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**Streamlining International Merger Control**

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**EC Merger Control 10<sup>th</sup> Anniversary Conference**

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Toronto, Canada

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## **Introduction**

Cross-border mergers now frequently trigger a multitude of pre-closing antitrust reviews. Reviewing jurisdictions include those with well-developed competition laws (the EU, the US and Canada are examples) as well as an ever-expanding roster of newcomers (at last count at least 60 countries had merger control regimes, with more on the way). Different substantive and procedural regimes make a multi-jurisdictional transaction a complex, expensive and time-consuming process.

The direct and indirect costs of multi-jurisdictional merger control for businesses (and governments) have become enormous. Direct costs include the substantial fees paid to lawyers, industry experts and economic consultants as well as merger notification filing fees. Indirect costs include diverted executive time and the delayed or foregone achievement of merger efficiencies. This paper highlights a number of practical procedural difficulties in co-ordinating world-wide merger filings, estimates the costs to business, catalogues some of the earlier attempts to address the issue and concludes with a modest proposal for much-needed action.

## **The Growing Problem of Multi-Jurisdictional Merger Review**

### *Economic Globalisation and the Merger Wave*

The economic liberalisation and technological change of the last decade have profoundly altered the global economy.<sup>1</sup> In the words of Eleanor Fox, “[m]arkets have overtaken the strong and insular economic authority of the nation state.”<sup>2</sup>

Business has responded to the reduction in trade barriers and advancement of technology, in part by international expansion and global consolidation through mergers, acquisitions and joint ventures.”<sup>3</sup> In the United States alone, merger activity has

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<sup>1</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* (Washington DC: US Government Printing Office, 2000) at 33, online: <<http://www.usdoj.gov/atr/icpac/finalreport.htm>> (date accessed: 14 August 2000) [hereinafter “ICPAC Report”].

<sup>2</sup> E M Fox, “Competition in world markets: a global problem in need of global solutions” in *Global Competition Review* (April/May 2000) at 17.

<sup>3</sup> *Supra*, note 1 at 43.

increased from US\$186 billion to US\$1.79 trillion over the past decade.<sup>4</sup> In 1999, world-wide corporate merger activity totalled approximately US\$3.4 trillion, with M&A activity of US\$2 trillion announced in the first half of 2000.<sup>5</sup>

This merger wave has resulted in a startling jump in the number of merger notifications in the US, the EU, Canada and in a bewildering array of other jurisdictions. In the US, mergers reported under the *Hart-Scott-Rodino Act* rose from 1,529 in 1991 to a record 3,702 in 1997 — a 142 percent jump.<sup>6</sup> An astonishing 1,000 additional filings were made in 1998 — an increase of nearly 28% in a single year — for a total 4,728.<sup>7</sup> This level was roughly maintained in 1999 and will almost certainly increase again in 2000.<sup>8</sup> In the EU, notifications to the Merger Task Force of the European Commission have almost tripled in less than five years: from 114 in 1995 to 292 in 1999.<sup>9</sup> Similarly, the number of notifiable transactions reported in Canada has mushroomed from 213 in 1994/95 to 414 in 1998/99.<sup>10</sup> And these are only the tip of the iceberg.

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<sup>4</sup> Antitrust division of United States Department of Justice *Annual Report Fiscal Year 1999* (Washington: US Government printing office, 2000) at 11, on-line: <http://www.usdoj.gov/atr/public/4523.htm> (date accessed: 7 September 2000) [hereinafter “DoJ 1999 Annual Report”].

<sup>5</sup> See “How mergers go wrong”, *The Economist* (22-28 July 2000) at 19, Thomson Financial Securities Data, “The World is Not Enough... to Merge: Worldwide Announced M & A Volume Soars to Record \$3.4 trillion in '99” (5 January 2000) online:

<[http://www.tfsd.com/news\\_room/archive/default.asp?title\\_id=102](http://www.tfsd.com/news_room/archive/default.asp?title_id=102)> (date accessed: 5 September 2000), and Thomson Financial Securities Data, “Viva La Deals!” (6 July 2000) online:

[http://www.tfsd.com/news\\_room/archive/default.asp?title\\_id=180](http://www.tfsd.com/news_room/archive/default.asp?title_id=180) (date accessed: 8 September 2000).

<sup>6</sup> Antitrust Division United States Department of Justice, *10-year Workload Statistics Report FY 1990-99* (2000), (Washington: US Government Printing Office, 2000) online:

<<http://www.usdoj.gov.atr/public/4504.htm>> (date accessed: 7 August 2000).

<sup>7</sup> Federal Trade Commission, *1998 Annual Report* (1999), (Washington, US Government printing office, 1999) at 8, online: <<http://www.ftc.gov/news.htm>> (date accessed: 5 August 2000).

<sup>8</sup> Federal Trade Commission, *Performance Report Fiscal Year 1999* (2000), (Washington: US Government printing office, 2000) at 14, online: <<http://www.ftc.gov/news.htm>> (date accessed 5 August 2000) and R. Pitofsky, “The Nature and Limits of Restructuring in Merger Review” in *The Cutting Edge Antitrust Conference* (New York, N.Y., February 17, 2000) online:

<<http://www.ftc.gov/speeches/pitofsky/restruct.htm>> (date accessed: 7 September 2000).

<sup>9</sup> Commission of the European Communities, *XXVth Report on Competition Policy - 1995* (1996) at 61, (Brussels: European Commission, 1997) online: <[http://europa.eu.int/comm/competition/annual\\_reports/](http://europa.eu.int/comm/competition/annual_reports/)> (date accessed 5 August 2000) and Commission of the European Communities, *XXIXth Report on Competition Policy - 1999* (2000) (Brussels: European Commission, 2000) at 45, online:

<[http://europa.eu.int/comm/competition/annual\\_reports/](http://europa.eu.int/comm/competition/annual_reports/)> (date accessed: 6 May 2000).

<sup>10</sup> Data for 1994-95 and 1995-96 are from the Competition Bureau, *Annual Report for the Year Ending March 31*, (1997) (Ottawa: Industry Canada, 1998) online: <<http://strategis.ic.gc.ca/SSG/ct01197e.html>> (date published: April 8, 1998). Data for 1996-99 are from the Competition Bureau *Annual Report of the Commissioner of Competition for the Year Ending March 31*, (Ottawa: Industry Canada, 1999) online:

### *The Multiplication of Merger Control Regimes*

As part and parcel of economic liberalisation, nations have come to recognise the importance of competition “as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world”<sup>11</sup> and the importance of competition laws to safeguard competition. As a consequence, competition laws are being enacted rapidly, with most of these incorporating some form of voluntary or mandatory pre- or post-merger notification. Today more than 60 jurisdictions have merger notification regimes — as recently as 1990 there were closer to a dozen.<sup>12</sup>

The proliferation of pre-closing reporting regimes presents a serious challenge to the business community and their counsel (and an even more serious expense). The pace of change and the lack of reliable sources of information in many jurisdictions compounds the problem. Even the identification of jurisdictions that have filing requirements is often difficult. In some countries, local practitioners have differing views regarding the existence of a reporting regime, let alone over the criteria for any filing.

This paper is not intended to catalogue comprehensively the differences in the world’s merger control regimes. Nevertheless, a few bear mention to illustrate the extent of the problems created by proliferation.

### *Threshold Tests Which Are Difficult to Apply*

Although no two jurisdictions have precisely the same threshold test, most base thresholds on some measure of assets or revenues. Many which follow the European model have adapted the thresholds in the EU Merger Control Regulation to suit local

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<<http://strategis.ic.gc.ca/SSG/ct01636e.html>> (date published: October 22, 1999). The statistical data are only available in the on-line versions of the Annual Reports.

