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**The Internationalisation of Merger Review:
Towards Global Solutions
(Perspectives of a Non-Governmental Advisor)**

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The Internationalisation Of Merger Review: Towards Global Solutions

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A problem acknowledged

The explosive growth of merger control regimes around the world and the attendant cost and complexity faced by parties to multijurisdictional mergers is now an acknowledged fact.¹ While the global surge of merger transactions has abated considerably since last year,² the fundamental problems associated with the proliferation of national and regional merger control laws have not. Those large transactions that are taking place continue to be burdened by filing requirements in dozens of jurisdictions, a myriad of notification thresholds, escalating filing fees, often the need to translate documents into multiple languages and a host of other unnecessary procedural differences.

Against this backdrop, the global community of competition authorities, practitioners and policy-makers has been faced, at least until very recently, with what political scientist Thomas Homer-Dixon has termed an “ingenuity gap”.³ Although the phrase was coined to cover a different set of problems, the concept is an apt one here – *i.e.* an acknowledged problem with no foreseeable solution. 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 two years ago, those who wished to address the problem appeared to lack the requisite wisdom to bring order to a system that had become chaotic.

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 being bridgeable. The ICPAC Report recommended an important step forward through the establishment of a “Global Competition Initiative” (GCI).

Then, as now, international cooperation amongst antitrust authorities occurred formally through a host of bilateral cooperation agreements and arrangements, most notably

between countries such as Australia, Canada, Israel, Japan, the US and the EU.⁴ While it is true that a variety of institutions, such as the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO) and the United Nations Conference on Trade and Development (UNCTAD), had acted as multilateral fora for competition policy discussions, progress was minimal and the ICPAC concluded that existing institutions each had limitations that prevented them from being the ideal place to advance the cause of greater coherence in international competition policy.⁵

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”.⁶ The recommended “new venue” was, of course, 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”.⁷ Believing too that “countries may be prepared to cooperate in meaningful ways, but are not necessarily prepared to be legally bound under international law”,⁸ 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.⁹

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The first important public support for the GCI came from then US Assistant Attorney General for Antitrust Joel Klein¹⁰ and European Commissioner for Competition Mario Monti¹¹ at the International Bar Association's 10th Anniversary Conference on the European Commission's Merger Task Force in September 2000.

But if Messrs Monti and Klein 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.¹² Happily, the effort succeeded, with consensus being achieved on:

- the reality of the problem created by multijurisdictional merger reviews with widely divergent procedures such as notification thresholds, timing, and filing requirements;
- the need for greater transparency of merger laws – knowing what laws are applied, when, where and how – given that an international merger faces possible scrutiny in dozens of jurisdictions; and
- the utility of developing a set of “best practices” in merger review against which the world's merger review regimes could be measured and to which they could aspire.

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

Despite the enthusiasm generated at Ditchley, concerns arose during the spring and summer of 2001 as to whether the momentum gained there had been jeopardised by the unusually lengthy change of leadership at the US Antitrust Division and the apparent insistence by leading antitrust agencies that they alone should manage the GCI's design and planning.¹³ Notwithstanding these concerns, subsequent indications from Klein's successor at the US Department of Justice, Charles James,¹⁴ and from Robert Pitofsky's successor at the US Federal Trade Commission, Timothy Muris,¹⁵ made it clear that the new US Administration intended to make good on the promise of the GCI envisioned by Ditchley and the ICPAC.

