillan Binch LLP*. The following is an edited version of a speech delivered to the Conference Board's antitrust conference, earlier this year

A problem acknowledged

Over the last decade or so, and in response to diverse causes (trade liberalisation, a shift to market economies in eastern Europe and the developing world, a global merger wave), competition authorities, competition practitioners and their 'customers' have built a complex global system of merger control regimes. This system, the parts of which may have constituted logical responses to national and regional demands, has become incoherent as a whole. But until about three years ago, those who wished to address the problem faced 'an ingenuity gap'—ie an acknowledged problem with no foreseeable solution. The requisite wisdom to bring order to a system that had become chaotic appeared to be lacking.

ICPAC and beyond: addressing the gap

In early 2000, with the publication of the Final Report of the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust (ICPAC), this merger review 'ingenuity gap' showed the first signs of becoming bridgeable. The ICPAC Report recommended an important step forward through the establishment of a 'Global Competition Initiative' (GCI).

In its report, the ICPAC recommended that "the United States explore the scope for collaborations among interested governments and international organisations to create a new venue where government officials, as well as private firms, non-governmental organisations (NGOs), and others can consult on matters of competition law and policy". The recommended "new venue" was, of course, what we then referred to as the GCI.

Eschewing the creation of a new institution (with the attendant bureaucracy, fixed processes and expenses that would inevitably follow), the ICPAC believed a "modest effort at creating a 'virtual organisation' with minimal dedicated staff, support by participating institutions and governments, and regular meetings can make a strong contribution to the development of a competition culture and sound antitrust

enforcement". Believing too that "countries may be prepared to co-operate in meaningful ways, but are not necessarily prepared to be legally bound under international law", the ICPAC recommended that the GCI could usefully advance constructive dialogue among competition agencies to:

- multilateralise and deepen positive comity;
- consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world;
- agree upon best practices for merger control laws and develop consensus principles; and
- consider approaches to multinational merger control that aim to rationalise systems for antitrust merger notification and review.

The first important public support for the GCI came from then US Assistant Attorney General for Antitrust Joel Klein and European Commissioner for Competition Mario Monti at the International Bar Association's EC Merger Control 10th Anniversary Conference in September 2000.

If Messrs Klein and Monti breathed life into ICPAC's recommendations in Brussels, the IBA's Ditchley Park meeting of international antitrust authorities, which followed in February 2001, can rightly be seen as midwifing the birth of their progeny. The Ditchley meeting also supplied some much needed ingenuity. The idea of bringing 40 or so of the world's senior competition law officials and professionals together in their individual capacities enabled a discussion of the concept, role and possible functions of the GCI without the institutional biases and agendas such luminaries might otherwise, quite reasonably, have been expected to bring to a discussion of this kind. Happily, the effort succeeded. In addition to endorsing the immediate formation of a GCI the meeting struck an informal steering committee to oversee its formal launch.

From Ditchley to the ICN

The cause of greater coherence in international merger review was further aided by the publication in September of a draft Report on 'Best Practices for the Review of International

Mergers' prepared on behalf of a group of leading international companies concerned with fast multiplying and divergent approaches to merger review ('the Merger Streamlining Group' or MSG). The aim of the Best Practices proponents was to "promote laws, enforcement practices and actions by merging parties which improve merger review processes while recognising the legitimate interest of all jurisdictions in examining transactions that may have effects on competition within their borders pursuant to their own substantive rules". The MSG Best Practices Report was supplemented almost immediately by the publication of a similar and highly complimentary set of recommendations from the International Chamber of Commerce and the Business Advisory Committee to the OECD ('ICC/BAC Best Practices'). As events have made clear, both reports have proved enormously influential in work which has followed on merger review issues.

Subsequently, the vision of the GCI was given public shape and clarity in the statements of the leaders of the European and American competition authorities. In speeches at the first OECD Global Forum on Competition on 17 October 17 2001, both Mario Monti and Charles James again endorsed and elaborated upon their visions of the GCI.