<sup>11</sup> ICPAC Report *supra* note 1 at 33.

<sup>12</sup> As of 1 August 2000, the jurisdictions with merger control / notification regimes were: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Portugal, Romania, Russia, Slovak Republic, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia.

needs.<sup>13</sup> But even with the popularity of the European approach, there remain a remarkable variety of threshold tests based on local or worldwide assets/revenues and/or market shares with which co-ordinating and local antitrust counsel must be familiar.

A number of countries (for example, Brazil, Belgium, the Czech Republic and Slovenia) employ mandatory reporting regimes based on alternative size of the parties or market share tests. Thus, in Slovenia, reporting may be required if the “companies involved in the concentration, including affiliated companies, jointly achieve more than 40 percent of sales, purchases or other transactions on a significant part of the Slovenian market.” Although initially it is up to the parties to determine whether a market-share threshold test has been crossed, it remains open to the regulatory agency to second guess. It is no surprise that thresholds such as these are widely condemned. They generate considerable uncertainty because market definition is such a subjective, fact-intensive and economics-intensive process – the absolute opposite of what business needs to ascertain legal obligations in time-constrained situations.

Other countries, like Brazil, Argentina and Russia, have merger notification thresholds based on worldwide assets or turnover. In Brazil notification is required if merger parties have worldwide sales in excess of R400 million (approximately US\$225 million). Similarly, merger parties may have a notification obligation in Argentina if their worldwide turnover exceeds US\$2.5 million. Russia’s threshold varies (see below), but, at the moment, the prior approval of the Ministry of Antimonopoly Policy is required if the total world-wide assets of the acquirer and the target exceed a remarkably low US\$350,000.<sup>14</sup> Legislation in several jurisdictions (Turkey being one example) does not explicitly state whether the relevant thresholds apply to the merger parties’ local or global assets and / or turnovers. Although the extremely low levels of some of these thresholds suggest that legislators had local mergers in mind when setting the values, the relevant agencies often take a different view. One would assume a merger in any jurisdiction would require at least local effects to trigger the application of the legislation, but where

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<sup>13</sup> See J W Rowley QC and D I Baker, eds, *International Mergers: The Antitrust Process*, 3d ed (London: Sweet & Maxwell, 2000) (forthcoming).

<sup>14</sup> An approximate estimate; the legislation requires notification if the parties’ assets exceed 100,000 times the minimum monthly salary.

there is no specific reference, the nexus between merger and market may be minimal (*e.g.*, modest export sales).<sup>15</sup>

Yet other jurisdictions, such as Russia, Mexico and Venezuela, have thresholds based on references to opaque, non-monetary values such as “economic units” or monthly minimum wages. For example, Russian legislation requires notification if the world-wide assets of the merger parties are in excess of 100,000 times the minimum monthly salary. Although ultimately referable to objectively established values, such thresholds do not allow non-local counsel to establish readily whether there may be a notification obligation.

### *Opaque Triggering Events*

In many jurisdictions the filing timeframe, or triggering event, is also far from clear. To illustrate, notification is required in Poland within 14 days of the “materialisation” of the intention to merge. This provision is ambiguous and, depending upon the transaction, may occur at the date of the signing of an agreement, its public announcement, a shareholder meeting approving the transaction, or the date of the launch of a share exchange offer. In the understated words of two commentators, “[i]n practice it may be very difficult to identify the exact moment at which a merging transaction has been triggered ...”.<sup>16</sup>

Another well-known “difficult jurisdiction” is Brazil. There, the relevant legislation stipulates that notification is required within 15 business days from the date that the transaction was “realized.” Initially, most practitioners took the view that the realization date equated with the transaction closing date. However, the antitrust authorities appear to consider that any agreement signed by the parties that could affect competition—potentially even a Memorandum of Understanding—may trigger the notification requirement. Personnel changes at CADE, the antitrust enforcement agency,

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<sup>15</sup> On the issue of whether an offshore merger will be considered to have effects in Argentina, see Opinions 42 and 52 of the National Commission for the Defence of Competition. On extraterritoriality and merger laws generally, see: E M Fox, “Extraterritoriality and Merger Law: Can All Nations Rule the World?” *Antitrust Report* (December 1999) 2-7.

have also appeared to affect the interpretation of what constitutes a triggering event. This is highly unsettling where fines ranging from approximately US\$30,000 to US\$3 million at current rates of exchange are available.

### *Early Filing Deadlines*

Many countries (typically those which follow the notification triggering events of the EU) require that filings be submitted very quickly after a transaction emerges. In Argentina, Brazil, Estonia, Latvia, Lithuania, Poland, South Africa and Turkey, for instance (as well as most member states of the European Union), filings are arguably required within 7-15 days of signing or announcing a merger agreement. Although deadlines are sometimes flexible, the statutory requirements may be completely unrealistic for transactions which emerge quickly (even if closing may be far in the distance). Such timeframes compound the other uncertainties, complications and costs of doing global deals. In both hostile and confidential situations, the problem is exacerbated. Confidentiality requirements of public market transactions often hinder the ability to get the deep enough into an organisation to get the information needed to complete world-wide filings.

### *Burdensome Filing Requirements*

Many regimes call for notifications which require detailed substantive analyses to be made at a very early stage of the transaction. This is true not only of the EU, but also Argentina, Brazil, Poland, South Africa, Turkey and other jurisdictions that require filings to be submitted soon after signing or announcing a merger agreement or launching a bid. (Indeed, some notification regimes require a detailed substantive analysis just to determine whether a filing is required!) Numerous jurisdictions also require merger parties to supply quantities of data that are often difficult and time-consuming to obtain (*e.g.*, in Argentina, sales must be broken down by local customs code categorization) yet add little real insight into the relevant substantive issues.

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<sup>16</sup> J Planavova-Latanowicz and C Harding, "The Control of Concentrations in the Czech Republic and Poland" (1999) 20 ECLR 265 at 271.

### *High Filing Fees*

Several jurisdictions appear to be “cashing-in” on merger filings by charging high filing fees. In the US, a filing fee of US\$20,000 per acquiring person per transaction was introduced in 1990; today it is US\$45,000 and may soon become much higher.<sup>17</sup> At the moment, Croatia tops the list with a maximum filing fee that beggars belief: US\$140,000. Although the jurisdictions currently doing so are relatively few<sup>18</sup>—some sixteen in number at the moment—the worry is about virus-like growth.

Filing fees are also becoming important—some may say crucial—sources of agency funding in a number of countries. In the United States, a significant source of operating funds is now derived by the two federal agencies from HSR notification fees.<sup>19</sup> Obviously, when fees generate revenues of upwards of US\$200 million<sup>20</sup> a year, there is little incentive for those agencies to advocate reductions, either in amounts or in thresholds.