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”¹⁶ 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”).¹⁷ 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”.¹⁸ 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/BIAC Best Practices”).¹⁹ 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 October 17, 2001, both Mario Monti and Charles James again endorsed and elaborated upon their visions of the GCI. Monti stated:

We should work towards the creation of a global network of competition authorities . . . members [of the GCI] should strive to achieve a maximum of convergence and consensus on fundamental issues such as the substance and economics of competition policy, and the enforcement priorities of competition authorities. Such consensus should result from a common understanding about the best approach to solving the problems. This project would foster and develop a common worldwide “competition culture” and encourage developed and developing countries worldwide to introduce and enforce sound competition policies.²⁰

Emphasising the pragmatic thrust of the envisioned GCI, James suggested that the

... general approach to issues should be as practical and concrete as possible; it should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement . . . [and its] meetings would provide a structured dialogue by focusing on only two or three projects at a time. As indicated, I believe it would be appropriate to start with some merger process issues, among other things. These projects would be aimed at developing non-binding general guidelines or “best practices” recommendations. Where the [GCI] reaches consensus on particular recommendations, it would be left to governments to implement them voluntarily, through unilateral, bilateral, or multilateral arrangements, as appropriate.²¹

Early work of the International Competition Network

Days later, the GCI, newly incarnated as the “International Competition Network” (ICN), was born.²² True to the spirit of the ICPAC's recommendations and the consensus reached at

Ditchley Park, the ICN has been structured as a project-oriented, informal network of antitrust agencies with opportunities for input from other antitrust stakeholders, and a mandate to address antitrust enforcement and policy issues of common interest in order to formulate proposals for procedural and substantive convergence.

And 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. A “Mergers Working Group”, chaired by William Kolasky, Deputy Assistant Attorney General in the Antitrust Division of the US Department of Justice, has set itself 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.

Notification and procedures

Taking its cue from the MSG and ICC/BIAC Best Practices documents, the Notification and Procedures Subgroup has reached agreement on a set of eight guiding principles for establishing best practices in notification and procedural matters. These principles, for which approval will be sought at this, the ICN’s first annual conference in Naples, are:²³

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 merger review process should provide for the protection of confidential information.

More important is the Notification and Procedures Subgroup’s agreement on an initial set of Recommended Best Practices for Merger Notification Procedures (“Recommended Practices” – see the ICN website at www.internationalcompetitionnetwork.org/wgl_practices.html). 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. These initial “Recommended Practices” have also been submitted for adoption by the ICN at this meeting in Naples. Beginning in October, work is to start on additional best practices, with a goal of completing that work by the next annual ICN conference.

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 are requested to provide examples of unnecessarily costly, burdensome, or dilatory procedures. The Global Merger Costs Survey co-sponsored by the International Bar Association and the American Bar Association which is now under way will also make a much-needed empirical

contribution to this important question and augment the largely anecdotal evidence that has existed to date.

Investigative techniques

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, the Subgroup has scheduled a workshop in Washington, DC in November for officials from ICN member competition authorities. The workshop's preliminary agenda is encouragingly pragmatic: the focus will be on analysing the relationship between states' merger laws; the substantive competition standards such laws use; 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 to be considered is 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

Finally, the Analytical Framework Subgroup is concentrating on the general analytical framework for merger review, including: (i) the substantive standards for prohibiting mergers; and (ii) the criteria for applying those standards. The Subgroup is now compiling information on the substantive standard applied in each member jurisdiction, and will present a panel in Naples on the competing substantive standards for merger evaluation (*i.e.*, "substantial lessening of competition" (SLC) versus "creation or strengthening of a dominant position" versus "public interest"). In light of the UK Department of Trade and Industry's declared intention in its July 2001 White Paper²⁴ to move the UK merger review regime's substantive standard to an SLC test, and the European Commission's consideration of the same question,²⁵ 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 provides us with the first real opportunity to address today's troubled approach to multijurisdictional merger review, there still remains an enormous gulf between talk and action. The challenge will be whether identifiably 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. Stepping up to the plate with concrete plans for process change in these two primary seats of antitrust will provide a model for legislators and enforcers in other jurisdictions whose laws and policies have drawn so heavily from these sources.

To help in taking these difficult next steps, our meeting here in Naples must be used to build both the commitment and expectation among the ICN members (and other stakeholders)

that they will *act* on the Guiding Principles and the Recommended Practices.