Early work of the ICN

Days later, the GCI, newly incarnated as the 'International Competition Network' (ICN), was born.

While not all of the ICPAC and Ditchley Park recommendations have yet been taken up by the ICN, its early work on merger control reform is encouraging. Its Working Group on Mergers, initially chaired by William Kolasky, then Deputy Assistant Attorney General in the Antitrust Division of the US Department of Justice (and now by Deborah Platt Majoras), has an ambitious work plan. Projects are being managed by subgroups in three areas:

- (i) merger notification and review procedures;
- (ii) investigative techniques for reviewing mergers; and
- (iii) the analytical framework for merger review.

Merger notification and review procedures

Guiding Principles

Taking its cue from the MSG and ICC/BIAC Best Practices documents, the Notification and Procedures Subgroup has developed eight Guiding Principles for Merger Notification and Review ('Guiding Principles') for merger notification and review that were adopted by the ICN membership at its inaugural conference in Naples, Italy in September 2002. The Guiding Principles are non-binding, and it is left to governments and agencies to implement them as appropriate:

- **Sovereignty**—Jurisdictions are sovereign with respect to the application of their own laws to mergers.
- **Transparency**—In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.
- **Non-discrimination on the basis of nationality**—In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.
- **Procedural fairness**—Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anti-competitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.
- **Efficient, timely and effective review**—The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time-frame.
- **Coordination**—Jurisdictions reviewing the same transaction should engage in such coordination as would, without

compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

- **Convergence**—Jurisdictions should seek convergence of merger review processes toward agreed best practices.
- **Protection of confidential information**—The process should provide for the protection of confidential information.

Recommended Practices

More important is the Notification and Procedures Subgroup's development of an initial set of more detailed Recommended Practices for Merger Notification Procedures ('Recommended Practices'). These first recommendations address three areas identified as the most pressing by public and private sector representatives of the Working Group:

- sufficient nexus between the transaction's effects and the reviewing jurisdiction;
- clear and objective notification thresholds; and
- flexibility in the time of merger notification.

The format consists of a short statement of the practice, followed by the explanatory comment. Disappointingly, these initial Recommended Practices were merely endorsed, but not adopted, at the ICN's inaugural meeting.

The ICN stopped short of outright adoption of the Recommended Practices in Naples because of concerns initially expressed by Denmark that the jurisdictional nexus requirement would not encompass a situation where a domestic firm acquires a foreign firm that otherwise likely would enter the domestic market and the acquisition would have material anti-competitive effects given the acquiror's current domestic market position (the concern has become known as 'the Danish Issue'). While such a transaction is a theoretical possibility, as a practical matter, these situations are so rare that it is very hard to justify burdening all outbound acquisitions with pre-merger notification requirements. Moreover, since Recommended Practices are not mandatory, the ICN should not be discouraged from adopting a best practice even when a small number of jurisdictions have a different view. Individual jurisdictions can depart from those practices with which they disagree. It is hoped that the 'Danish Issue' can be addressed pragmatically, by a new 'Comment' to the Recommended Practice, and that the first three Recommended Practices will be adopted when the ICN next meets in Mérida, Mexico, this coming June.

Since Naples detailed work has been underway on the next set of Recommended

Practices. Based on discussions with subgroup members and advisors, four new subjects are to be covered:

- Review Periods (timing of review, phased reviews, and expedited review)
- Notification Requirements (initial and supplementary requests, alternative formats, guidance, document translation and authentication).
- Transparency (clarity, scope of coverage, access to laws, regulations, decisions and exemptions, decision making criteria, and protection of confidential information).
- Periodic Review of Merger Control Procedures (periodic review and reform to promote convergence).

Work product is expected to be presented for consideration and, one hopes, adoption in Mérida.