### *The Costs of Multi-jurisdictional Deals*

Divergent notification thresholds, timing and notification requirements (not to mention differences in substantive approaches) cost business dearly. Even the expense of

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<sup>17</sup> Two bills presently before the 106<sup>th</sup> Congress, S 1854 and HR 4194, would significantly increase HSR filing fees. Bill S 1854 would amend the *Hart-Scott-Rodino Act of 1976* (Pub 1 No 94-435 Stat 1383 (1976) (codified in various sections of 15, 18 and 28 of the USC) in several important ways. Amongst other things, it would raise the size-of-transaction threshold from US \$15 to US \$35 million and would create a two-tier filing fee, establishing a new US \$100,000 filing fee for larger transactions. The filing fee would remain US \$45,000 for transactions valued from \$35 million to \$100 million. Both filing fees would be indexed for inflation. HR 4194 would increase the size-of-transaction threshold to US \$50 million, eliminate the size-of-person test, and impose multi-tier filing fees ranging from US \$45,000 to US \$225,000. The increased reporting thresholds and multi-tiered filing fees are, importantly, designed to be revenue neutral. It has been estimated that raising the size-of-transaction threshold to US \$35 million would decrease the number of transactions requiring reporting by about 1/3 and that raising the threshold to US \$50 million would eliminate about 1/2 of all HSR filings: See ABA Antitrust Section, *Hart-Scott-Rodino Antitrust Improvements Act of 1999* (April 2000), online: <[http://www.abanet.org/antitrust/hsr\\_antitrust.html](http://www.abanet.org/antitrust/hsr_antitrust.html)> (dated accessed: 5 September 2000). Bill S 1854 has been placed on the Senate Legislative calendar under General orders as of 5 September 2000; Bill HR 4194 is at House subcommittee actions as of 5 September 2000.

<sup>18</sup> These are detailed in Annex 3-A of the ICPAC Report, *supra* note 1 and at Appendix A.

<sup>19</sup> “As a technical matter, Agency funding is not “tied” to filing fees. But, as a practical matter, Congress is unlikely to provide funding to the Agencies beyond the funds raised by HSR filing fees.” See ABA Antitrust Section, *Hart-Scott-Rodino Antitrust Improvements Act of 1999* (April 2000) at 5 (note 8), online <[http://www.abanet.org/antitrust/hsr\\_antitrust.html](http://www.abanet.org/antitrust/hsr_antitrust.html)> (dated accessed: 5 September 2000).

bringing local counsel up to speed on the salient antitrust issues can be high. And because so many notified transactions— well over 95% by most estimates—are non-problematic,<sup>21</sup> multi-jurisdictional merger notification often turns out to be little more than a time-consuming and expensive procedural exercise. After finding that only 1% to 5% of mergers are prohibited or restructured, the ICPAC Report concluded that “[t]his evidence leads the Advisory Committee to conclude that the growing incidence of multijurisdictional merger review is imposing unnecessary costs in a large number of transactions that present little, if any, actual competitive concerns.”<sup>22</sup>

Ostensibly, mandatory pre-merger notification is required because of the assertion that it will frequently be difficult or impossible to remedy a merger satisfactorily after it is consummated. While this may be true in a limited number of cases, the number is likely to be very small. Most mergers simply do not scramble the eggs in ways which are difficult to unscramble. More important, because the vast majority of mergers are in fact non-problematic, merger notification imposes huge and possibly unnecessary costs on the thousands of parties involved in competitively neutral or pro-competitive transactions. As Sims and Herman have noted in the US context:

“The legislative history of HSR is quite clear: the premerger notification provisions of the HSR Act were intended to apply only to “the very largest corporate mergers – about the 150 largest out of the thousands of mergers that take place every year.” With respect to these transactions, the advertised goal was relatively benign: to give the antitrust agencies advance notice of these important deals and a small amount of readily accessible information. The agencies could then use the information to make a preliminary analysis of the transaction and, where warranted, have a reasonable shot at winning a premerger injunction, thus avoiding the divestiture difficulties that occasionally arose. This was modest medicine for a modest problem – the small number of large “midnight mergers” that have been the justification for HSR from its beginnings to the present time.”<sup>23</sup>

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<sup>20</sup> Based on the number of chargeable filings (i.e., excluding reportable transactions for which no filing fees are required): DoJ 1999 Annual Report, *supra* note 4 at 11.

<sup>21</sup> In the US, for example, the FTC and the US Department of Justice’s Antitrust Division thoroughly review only 2% to 3% of notified mergers. See R Pitofsky, “The Nature and Limits of Restructuring in Merger Review”, *supra* note 8.

<sup>22</sup> ICPAC Report, *supra* note 1 at 95.

<sup>23</sup> J Sims and D P Herman, “The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation,” 65 Antitrust Law Journal

Against this backdrop it is increasingly important to question what it is about business transactions known as mergers that warrant such regulatory oversight? By comparison, contractual arrangements, joint ventures and various other forms of business arrangement or re-organisation are not subject to such broadly based mandatory reporting and review.

Although the concept of pre-merger notification has undoubted merit when seen as a fix-it-first tool, these merits must be weighed against the increasing burdens the system is placing on business and regulators. While this may not suggest that pre-merger notification be done-away altogether, it certainly argues for careful design of such regimes to balance overall transaction costs against the benefits of detecting and preventing or restructuring the small number of anti-competitive transactions.<sup>24</sup> Simply stated, in an environment where mergers rarely raise serious antitrust concerns, merger regulation should not impose onerous costs on business or the agencies charged with enforcing substantive rules.<sup>25</sup>

To date, insufficient work has been done to measure the costs of multiple notification regimes. An early attempt to determine the costs of domestic merger review was undertaken in 1997 by Sims and Herman.<sup>26</sup> They estimated the total cost of HSR by taking into account:

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(1997) 865 at 877 and 878, citing, in part, HR Rep No 94-1373 at 11 (1976) [hereinafter “Sims & Herman”].

<sup>24</sup> Some of these problems can, of course, be dealt with by merely raising notification thresholds and eliminating filing fees. That said, voluntary notification regimes can have many merits, particularly where voluntary notification is coupled with active investigation. In the UK, for example, merger parties are well aware that the regulator may investigate controversial transactions and therefore have an incentive to voluntarily report cases that may have antitrust issues because they want certainty that their transaction will not be challenged after completion. At the same time, parties to neutral or pro-competitive transactions – no matter how large – can choose not to notify without risking sanctions for non-compliance.

<sup>25</sup> For a cost/benefit analysis of HSR, see *Ibid.* at 884-892.

<sup>26</sup> *Ibid.* While no comparable study of Canadian merger review has been published, the costs of a recent, high profile contested Canadian merger were enormous. Grant Billing, chairman and chief executive of Superior Propane, said that legal and experts’ fees escalated to C\$11-million, while efficiencies and cost savings that were lost from having to run two separate operations resulted in additional costs of C\$35-million and are increasing at a rate of C\$3-million a month. See “Superior defeats Competition Bureau over deal” *National Post*, 31 August 2000 at C1. (The Competition Bureau has announced that it will

- filing fees;
- out-of-pocket costs (e.g., lawyers and economists fees and document production / transaction costs);
- regulatory delay (i.e., lost savings, efficiencies and synergies due to the running of a statutory waiting period or full-blown investigation);
- lost employee time and management attention; and
- excessive relief (i.e., remedies intended to solve a non-existent or unlikely competitive problem or relief in which the costs outweigh the competitive benefits).

According to their estimates, the total direct cost of HSR was at the time almost US\$1 billion a year *for transactions that raise virtually no antitrust concerns*. Although open to criticism for arguably under-estimating the benefits of pre-merger notification and making questionable costs assumptions (perhaps also through underestimation), the underlying thesis is compelling: merger control is enormously expensive in an environment where few mergers raise serious antitrust issues.

In the absence of a comprehensive study of the costs of multi-jurisdictional merger control compliance, some very rough estimates may be made. By way of illustration, suppose that there are 150 mergers a year that raise little or no substantive issues but are subject to notification in the EU, the US, Brazil, Canada, Mexico and South Africa and an additional 100 (subject to notification in the same jurisdictions) that raise some substantive issues that are addressed within the Phase 1 period in Europe, the initial 30 waiting period under HSR and similar timeframes in other jurisdictions.<sup>27</sup>

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appeal the Competition Tribunal's decision to allow the merger on the basis that it was likely to yield efficiency gains well in excess of anti-competitive effects.)