The EC's leadership opportunity

Because of its current engagement in its own merger reform process, the European Commission is ideally placed to play a much needed first-mover role in transforming talk into action. In this regard, Philip Lowe's assumption of office, and the judgment in *Airtours*,²⁶ should be used as positive catalysts to this end. The following steps are respectfully suggested for Europe's consideration:

- Commencing now, the EC should begin to "market test" (be more open about) the likely outcomes of the reform process – so as to be able to adjust, if necessary, to well-considered responsive comment.
- A draft of the proposed market power analysis guidelines should be published as soon as possible – and no later than October – to enable public comment before the approach is finalised.
- As part of the building-out of due process improvements, provision should be made for much earlier access to documents for merger parties than is now available. In addition the concept of a "clean team" process for the re-evaluation of preliminary conclusions reached by MTF case teams – as described by Mario Monti following clearance of Carnival's bid for P&O – appears a useful one, and should be developed further.
- A super fast track appeal process (involving fixed time limits) – *e.g.* appeals to be launched within 30 days, with an appeal decision to be reached in three months – would not only be deal sensitive but would simulate some of the disciplines associated with separate investigative and decision-making bodies.
- Given the divided views on a change to the substantive test, a compromise, in the nature of a stepped change (apparently now being mooted within the Commission) is worthy of consideration. This would involve retaining, over the short term (say two to three years) the dominance test, but with the announced intention to convert to an SLC test thereafter. During the interim period, guidelines would help to ensure against loss of precedent and provide transparency as to how the Commission would approach the SLC test once enacted. Such an approach would also provide a better intellectual foundation for the examination of interdependent effects, where appropriate.
- To be certain that the best effect is obtained from the planned new central role for economics in the process, great care needs to be taken as to how the economics unit and its reports are structurally positioned. Establishing a separate reporting line for economic

input in merger review cases would ensure the benefit of a separate voice and avoid inappropriate homogeneity which might result should the new economics unit feel any sense of subservience.

The US cannot be exempt from change

For a multilateral reform process to work, all key players must participate. In the case of the US system, despite its age and intellectual provenance, careful and dispassionate introspection, followed by action, is clearly called for. 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. The most important reform needed in the US system is a meaningful time limit on the second stage of review, which in practice can drag on for the better part of a year or more. Another priority should be the reduction of excessive filing fees to reasonable, merger-related, cost recovery levels. 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 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.
- 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 stakeholders

Both ICPAC and Ditchley emphasised the importance of collaboration within a GCI (or ICN) of all interested antitrust stakeholders – including other international organisations and non-governmental organisations 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. But much remains to be done, and it will be vital for stakeholders such as the IBA, the ICC/BIAC, the ABA, the World Bank, OECD, UNCTAD and others to maintain and enhance their respective commitments. To these stakeholders we respectfully suggest:

- making known their expectations of the ICN – *i.e.* 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 key 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.

Accountability after Naples

The momentum for reform has re-emerged with the official launch of the ICN. And its work to date has been very encouraging. But the global competition community cannot afford not to convert its talk into action. The ingenuity gap has not yet been closed, and clearer thinking, frank discussion and more coordinated reform are today's priorities. This all suggests the need for a "Ditchley Park II" meeting of antitrust stakeholders in a post-Naples environment to take account of where we stand, and to help map the pragmatic course for future implementation.

NOTES

¹ See *Getting the Deal Through: Merger Control 2002: The International Regulation of Mergers and Joint Ventures*, London: Law Business Research, 2002 [hereinafter "Getting the Deal Through 2002"] at 3 where it was noted that in the United States mergers reported under the Hart-Scott-Rodino Act rose from 1,529 in 1991 to 4,926 by 2000 which means that filings were growing during the global merger wave at a compound annual growth rate of 12%. In the European Union, notifications to the Merger Task Force of the European Commission increased from 63 in 1991 to 345 in 2000 (a compound annual growth rate of 35%). Similar growth rates in mergers have been encountered throughout the industrialised world.