Web links and templates

The notification and procedures sub-group is also encouraging member agencies to (a) create web links to the ICN site containing information about their merger control regimes—66 have so far been established, and (b) complete a common template / questionnaire with information about their merger regimes. This information will be posted on the ICN website as it becomes available, creating a further source of information about multi-jurisdictional merger review that will compliment other sources and sites, such as the IBA's Global Competition Forum website, www.globalcompetitionforum.org. The IBA's site is undoubtedly the world's most comprehensive antitrust law and policy resource—containing the laws, guidelines, forms and the like for over 125 regimes and with over 700 links to antitrust websites worldwide.

Costs studies

The Notification and Procedures Subgroup has also started to compile existing studies and materials relating to the costs, burdens and delays arising from multijurisdictional merger notification and review. To assist the process, private sector advisors have been requested to provide examples of unnecessarily costly, burdensome, or dilatory procedures.

A Global Merger Costs Survey co-sponsored by the International Bar Association and the American Bar Association will also make a much-needed empirical contribution to the deliberations of the ICN and augment the largely anecdotal evidence that has existed to date. The Report of the survey is in its final drafting stages and it is anticipated that it will first be presented in June at the ICN's upcoming Mérida meeting.

Investigative techniques for reviewing mergers

The Investigative Techniques Subgroup is focused on the development of best practices for investigating mergers, including (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. To develop its proposals, nearly 100 staff lawyers and economists from 41 antitrust agencies held an International Merger Workshop on investigative techniques in Washington DC in mid-November 2002. The workshop provided a venue for lawyers and economists from the different antitrust agencies to meet and learn from one another's practical experiences in conducting merger reviews. Participants discussed merger review procedures; the methods agencies can use to develop an effective merger review plan; and the function of international cooperation in merger review cases. Also on the agenda was the role of economists and economic evidence in merger investigations which, given the very real need in many jurisdictions for merger review to be conducted on a sounder economic basis, is a welcome step in the right direction.

Analytical framework for merger review

Finally, the Analytical Framework Subgroup has developed a general analytical framework for merger review, including: (i) the substantive standards for prohibiting mergers; and (ii) the criteria for applying those standards. The Subgroup submitted a discussion paper to the ICN at Naples together with information on the substantive standard applied in each member jurisdiction. Competing substantive standards for merger evaluation (ie, "substantial lessening of competition" (SLC) versus "creation or strengthening of a dominant position" versus "public interest") were considered in both the paper and by a panel at the Naples meeting. In light of the move by the UK to an SLC test late last year, and the European Commission's consideration of the same question, a more cogent approach to this key question for international substantive harmonisation is obviously timely.

The gulf between talk and action

While the birth of the ICN has provided us with the first real opportunity to address today's troubled approach to multijurisdictional merger review, there remains an enormous gulf between talk and action. The challenge is whether necessary changes can be implemented. And here real leadership will be required from competition laws' bipolar leaders (the US

federal agencies and the EC Competition Directorate), members of the ICN Steering Group, and influential regional member states. It will be particularly important for the EC and US to step up to the plate and provide a model for legislators and enforcers in other jurisdictions whose laws and policies have drawn so heavily from these sources.

The EC's leadership

The European Commission should be singled out for particular praise, having taken on much needed leadership in transforming talk into action. Philip Lowe's assumption of the Director General's office, and the decisions of the Court of First Instance in *Airtours*, *Schneider* and *Tetra Laval* were positive catalysts to this end. Commissioner Monti's detailed proposals for reform of the European merger control illustrate that there is high level commitment and real momentum for implementing positive changes. A number of significant changes to better align the Merger Regulation with Best Practices are proposed:

- Increased flexibility in timing of notification by removing the current deadline for notification of one week after the conclusion of a binding agreement and by introducing the possibility of notification before conclusion of a binding agreement;
- Enhancing transparency regarding the scope of the current substantive test by clarifying the application of the notion of dominance to so-called 'unilateral effects' in situations of oligopoly short of joint dominance;
- Publication of draft guidelines on the assessment of horizontal mergers which provide greater predictability on how such mergers will be assessed (the draft guidelines are subject to full consultation);
- Explicit recognition of the relevance of efficiencies in merger review analysis;
- Improved staffing and resources, including a chief economist and accelerated recruitment of industrial economists.
- Publication of a draft best practices paper which would make changes to both the decision-making procedure and the personnel structure of the Directorate General of Competition.
- Use 'Devil's advocate panels' of peer review to scrutinise a case team's preliminary conclusions with a 'fresh pair of eyes' at key points of the investigation;
- Improved rights of defence, with merging parties having: early access to the file 'against' them; an opportunity to confront 'complaining' third parties; and an opportunity to attend 'state of play' meetings at which they will be updated on

the progress of the investigation and able to discuss their case with senior Commission management;