<sup>27</sup> The 250 estimate is based on the assumption that virtually all of the nearly 300 mergers notifiable in Europe are also HSR reportable, which seems reasonable given the very large EU threshold and the very small US threshold (and that only 20 were subject to Phase 2 proceedings—see discussion in text below). Without in-depth empirical study, it is impossible to know how many of these transactions trigger notification obligations in other jurisdictions, but Brazil, Canada, Mexico and South Africa have been taken as representative examples because they are jurisdictions in which filings are commonly made. There are obviously many other multi-jurisdictional transactions, such as intra-EU transactions that require reporting

Each transaction could cost well over US\$150,000 in filing fees alone.<sup>28</sup> (The exact amount would depend upon the size of the transaction as certain jurisdictions have sliding scale filing fees.) For the non-complex transactions, assume legal fees at an average of US\$50,000 in each country, which would add US\$300,000 to the total.<sup>29</sup> Indirect costs such as diverted executive and internal staff time are difficult to determine because of the absence of publicly available data or even comprehensive internal corporate accounting measures. However, a modest estimate might be 50% of direct costs; US\$150,000. Thus, a non-complex multi-jurisdictional merger could easily cost upwards of US\$600,000 just to comply with antitrust filing requirements in a handful of major jurisdictions.

More complex transactions require in-depth antitrust analysis, both on the part of lawyers and economic experts, and would also require additional executive attention. As a ballpark estimate, assume that both the legal/experts fees double to an average of US\$100,000 per jurisdiction and indirect costs increase proportionally (i.e., to US\$300,000). Thus would result in an average total cost in excess of US\$1 million to complete the merger process in complex (but still pro-competitive or competitively neutral) transactions.

In summary, without considering the costs of delays due to regulatory review, the cost to the global economy would be at least US\$180 million a year (i.e., 150 x US\$600,000 plus 100 x US\$1,050,000) just to complete merger filings in 250 non-problematic transactions.

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in two or more member states (plus, in some cases, the US and elsewhere) that have not been taken into consideration for the purpose of this analysis.

<sup>28</sup> See Appendix A.

<sup>29</sup> US\$50,000 has been chosen as a rough average. In some cases lead counsel would generate disproportionately high fees, but local counsel would be able to benefit from work done centrally (e.g., the antitrust analysis developed by lead counsel may be applicable in every jurisdiction, although this would obviously have to be supplemented / confirmed by local counsel). The costs of preparing filings in certain jurisdictions would also be much more significant than those in others; a Form CO, for example, is much more costly and time-consuming to prepare than an initial HSR filing.

The opportunity costs due to delay are potentially even more significant. For every day that non-problematic mergers are delayed, the merger parties – and ultimately consumers – lose the benefit of the synergies and efficiencies that accrue from most mergers. Even if synergies represent only about one-tenth of one per cent of total transaction value, a 30 day delay for the 250 transactions that we are considering could cost business upwards of US\$1.5 billion a year, or US\$5.6 million per transaction.<sup>30</sup> Although ordinary commercial time frames may not permit most transactions to be consummated within 30 days in any event, even if delays due to antitrust review were no more than one week, the cost would still be well over a quarter of a billion dollars a year.

Even if there were only 250 multi-jurisdictional transactions a year that did not raise serious antitrust concerns (there are likely more), the annual cost to complete merger filings in these cases is clearly enormous. For the handful of transactions that have more serious substantive issues to be dealt with (in any one jurisdiction), costs would skyrocket. These are the 20 cases for which the European Commission opens

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<sup>30</sup> Average synergy gains in the first year after a merger are roughly 0.014% of total transaction value, assuming that seven of the top ten completed mergers up until 1999 are representative examples (US\$6.071 billion / US\$421.1 billion). Assuming (a) that this ratio is the same for every merger; (b) that the parties to the 250 mergers we are considering have at least US\$5 billion in world-wide assets or revenues – as they must to trigger EU notification requirements; and (c) that the average time lost in the antitrust process is 30 days (i.e., the duration of the Phase 1 process or 8% of the calendar year), lost synergies in 1999 due to a 30 day antitrust review would amount to approximately US\$1.4 billion (i.e.,  $0.014 \times \text{US\$1.25 trillion}$  ( $\text{US\$5 billion} \times 250$ ) =  $\text{US\$17.5 billion} \times 0.08$ ), or about US \$ 5.6 million per transaction, per month.

The 0.014% synergy gains estimate was determined using the merger parties' own synergy estimates. See: Associated Press, "Canadian Jobs Safe in Mobil, Exxon Merger," (16 December 1999) online: [www.edmontonjournal.com/business1/stories/991216/3303202.html](http://www.edmontonjournal.com/business1/stories/991216/3303202.html); SBC Communications, *Annual Report 1999* at 3 online: [www.sbc.com/investor/financial/annual report/99\\_annualreport.pdf](http://www.sbc.com/investor/financial/annual%20report/99_annualreport.pdf); J.H. Hance, "Remarks at the BankAmerica/NationsBank Merger Press Conference" (13 April 1998), online: [www.bankofamerica.com/newsroom/s...ech.cfm?speechid=speech.19980413.02.htm](http://www.bankofamerica.com/newsroom/s...ech.cfm?speechid=speech.19980413.02.htm); At & T, News Release, "AT&T offers \$62 billion in cash, stock and assumed debt and preferred equity for MediaOne Group," online: <http://www.att.com/press/item/0,1354,664,00.html>; Vodafone Airtouch PLC, *Annual Report and Accounts For the Year Ending March 2000*, online: [http://www.vodafone-airtouch-plc.com/downloads/vfat/investor/vfatra\\_2000.pdf](http://www.vodafone-airtouch-plc.com/downloads/vfat/investor/vfatra_2000.pdf); Thierry Desmares, TotalFinaElf Shareholders Meeting, (25 May 2000), online: <http://www.totalfinaelf.ext.fth.net/cgi-bin/frames.pl?lang=us&grp=bi&sgroup=cp&file=index.htm>; AT & T, News Release, AT&T, TCI to merge, create new AT&T consumer services unit, (24 June 1998), online: <http://www.att.com/press/0698/980624.cha.html>. "Bell Atlantic and GTE Complete their Merger and Become Verizon Communications," News Release, (30 June 2000), online: <http://newscentre.verizon.com/proactive/newsroom/release.vtml?id=39368> [hereinafter "Bell Atlantic Merger"]

Phase 2 proceedings and the 100-plus mergers subject to second requests in the US.<sup>31</sup> Addressing issues raised during the Phase 2 process in Europe and/or complying with a second request can each easily add many millions of dollars to the cost of completing a single transaction. Very large transactions tend to be those subject to this very intense, and very costly, scrutiny: indeed, almost 50% of all second requests are issued in connection with transactions valued at US\$500 million or more.<sup>32</sup> It is therefore no surprise that it takes, on average, almost a year to complete very complex global transactions.<sup>33</sup>

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<sup>31</sup> See Commission of European Communities, *XXIXTH Report on Competition Policy 1999*, (Brussels: European Commission, 2000) at 45 and the Federal Trade Commission and Department of Justice (Antitrust Division) *Annual Report to Congress Fiscal Year 1999* (Washington DC: US Government Printing Office, 2000) at 5. In 1999, there were 20 Phase 2 proceedings and 113 Second Requests issued (45 by the FTC and 68 by the Department of Justice).