² The rate of announced merger has since dropped precipitously in the wake of a global economic slowdown. While in part caused by the increase in the monetary thresholds under the *Hart-Scott-Rodino Act*, the U.S. for one, has seen merger notifications drop by 50% in 2002 from 2001 numbers according to Charles James, U.S. Assistant Attorney General, Antitrust Division in a recent speech to the American Bar Association on August 16, 2002.

³ Thomas Homer-Dixon, *The Ingenuity Gap* (Toronto: Vintage Canada, 2001).

⁴ See generally, ICPAC Report at 181.

⁵ *Ibid.* at 282-283.

⁶ *Ibid.* at 282.

⁷ *Ibid.*

⁸ *Ibid.* at 284.

⁹ *Ibid.*

¹⁰ Joel Klein, *Time for a Global Competition Initiative?*, EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 2000.

¹¹ Mario Monti, *The Main Challenges for A New Decade of EC Merger Control*, EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 2000; see also Mario Monti, *European Competition Policy for the 21st Century*, The Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York City, October 20, 2000.

¹² Convened and hosted by the International Bar Association (IBA), with support from Fordham University and the ABA's Antitrust Section, Ditchley drew participants from Australia, Belgium, Brazil, Canada, the European Union, Finland, France, Germany, Hungary, Israel, Japan, Italy, Mexico, the Netherlands, South Africa, Spain, Switzerland, the United Kingdom, the United States and Turkey.

¹³ See *Getting the Deal Through 2002, supra*, note 1 at 3.

¹⁴ See Charles A. James, Assistant Attorney General, Antitrust Division, US Department of Justice, *International Antitrust in the Bush Administration*, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, September 21, 2001.

¹⁵ See Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word - Continuity*, Annual Meeting of the ABA Antitrust Section, Chicago, Illinois, August 7, 2001.

¹⁶ First Discussion Draft, September 21, 2001 published at the IBA's 5th Annual Competition Conference, Fiesole, Italy; subsequently re-published in refined format in *Global Competition Review*, October/November, 2001 and presented at the OECD's Global Forum on Competition in Paris on October 17, 2001 [hereinafter "*Best Practices*" cited to *Global Competition Review*, October/November, 2001]. The report was prepared by a project team consisting of Janet McDavid (Hogan & Hartson), Phillip Proger (Jones Day), Michael Reynolds (Allen & Overy), and William Rowley QC and Neil Campbell (McMillan Binch), with assistance from Catriona Hatton and Lynda Marshall (Hogan & Hartson) and David Anderson (Allen & Overy).

¹⁷ The Merger Streamlining Group is a group of international businesses which have broad experience with the merger review processes of many jurisdictions. The current membership of the group comprises Alcan Inc., British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Goldman Sachs International, My Travel plc, National Economic Research Associates (NERA), Rio Tinto plc, South African Breweries and Vodafone Group plc.

¹⁸ *Best Practices, supra*, note 16 at 27.

¹⁹ *Recommended Framework for Best Practices in International Merger Control Procedures*, October 2001.

²⁰ See Mario Monti, *Opening Speech*, OECD Global Forum on Competition, Paris, October 17, 2001.

²¹ Charles James, *International Antitrust in the 21st Century: Cooperation and Convergence*, OECD Global Forum on Competition, Paris, October 17, 2001.

²² On October 25, 2001 the ICN was launched formally in New York City at the Fordham Corporate Law Institute conference by top officials from antitrust authorities in Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, United States and Zambia.

²³ See << http://www.internationalcompetitionnetwork.org/wg1_principles.html>>.

²⁴ U.K., H.C., "A World Class Competition Regime", DTI, Cmnd 5233, 31 July 2001.; see <<<http://www.dti.gov.uk/cp/pdfs/compwp.pdf>>>.

²⁵ Commission Of The European Communities, *Green Paper on the Review of Council Regulation* (EEC) No 4064/89, Brussels, 11.12.2001 COM(2001) 745/6 final.

²⁶ See Judgment of the Court of First Instance, June 6, 2002, *Airtours plc v. European Commission*, Case T-342/99.

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