- Increased flexibility of investigatory timeframe by providing, at the parties' request, an additional four weeks in 'complex' cases and an additional three weeks triggered on the submission of a remedy offer; and
- Consideration of methods of enhancing exiting fast-track judicial review, perhaps through specialised 'judicial panels' or the creation of a specialised merger chamber within the Court of First Instance.

The Commission plans to issue draft notices on vertical and conglomerate mergers during 2003.

The US cannot be exempt from change

For a multilateral reform and convergence process to work, all key players must participate. In the case of the US system, despite its age and distinguished intellectual provenance, careful and dispassionate introspection, followed by action, is clearly needed. Once the paragon of non-regulatory antitrust, over the past two-and-a-half decades (under Hart-Scott-Rodino) US merger law has become both bureaucratic and regulatory as well as being non-responsive to calls for corrective actions.

At a general level, public announcement of an intention to align the US system (to the extent that is misaligned) with ICN Guiding Principles and Recommended Practices at the earliest opportunity would be most helpful. More specifically, reform aimed at introducing a meaningful time limit on and reducing the unnecessarily burdensome scope of the second stage of review, which in practice can drag on for the better part of a year or more should be seen as a first priority. In this regard, because legislative change may be difficult to achieve, the following steps are respectfully suggested for the US's consideration:

- Both federal antitrust agencies should immediately undertake a study of the possible introduction of voluntarily assumed 'Service Standards' (no legislative change would be required), the effect of which would be to introduce a two-phase, time-limited, merger review system.
- This should also help to address ongoing concerns with the current 'second request' process. Such a system would be based on an 'HSR Plus' notification form to be filed on a voluntary basis for mergers which may be expected to require substantial analysis. 'HSR Plus' forms would have somewhat similar information content requirements to the Form CO, but would

be less comprehensive—and certainly less comprehensive than a standard second request. The Canadian Long Form Notice could be looked at as a reference point. Where ‘HSR Plus’ notices are filed, federal agencies would commit to conclude investigative action within five months of receipt of a completed filing.

Consideration should also be given to the reduction of excessive filing fees to reasonable, merger-related, cost recovery levels. As well, both federal antitrust agencies should voluntarily commit to undertaking on a periodic basis (say, every three to five years) the type of ‘merger reform’ process that is mandated and is now under way in Europe under the EC Merger Regulation.

A role for other jurisdictions and stakeholders

But other jurisdictions need not and should not wait for the EU or US to act. With Guiding Principles adopted and several Recommended Practices endorsed and more on the way, members of the ICN (and particularly those with leadership roles) now have the individual responsibility to seek to convert words into actions (doubtters have raised the question from the outset of whether the ICN would become just another ‘talking shop’). Brazil, Canada, Mexico and others, for instance, could launch constructively critical reviews of their own legislation and practices, determine the extent to which they measure up to ICN standards and, where they do not, take steps towards reform.

Because of the relative size of these jurisdictions, the importance of having a world-class, best practices-aligned merger review system cannot be overstated. Not only would convergence to ICN Guiding Principles and Recommended Practices be reputationally beneficial, but leadership of this sort from some of the ‘newer’ antitrust regimes would undoubtedly spur other similarly positioned members of the ICN into action.