<sup>32</sup> Federal Trade Commission and Department of Justice (Antitrust Division) *Annual Report to Congress Fiscal Year 1999, ibid.*, Exhibit A, Statistical Tables for Fiscal Year 1999 – Data Profiling Hart-Scott-Rodino Premerger Notification Filings and Enforcement Interest, Table IV.

<sup>33</sup> The average number of days between the date of announcement and the date of completion for the nine largest global mergers (to 1999) was 338 days. This was derived from press releases announcing the intention to merge and the completion of the regulatory process. See: M. Leibovich and M.M. Hamilton, "FTC Puts Exxon Mobil Deal on Hold," *Washington Post* (22 October 1999) E1, online: [http://www.washingtonpost.com/wpsrv/business/longterm/mobilexson/mobil\\_exxon.htm](http://www.washingtonpost.com/wpsrv/business/longterm/mobilexson/mobil_exxon.htm). "Exxon and Mobil Confirm Federal Trade Commission Approval of Merger," online: [www.businesswire.com](http://www.businesswire.com); Citigroup Corporation, News Release, "Citigroup (CCI) to begin trading today, Following completion of merger of Citicorp and Travelers Group" (8 October 1998), online: [http://www.citicorp.com/corporate\\_affairs/pr68.htm](http://www.citicorp.com/corporate_affairs/pr68.htm). Citigroup Corporation, News Release, "Citicorp and Travelers Group state that Fed approval means merger will be completed on October 8" (24 September 1998), online: [http://citicorp.com/corporate\\_affairs/pr66.htm](http://citicorp.com/corporate_affairs/pr66.htm); "SBC Communications and Ameritech to Merge" (11 May 1998), online: [http://www.abc.com/news\\_center/article.html?query\\_type=article&query=19980511-01](http://www.abc.com/news_center/article.html?query_type=article&query=19980511-01). "SBC Completes Acquisition of Ameritech" (8 October 1999), online: [http://www.sbc.com/news\\_center/articles.html?query\\_type=article&query=1991008-01](http://www.sbc.com/news_center/articles.html?query_type=article&query=1991008-01); Bank of America, News Release, "NationsBank and BankAmerica to Merge" (13 April 1998), online: <http://www.bankofamerica.com/newsroom/p...press.cfm?PressID=press.19980413.02.htm>; Bank of America, News Release, "It's Official: NationsBank and BankAmerica Merge" (30 September 1998), online: <http://www.bankofamerica.com/newsroom/p...press.cfm?PressID=press.19980930.01.htm>; MediaOne Group, News Release, "MediaOne Group and AT & T sign definitive Merger Agreement" (6 May 1999), online: <http://www.mediaonegroup.com/news/hrml/19990812101439.html>. MediaOne group, News Release, "AT & T Closes MediaOne Merger" (15 June 2000), online: <http://www.mediaonegroup.com/news/20000615075159.html>; "Vodafone Group Offers to Purchase AirTouch for \$45 Billion" (6 January 1999), online: <http://www.cmcnyls.edu/bulletins/vdfgopat.html-ssi>. "Commission authorises Vodafone and Air Touch to Merge," News Release (25 May 1999), online: [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/99/342|0|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/99/342|0|AGED&lg=EN); and "AT & T Corporation will buy Tele-Communications Inc. in a \$48 Billion Deal" (24 June 1998), online: <http://www.cmcnyls.edu/bulletins/attwbtc.html>. "AT & T and TCG Merger," Press Release, online: [www.att.com](http://www.att.com), "Total Fina and Elf Aquitaine Reach Amicable Accord on Merger," Press Release (13 September 1999), online: <http://www.totalfinaelf.com/us/html/bi/cp/99/ope15a.htm>. "European Commission Approves Total Fina- Elf Aquitaine Merger," Press Release (9 February 2000), online: <http://www.totalfinaelf.com/us/html/bi/cp/2000/002009.html>; "Bell Atlantic and GTE Agree to Merger,"

While many commentators have identified the chaos of multi-jurisdictional merger review as problematic and have agreed that something needs to be done, views differ on how best to accomplish harmonisation or co-ordination and the prospects from making progress.

### **Proposals for Reform to Date**

#### *The ABA Report*

The first major recognition of the need to minimise the burden of multi-jurisdictional merger review was the American Bar Association's 1991 *Report of the Special Committee on International Antitrust* (the "ABA Report"). It examined a wide range of antitrust issues arising from globalization including conflicts in international merger review.<sup>34</sup> Its analysis of merger issues focused on reporting requirements, extraterritorial enforcement and conflicts of jurisdiction, and access to information outside the jurisdiction of the investigating agency. Its recommendation of harmonized content and timing for pre-merger reporting requirements, the establishment of a two-stage filing system, and the sharing of confidential information among enforcement agencies (subject to appropriate confidentiality safeguards) provided a visionary roadmap for procedural improvements. But, to date, its recommendations have not been taken up.

#### *The OECD/Whish & Wood Report*

Three years later, the Organization for Economic Co-operation and Development (OECD) released *Merger Cases in the Real World — A Study of Merger Control Procedures* authored by Richard Whish and Diane Wood.<sup>35</sup> Chapter IV of the study explored the motivations, advantages and disadvantages for both enforcement agencies and the business community of greater co-operation and convergence in merger reviews.

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Press Release (28 July 1998), online:

<http://newscentre.verizon.com/proactive/newsroom/release.vtml?id=36593> . Bell Atlantic Merger *supra* note 30.

<sup>34</sup> (Chicago: American Bar Association, 1991) at 205-208. One of the authors of this article, J W Rowley QC, was a member of the Special Committee.

Like the ABA Report, it concluded that substantive harmonization was premature, but that the time was ripe to address procedural issues. Cost savings from better co-ordinated procedures would translate into more efficient and effective investigations, which in turn would benefit customers. From the agencies' perspective, co-operative efforts might contribute to minimization of duplication, ease of gathering information and avoidance of conflict. For merging parties, the principal benefits from co-operation would be a reduction in review time and costs.

The Whish and Wood recommendations included:<sup>36</sup>

- the establishment of a waiver system which would enable parties to waive confidentiality restrictions on inter-agency communication in return for expedited consideration or reduced fees;
- the implementation of guidelines governing the treatment by the agencies of merging parties' confidential information;
- the utilization of a common filing form with common information requirements; and
- the convergence of time periods within which agencies would complete their reviews of proposed transactions.

Despite a positive initial reception, most of these recommendations have been ignored.

A working party of the OECD Committee on Competition Law and Policy has adopted a relatively modest report and common filing form which incorporates some of the Whish and Wood recommendations last year.<sup>37</sup> Twenty-eight jurisdictions<sup>38</sup> reached

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<sup>35</sup> OECD, "Merger Cases in the Real World — A Study of Merger Control Procedures" in 1994 *Competition Policy Workshop* (Paris: OECD, 1994).

<sup>36</sup> *Ibid.* at 98-111.

<sup>37</sup> OECD, Committee on Competition Law and Policy, *Report on Notification of Transnational Mergers* (approved by the Directorate for Financial, Fiscal and Enterprise Affairs) (5 February 1999), online: <[http://www.oecd.org/daf/clp/CLP\\_reports/notifmergers.pdf](http://www.oecd.org/daf/clp/CLP_reports/notifmergers.pdf)> (date accessed: August 2000).

consensus on the form, demonstrating that a common approach to procedural matters can work. However, the initiative has yet to be endorsed by the OECD Council and it remains to be seen whether member states will in fact follow the non-binding recommendation for a common form filing.<sup>39</sup> The tea leaves do not point that way.

### *The United Kingdom/France/Germany Common Form*

In 1997, the competition authorities of Germany, France and the United Kingdom adopted a voluntary common filing form.<sup>40</sup> Enforcement agencies in each country will accept the Common Form when a merger is to be examined in two or more of the jurisdictions. Merging parties opting to utilize the system will be told within one month whether additional information is required. Each agency continues to enforce its own laws in the manner it considers appropriate.

Unfortunately, this three-country regime does little to address the cost and time issues which arise with multi-jurisdictional mergers; among its shortcomings:

- Parties can use the Common Form only if they are notifying in at least two of the covered jurisdictions. Since the Common Form is based on the concept of standardizing and easing filing obligations while providing competition authorities the basic information they need, there is no principled reason for precluding use of the Common Form even if parties are filing only in one jurisdiction.<sup>41</sup>
- A Common Form filing does not constitute a formal notification in either France or the UK. Only after waiting one month in France do the parties learn whether

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<sup>38</sup> The members of the OECD Committee on Competition Law and Policy are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and the European Union.

<sup>39</sup> Brazil appears to have adopted the OECD common form: see “Latin Antitrust in Search of the Right Formula” *Global Competition Review* (June/July 2000) at 14.

<sup>40</sup> United Kingdom Office of Fair Trading, News Release, “Easier Procedures for Multi-National Mergers” (29 September 1997), online: < <http://www.coi.gov.uk/coi/depts/GOF/GOF97Q3.html> > (date accessed: August 2000).

the competition authority believes a formal notification is advisable. In the UK, a Common Form will only constitute a filing for purposes of initiating the review period of the Office of Fair Trading if the merger parties comply with additional conditions.<sup>42</sup>

- One jurisdiction, Germany, actually requires *less* information on its own form than does the Common Form does.<sup>43</sup>
- Use of the Common Form does not speed up the review processes. The three participating agencies have only undertaken to “seek, where possible, to co-ordinate their timetables for final decisions”<sup>44</sup> (which may, in fact, result in faster jurisdictions slowing down).

In sum, the incentive to utilize the Common Form is thus very severely limited. Nor has the fact that the United Kingdom and France<sup>45</sup> are voluntary notification systems helped bring the form into widespread use.<sup>46</sup> Not surprisingly, the Common Form has had minimal practical impact on pre-merger notification in any of three sponsor countries. To the knowledge of the authors it has been used only once for notification in Germany. In some cases (e.g., Federal Mogul’s £1.5 billion acquisition of British automobile parts maker T & N) the form has been used in the United Kingdom and France, while Germany has been notified under its domestic regime, which, as noted, has less onerous filing requirements.<sup>47</sup>

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<sup>41</sup> See generally, ABA Antitrust Section, *Report on Proposed Common Form for Reporting Mergers* (March 1998), online: < <http://www.abanet.org/antitrust/common.html> >.

<sup>42</sup> *Ibid.* at p. 2.

<sup>43</sup> I K Gotts and S Strasser, “*Caveat Emptor: Failure to Consider Pre-Deal What Foreign Pre-Merger Notifications Requirements Apply Can Prove Detrimental to Multinational Companies*” (ABA Section of Antitrust Law Annual Meeting, Toronto, Canada, 3-5 August 1998).

<sup>44</sup> Introductory Comments to the Common Form for Mergers in the United Kingdom, France and Germany. See also commentary by N Charbit and C Coasnes, “Multi-merger Notification Form” (December 1997/January 1998) *Global Competition Review* 53.

<sup>45</sup> Pending the adoption of proposed amendments.

<sup>46</sup> D Berry, “Common Merger Application Form” (December 1997/January 1998) *Global Competition Review* 50.

<sup>47</sup> Information received from the German Antitrust Authority and European competition law practitioners.

### *Bilateral Agreements and Case-by-Case Cooperation*

Some progress has occurred through bilateral co-operation agreements between governments or their enforcement agencies. Nevertheless, during the past decade, there has been a remarkable shift in focus from avoiding enforcement conflicts to friendly collaboration. However, many do not apply to mergers, confidentiality restrictions inhibit full agency collaboration and none have alleviated reporting burdens on merger parties.<sup>48</sup>

The shift from conflict avoidance to co-operation occurred with the 1991 agreement between the United States and the European Union. The agreement provides for co-operation on three main levels:<sup>49</sup>

- antitrust officials will share general information concerning antitrust enforcement policy;
- each jurisdiction will inform the other of anti-competitive conduct which is “relevant to, or may warrant, enforcement activity” in the other jurisdiction; and
- antitrust officials may request non-confidential information in the possession of the other enforcement agency.<sup>50</sup>

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<sup>48</sup> The main bilateral agreements are: *Agreement Between the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Co-Operation Regarding Restrictive Business Practices*, Germany and United States, 1976, TIAS 8291, 27 UST; *Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-operation on Antitrust Matters*, Australia and United States, 1982, 21 ILM 702; *France-Federal Republic of Germany Agreement Concerning Cooperation on Restrictive Business Practice*, France and Germany, 1984; *Co-operation and Co-ordination Agreement Between the Australian Trade Practices Commission and the New Zealand Commerce Commission*, Australia and New Zealand, 1990/1994; *Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws*, EU and United States, 1991/1995 (re-enacted 27 April 1995, OJL 47); *Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, Canada and United States, 1995, ILM 35/309; *Agreement Between the European Community and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws*, EU and United States, 1998, 8 June 1995, OJL 173; *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance*, Australia and United States, 1999; *Agreement Between the European Communities and the Government of Canada Regarding the Application of their Competition Laws*, Canada and EU OJL 175, 1999. For commentary regarding the Canada-EU agreement, see O K Wakil, J F Clifford & N Johnson, “Canada and the European Union Enter into A New Era of Antitrust Enforcement Cooperation” (February 2000) *Antitrust Report* 20.

<sup>49</sup> *Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws*, *supra* note 48.

The EU/US agreement and its progeny<sup>51</sup> do not empower antitrust authorities to use their own investigative powers to collect evidence in the other jurisdiction or to require the requested agency to do so on their behalf. Nor do they contemplate exchanges of information which are subject to statutory confidentiality protections. These restrictions can be contrasted with the “MLAT” between Canada and the United States<sup>52</sup> which provides for the collection and exchange of evidence using formal powers and the exchange of confidential information, but only in criminal matters such as conspiracy cases (i.e., not mergers). The United States has enacted framework legislation for extending these more expansive types of co-operation to non-criminal matters including mergers (subject to a continued confidentiality restriction on pre-merger filings).<sup>53</sup> However, only one “antitrust mutual assistance agreement”(with Australia) has been negotiated pursuant to this enabling legislation.<sup>54</sup>

In practice, the major enforcement agencies currently co-operate and co-ordinate to a considerable extent on many cross-border transactions. When confidentiality restrictions impede the desired level of co-operation, they do not hesitate (picking up perhaps on the recommendation of the OECD’s 1994 Whish/Wood report) to request waivers from merging parties which allow confidential information to be discussed and, sometimes, confidential documents to be exchanged. Merging parties typically grant such waivers when requested to do so because of the risk that an investigation will slow down and/or become more in-depth and adversarial if they refuse. In theory, merging parties

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<sup>50</sup> In 1998, there were 43 notifications by the EU and 39 notifications by the United States under this agreement (unpublished information provided by the European Union), a substantial increase over the 3 EU and 9 US notifications in 1991. See European Union, *XXVII<sup>th</sup> Report on Competition Policy - 1997* (Brussels: European Union, 1998) especially part II of the Report on the Application of the Competition Rules in the European Union (Report Prepared Under the Sole Responsibility of DG IV in Conjunction with the Twenty-Seventh Report on Competition Policy, 1997 - SEC (98) 636), online: <<http://europa.eu.int/comm/dg04/public/en/index.htm>>. (These figures represent the number of cases in which one or more notifications were made, not the total number of notifications.)