Finally, both ICPAC and Ditchley also emphasised the importance of collaboration within a GCI (or ICN) of all interested antitrust stakeholders—including other international organisations, both governmental and non-governmental (such as legal, business and consumer groups) as well as private firms and knowledgeable individuals. The validity of this recommendation can be seen in the contributions already made from these sources to getting us where we are today. However, work has just begun and it remains an open question as to whether it was the right decision to restrict ‘membership’ in the ICN only to competition agencies. In Ditchley, much of the

discussion revolved round the benefits of inclusion. It is probably time to reopen this question—at least for discussion.

In the meantime, much remains to be done, and it will be vital for stakeholders such as the IBA, the ICC/BAC, the ABA, the World Bank, OECD, UNCTAD and others to maintain and enhance their respective commitments. To these stakeholders it is respectfully suggested:

- making known (publicly) their expectations of the ICN—ie that membership focus on practical and achievable projects and utilise all appropriate resources to convert their Recommended Practices and other recommendations into actual reforms of national merger regimes;
- marshalling support from individual firms, interest groups, the competition bar and others to provide a positive policy context in which the ICN and others can seek to accomplish their various convergence goals.

Next steps for the ICN

To date, the work of the ICN has been astonishingly positive. However, there are a number of issues that ought to be addressed by the ICN before and during its next Conference in Mérida, Mexico on 23-25 June 2003.

Implementation of recommendations

There has been some debate about how the ICN should involve itself in the implementation of its recommendations. Many believe that the ICN can and should properly play a role in this regard. Certainly, the ICN must do more than simply make proposals. It must be possible to find a way to do more, without at the same time frightening off agency participation or inhibiting recommendations which are inconsistent with an agency’s existing regimes. Without the ICN itself playing at least some role in promoting implementation, the huge investment that has been made to date, in time and intellectual capital, risks being lost.

A few prescriptions for the promotion of ICN work-product

Leadership responsibility rests initially with leaders. Because of this, ICN Steering Committee members might individually wish to espouse publicly the ICN’s work product and announce their intention to seek to align their laws and procedures with the ICN’s recommendations. It would also not seem inappropriate to ask for the ICN’s leaders to publicise and support the ICN principles and practices in seminars, conferences, speeches, press releases and websites. The ICN’s ‘voice’ also requires development. This suggests the need for a carefully thought out, professional programme for interaction with

domestic and international media. The point is—the message needs to get out!

Voluntary self-assessment

ICN leadership could promote the concept of transparent self-assessment by all members as to their regimes compliance with recommended practices. Members could then undertake self-assessments of compliance and publish their findings. In this regard, the IBA, the Mexican Competition Authority and the Mexican Bar are holding an invitational forum on 26 June in Mexico City, following the Mérida meetings, which will include such self-assessment exercises by a number of the agencies of the Americas.

Role of NGAs

Pending the outcome of a more general reassessment of the role of the NGAs, ICN leadership might consider how non-governmental advisors can best promote/help with ICN implementation issues. An informal (non-annual conference) meeting(s) with interested NGAs could assist. ICN leadership might promote/participate in inter-agency workshop on implementation issues. Here too, NGA stakeholders could play a useful role.

Institutional structure of the ICN

It would now seem timely to reassess whether the concept of a virtual organisation works in practice: eg should the ICN continue to operate without a permanent secretariat or source of funding? Apart from practical issues (such as how does one contact the ICN?), the absence of a more permanent organising and coordinating body may hinder the ability of the ICN to carry out its work projects effectively. Moreover, the absence of a ‘corporeal’ existence affects the ability to receive and disburse funds and may carry negative implications for the ability to finance certain activities. Examples might include the ongoing maintenance of its website or, more importantly, the ability to provide financial assistance to authorities in transitional and developing countries.

Final thoughts

This all suggests the need for active, and rolling dialogue amongst all antitrust stakeholders in a post-Naples environment to take account of where we stand, and to help divine and map the soundest course for future implementation.

The global competition community cannot afford not to convert its talk into action. The ingenuity gap has not yet been closed. Clear thinking, frank discussion and more co-ordinated efforts to ensure reform actually occurs are today’s priorities. ♡