<sup>51</sup> See *Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, *supra* note 48; and *Draft Agreement Between the European Communities and the Government of Canada Regarding the Application of their Competition Laws*, *supra* note 48.

<sup>52</sup> *Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters*, Canada and United States, 18 March 1985, 24 ILM 1092, in force 1990.

<sup>53</sup> *International Antitrust Enforcement Assistance Act of 1994*, 1996, 15 USC 6201-12.

<sup>54</sup> See *Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-operation on Antitrust Matters*, *supra* note 48.

should expect to benefit from more focused and expeditious reviews resulting from this *ad hoc* process, but such outcomes are far from certain because the waiver grants are not normally tied to timing commitments by the agencies.<sup>55</sup>

### *The ICPAC Report*

Most recently, what may yet prove to be a key building block to the incremental process of reform was unveiled in February 2000 when the US DoJ's International Competition Policy Advisory Committee (ICPAC) released its final report. The wide-ranging and comprehensive Report makes many observations and recommendations that could form the basis of important reform. Among its contributions, it recommends that agencies throughout the world be encouraged to adopt what ICPAC called "Disciplines for Merger Review." The concept is that national antitrust agencies would work together to develop the "disciplines" that governments could agree upon to guide the review of mergers with significant spill-over effects;<sup>56</sup> that agencies should encourage and further deepen cross-border co-operation in reviewing mergers;<sup>57</sup> that agencies consider the adoption of "work-sharing arrangements" in order to co-ordinate multi-jurisdictional

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<sup>55</sup> An analysis of these issues may be found in: *Exchanges of Confidential Information Between Antitrust Enforcement Agencies: Preliminary Observations Prepared by a Working Group of the Antitrust and Trade Committee of the International Bar Association*, submitted to and at the invitation of the International Competition Policy Advisory Committee to the United States Department of Justice, 15 April 1999. The members of the Working Group were Terry Calvani, Pillsbury, Madison & Sutro, San Francisco and Washington; Neil Campbell, McMillan Binch, Toronto; and John Davies, Freshfields Deringer, Brussels). See also the ICPAC Report, at 69-71.

<sup>56</sup> *Ibid.* at 62-63 *supra* note 1. The suggested disciplines include: (i) nations should apply their laws in a non-discriminatory manner and without reference to firms' nationalities; (ii) as a best practice, with limited exceptions, non-competition factors should not be applied in antitrust merger review; (iii) enforcement agencies must establish their independence, and "parochial" political concerns should not play a role in the merger review process; (iv) nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests; and (v) in a clash between jurisdictions, remedies with extraterritorial effects should be tailored to cure the domestic problem.

<sup>57</sup> *Ibid.* at 68-75. Key features of such a co-operation framework would include: development of a multi-jurisdictional merger review protocol and the development of work-sharing arrangements between agencies. The Protocol would have: (i) a description of the way the federal antitrust enforcement agencies in the United States conduct cross-border co-ordinated merger investigations (this recommendation would apply to each jurisdiction seeking to improve the co-ordination of international merger review); (ii) model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information between competition authorities during a merger review; (iii) a policy statement outlining safeguards established in a reviewing jurisdiction to protect confidential information. Other jurisdictions usefully could develop comparable protocols and jurisdictions also should consider adopting a policy of providing notice to a party when they share documents of that party with another jurisdiction.

merger reviews in a more efficient and seamless manner;<sup>58</sup> and that targeted reform of the merger review process would be desirable. Areas recommended for reform included notification thresholds;<sup>59</sup> review periods and timing;<sup>60</sup> and notification forms and information requests.

ICPAC also recommends the formation of a “Global Competition Initiative” to foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and a common culture. Membership in the forum would be inclusive and include government officials, private firms, non-governmental organizations and others. ICPAC does not intend that the formation of the Global Competition Initiative will preclude the use of existing international organizations and venues such as the WTO, the OECD, and the United Nations Conference on Trade and Development (UNCTAD).<sup>61</sup>

The Report suggests that such a gathering could also serve as an information centre, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities.”<sup>62</sup> ICPAC proposes that the Global Competition Initiative set as its goal consideration of the “full range of competition policy matters of

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<sup>58</sup> *Ibid.* at 83-84. The Report suggests that: (i) in a first step, each jurisdiction conducts its own review of a proposed transaction but participates in the formulation, if not the negotiation and implementation, of remedies; (ii) in appropriate cases, it may be feasible to take co-operation to the next level and limit the number of jurisdictions conducting second-stage reviews of a proposed transaction; and (iii) one jurisdiction would coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions.

<sup>59</sup> *Ibid.* at 97.

<sup>60</sup> *Ibid.* at 98.

<sup>61</sup> Konrad von Finckenstein QC, the Canadian Commissioner of Competition, recently said that “[a]s appealing as this [the Global Competition Initiative] proposal might seem on the surface, it is not something I would support. I believe that the premise of the Initiative - that the several existing multilateral and plurilateral organizations do not provide adequate opportunities for antitrust officials to meet and talk about competition policy issues - is erroneous. The OECD, UNCTAD, APEC, the numerous bar meetings in Canada, the US and the European Community, such as this one, and the numerous conferences devoted specifically to competition policy issues offer significant scope for a meaningful exchange of views and experiences among competition policy officials. If they wanted, competition law enforcers could travel the world and never set foot in their offices. How many international institutions do we really need and what is the optimum number of meetings? In my view we have just about reached the saturation point ... I am on public record as to the reasons why I support the WTO as the vehicle to bring competition policy mainstream”: Konrad von Finckenstein QC, Commissioner of Competition, Competition Bureau, “Opening Remarks” (American Bar Association, Section of Antitrust Law, Panel Entitled “Global Warming? International Reaction to the ICPAC Report”, New York City, New York, 11 July 2000).

<sup>62</sup> ICPAC Report, *supra* note 1 at 29.

consequence to the global economy”.<sup>63</sup> To achieve this ambitious goal, ICPAC identified a number of “areas for constructive dialogue” related to the need to:

- multilateralize and deepen positive comity;
- agree upon the consensus disciplines noted above regarding best practices for merger control laws and consider disciplines to define actions of governments in areas with negative spill-over potential such as export cartels;
- consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world;
- consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review;
- consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
- undertake collaborative analysis of issues such as global cartels and market blocking private and government restraints; and
- possibly undertake some dispute mediation and even technical assistance services.<sup>64</sup>

While it is too early to determine the impact of the ICPAC Report, one thing is certain: its wide-ranging and fundamental recommendations will take some time to come to fruition — assuming of course that that the Report does bear fruit in the long run. The more troubling possibility is that the Report will quietly be slipped under the rug, as happened to the OECD Whish/Wood Report. A worrying sign that this may occur is already evident: a deafening silence from the US agencies since the fanfare which accompanied the release of the Report.

### **Shortcomings of Previous Reform Proposals**

All of these reform initiatives have at least two things in common: they have yet to produce much by way of concrete reform which ameliorates the burden on merger parties in multi-jurisdictional transactions, and they have all been initiated by *others* than

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<sup>63</sup> *Ibid.* at 282.

<sup>64</sup> *Ibid.* at 284-285.

those most affected by the current chaotic situation — i.e., regulators and lawyers, rather than the senior international business community.

Institutional inertia is a retarding factor. It is a sad truth is that regulators often lack strong incentives to push for reform — their focus is inevitably their own corner of multi-jurisdictional transactions and they tend to be fond of their own way of doing things. In the decade since the ABA Report’s pioneering work little has changed in the legal/regulatory frameworks of individual jurisdictions (aside from proliferation). Merger parties continue to experience the systemic flaws of the global patchwork of different systems.

While the goals of the reform initiatives canvassed above have been laudable, none have achieved what the international business community requires — immediate relief from the unwieldy morass of multi-jurisdictional merger review processes. Focussed reform to bring about targeted relief is the order of the day. To that end, the following modest proposal for reform is offered for consideration and debate.

### **A Business-Sponsored Streamlining Project**

What may prove to be the most effective way forward is for senior members of the international business community to seek to catalyze reform. A high profile sponsor group comprising leading multinational enterprises may have the credibility (and the political heft) to advance the agenda. It is time for those who are most affected by the international competition community’s failing to attempt to get its house in order.

A first task of such a group could be to persuade legislators and agencies in a small number of key jurisdictions to adopt (or at least to pilot test) a voluntary “common process” system with co-ordinated time limits and filing requirements.<sup>65</sup> A non-mandatory “lead agency” protocol similar in principle to the work sharing arrangements contemplated by the ICPAC Report might also be explored. If the initial phase is

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<sup>65</sup> See also: J W Rowley QC and A Neil Campbell, “Multi-jurisdictional Merger Review — Is it Time for a Common Form Filing Treaty?” in *Policy Directions for Global Merger Review, A Special Report by the Global Forum for Competition and Trade Policy*, Global Competition Review, April 1999.

successful, it would form a powerful model for extension to numerous other jurisdictions involved in reviewing mergers.

Obviously, any list of key antitrust jurisdictions would have to include both the United States and the European Union as both are central in almost all large multinational mergers. The United States has an open-ended, document-intensive process while the EU has a potentially lengthy but time-limited review with heavy up-front filing requirements. A third candidate jurisdiction could be Canada. Although a smaller jurisdiction, it addresses as many multinational mergers as the EU because of its trade ties to both the United States and the EU. Canada also has some different perspectives that could “leaven the mix” in developing a system not wedded either to the US or EU models (e.g., its short-form/long-form regime) and the agencies in these three jurisdictions already have the benefit of close working relationships on merger cases. Another “initial phase” country (which is less economically well-developed) might be added to obtain learning about the potential broader applicability of such a system.

Such a streamlining project might envision the following features:

- in those jurisdictions where the agencies have agreed to test the streamlining proposals, merging parties would be given the choice of whether to opt into the system (*i.e.* they could have their merger reviewed under the now-prevailing system *or* under the co-ordinated system being tested by the agencies);
- participating agencies would agree to follow the common timing and process arrangements while continuing to apply their own substantive domestic laws;
- merging parties would allow agencies greater latitude to communicate and co-ordinate reviews subject to appropriate confidentiality safeguards;
- existing processes would be divided into two time-limited stages to facilitate quick clearance of easy cases with light filing requirements and a detailed but more finite review for complex cases; and

- agencies would be encouraged to consider the designation of a “lead agency” in cases where one jurisdiction is more affected than others and/or common issues predominate over local issues.

If such measures were successful in alleviating the burden faced by the parties to multi-jurisdictional mergers while allowing national competition agencies to complete their reviews of such mergers without loss of autonomy or authority, it would represent an important building block for more far-reaching changes to increase the efficiency and effectiveness of international merger review.

**APPENDIX A**  
**FILING FEES OF SELECTED JURISDICTIONS<sup>66</sup>**

<b>JURISDICTION</b>	<b>FILING FEE</b>	<b>FILING FEE (US\$)<sup>67</sup></b>
Australia	AUD 15,000	\$9,676
Austria	ATS 1,000 for Phase 1, ATS 20,000 – 400,000 for Phase 2	\$77, \$1,549 - \$30,982
Brazil	BRL 15,000 – 18,000	\$8,339 - \$10,000
Canada	CDN 25,000	\$16,821
Croatia	Up to HRK 1 million	\$140,462
Czech Republic	CSK 50,000	\$1,438
Germany	DEM 10,000 – 100,000	\$5,449 – 54,495
Hungary	HUF 500,000	\$2,108
Ireland	IEP 4,000	\$5,413
Mexico	USD 8,842	\$8,842
New Zealand	Application for clearance: NZ\$2,2-50 Application for authorization: NZ\$22,500	\$1,190 \$11,900
Romania	ROL 6.5 million plus 1% of parties' turnover	\$424
Slovak Republic	SKK 15,000 – 50,000	\$363 - \$1,209
South Africa	ZAR 5,000 – 500,000	\$817 - \$81,744
Switzerland	No fee if Phase 1 clearance, Fee due if Phase 2 proceedings open	
United Kingdom	GBP 5,000 – 15,000	\$8,090 - \$24,269
United States	USD 45,000	

<sup>66</sup> Annex 3-A, ICPAC Report, Source: Submission by Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998).

<sup>67</sup> Conversion rates are year-end average 1999.

**J William Rowley QC** is a partner in the Toronto office and chairman of McMillan Binch. He attended University of Ottawa Law School from 1965-1968, where he was Editor-in-Chief of the *Ottawa Law Review*, University Gold Medalist and graduated *Magna Cum Laude*. Prior to joining the firm he served as law clerk to Mr Justice Roland A Ritchie of the Supreme Court of Canada, and before that served as Special Assistant to the Director (now Commissioner) of the Canadian Competition Bureau. His current practice is devoted largely to competition law (mergers and acquisitions, dominance and conspiracy), corporate governance, international arbitration and general public policy/government interface advice.

Mr Rowley is Chairman of the *International Bar Association*, Section on Business Law and a National Representative for Canada. He is a non-executive member of the board of directors of *The CGU Group Canada Ltd.*, a member of the board of governors of the *International Capital Markets Group* and is co-founder and a director of the *Global Forum on Competition and Trade Policy*, London and Washington, DC.

In addition to heading the firm's Competition Law practice, Mr Rowley is also a frequent writer and speaker in the Antitrust and Corporate Governance fields both in Canada and abroad. He is co-author with Donald I Baker of *Rowley & Baker, International Mergers: The Antitrust Process*, 2nd edition, Sweet & Maxwell, 1996 (3rd edition forthcoming, Autumn 2000). He is Editor-in-Chief, *Business Law International*, London; Chairman, Editorial Advisory Board of the *International Business Lawyer*, London; a member of the Advisory Board of *the Antitrust and Trade Regulation Report*, Washington, DC; Antitrust Editor of the *ABA Canadian Law Newsletter* and Editorial Board member of *Antitrust Report*, Matthew Bender, New York, *The Global Competition Review*, London and *The European Lawyer*, London. He is past chairman of the Antitrust and Trade Committee of the International Bar Association.

In his arbitration practice, Mr Rowley serves as a member of the National Panel of Arbitrators for Canada, ICC, Paris. He has chaired or participated as a tribunal member or counsel in numerous international and national arbitrations. In addition to ICC arbitrations, he has conducted cases under other rules such as those of UNCITRAL, the LCIA, the AAA and a number of domestic regimes. Mr Rowley is also a member of the London Court of International Arbitration. Further panel memberships include those of the American Arbitration Association, New York; the German Institute of Arbitration, Cologne; the Kuala Lumpur Regional Centre for Arbitration, Malaysia; The International Arbitral Centre, Vienna; The Indian Council of Arbitration, New Delhi; and The Alberta Arbitration and Mediation Society.

Mr Rowley is married to the former Janet Newman. He has two children, Christopher and John.