BEST PRACTICES IN

MULTI-JURISDICITIONAL MERGER REVIEW

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Introduction

Multi-jurisdictional review is giving rise to increasing challenges for enforcement authorities and merging parties. These challenges have their roots in both substantive and procedural divergences between jurisdictions. While substantive differences may have received a greater profile, as a result of cases such as *GE/Honeywell*, *Boeing/McDonnell Douglas* and *deHavilland*, practitioners and enforcement authorities increasingly are coming to the view that, for the vast majority of transactions, procedural divergence is a much more serious and pressing issue. This procedural divergence has been exacerbated by the proliferation of new merger control regimes - over 60 jurisdictions now have some form of merger control, and many more are in the process of drafting new laws.

This has intensified calls for action by the business and legal communities. Just a few weeks ago, the Business and Industry Advisory Committee to the OECD ("BIAC") and the International Chamber of Commerce ("ICC") jointly submitted to the OECD's Competition Law and Policy Committee (Working Party 3) a document entitled *Recommended Framework for Best Practices in International Merger Control Procedures* (the "BIAC/ICC Best Practices").[1] In a parallel initiative, a group of competition law practitioners from Europe, the U.S. and Canada prepared a document entitled *Best Practices for the Review of International Mergers* (the "Fiesole Best Practices") for an IBA conference in Fiesole, Italy in September of this year.[2] Subsequently, the International Competition Network ("ICN") was launched and merger control issues were identified as one of the two key areas that would be the subject of the ICN's initial work. These issues also featured prominently in the Final Report of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust (the "ICPAC Report") released by the U.S. Department of Justice in February 2000.[3]

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1 Business and Industry Advisory Committee to the OECD and International Chamber of Commerce, *Recommended Best Practices in International Merger Control Procedures*, October 4, 2001. Two of the authors of this paper (Crampton and Winterscheid) participated in the drafting of that document.

2 Janet McDavid, Phillip Proger, Michael Reynolds, J. William Rowley and A. Neil Campbell, *Best Practices for the Review of International Mergers* (Discussion Draft, September 21, 2001).

3 United States Department of Justice, February 28, 2000, at Chapter 3.

Multi-jurisdictional merger review has become a pressing issue within business, legal and enforcement circles because the rapid march towards globalization has spawned an increasing number of mergers among multi-national companies. To the extent that filings are now required to be made in multiple jurisdictions, with assessments of potential filing obligations being required in additional jurisdictions, business persons and their counsel are finding themselves overwhelmed by the onerous demands of multi-jurisdictional merger review. Indeed, the situation has reached the point where, in some cases, businesses have become virtually paralysed by the demands of merger review, unable to focus on their day-to-day operations because so many of their key people are involved in assembling and/or analyzing information and submissions for regulators. In many cases, a significant part of this burden is imposed by filing requirements relating to jurisdictions where significant competition issues are not raised.

While few would dispute the right of sovereign jurisdictions to enact their own merger control regimes and to require filings to be made where the merging parties have a minimum "nexus" with that jurisdiction, a consensus is beginning to emerge in favour of the adoption of international best practices and in support of greater procedural convergence. This paper summarizes and builds upon the best practices that have been identified by BIAC/the ICC, in the Fiesole Best Practices and in the ICPAC Report.

1. Transparency, Certainty and Predictability

Lawmakers and regulators should strive to achieve a high degree of transparency, certainty and predictability regarding the key parameters of a regulatory regime, including the relevant legislation, regulations, practices and procedures. This is critical, primarily because any lack of transparency inevitably increases the costs and uncertainty associated with the regulatory process.

At a minimum, there needs to be greater transparency, certainty and predictability regarding the test(s) for determining whether a filing is even required in a given jurisdiction. In addition, as noted in the BIAC/ICC Best Practices:

> [M]erging parties and other persons with a potential interest in a merger should be able to clearly ascertain ... any applicable time

> deadlines for making a pre-merger filing; the information required to be provided in a filing and in any voluntary submissions that may be considered helpful; how third parties can make their views known to the agency with respect to the merger; and the time periods, if any, within which any decisions must be made by the enforcement authority.[4]

Transparency, certainty and predictability also can be increased through the issuance of detailed guidelines that address a range of important issues, including:

> ...the test for determining when a "second phase" review will be commenced and the test for determining whether a merger will be challenged or approved; the potential theories of anti-competitive effects that may be considered; the extent to which political or other non-competition considerations may influence the determination of whether a merger may be approved or challenged; the principles applied in defining the product and geographic dimensions of relevant markets; the manner in which market shares will be calculated; how ease of entry will be evaluated; and the role of efficiencies and other factors in the agency's analysis.[5]

Regarding timing, there is a strong view among many in the international business community that the certainty associated with fixed maximum merger review periods is preferable to the flexibility and uncertainty that are inherent in a system that has no such periods. Specifically, there is an emerging consensus in favour of moving to a European style two-stage approach that, at a minimum, would impose a 30 day maximum period on the initial review stage. Support is also growing in favour of the adoption of a fixed maximum second stage review period, in the range of 4-5 months, for those transactions that cannot be cleared within 30 days.[6] In recognition of the fact that merging parties may in some cases have an interest in extending this 4-5 month period, for example to give more time for negotiations regarding a potential remedy, they should have an ability to obtain an extension, but only with their consent. In any event, a desirable best practice for agencies to adopt would be to grant waivers to allow merging parties to consummate their transaction prior to the expiry of the statutory waiting or suspension

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4 *Supra*, note 1, at §2.2.1.2.

5 *Ibid*., at §2.2.1.4.

6 For example, see the BIAC/ICC Best Practices, *ibid.*, at §2.1.5.2 and the FIESOLE Best Practices, *supra*, note 2, at Part I, §13. The ICPAC Report also recommended a 30 day maximum initial review period, with unspecified deadlines to be employed during the second stage of merger review. See *supra*, note 3, at 98.

period, once it has been determined that a transaction is not likely to have anti-competitive effects or once a remedy has been agreed upon. This would be consistent with the view that these periods should be maximum, rather than minimum, review periods.

Other steps relating to timing that could improve the merger review process include (i) inserting a senior officer early in the process to perform a triage function, which is something that the Canadian Competition Bureau successfully instituted earlier this year; (ii) allowing for pre-filing meetings between the merging parties and staff of the enforcement agency to discuss the content of the filing, or to ensure that any matters in respect of which the agency is particularly interested are addressed by the merging parties in their initial filing or submission; (iii) making every effort to narrow the legal and factual issues as early as possible and on an ongoing basis throughout the merger review, as the U.S. Department of Justice recently has committed to doing as part of its Merger Review Process Initiative;[7] and (iv) providing a clearance decision, approval, "no action" letter or other written decision once the merger review has been completed, without waiting for authorities in other jurisdictions to complete their reviews.

Certainty and predictability also can be significantly increased by the adoption of readily ascertainable objective criteria for filing tests and information requirements. Currently, the pre-merger notification laws of many countries contain various subjective tests that give rise to significant uncertainty for merging parties. For example, several countries have adopted a market share threshold for determining whether or not a transaction is notifiable.[8] This effectively requires merging parties to conduct a full-blown competition analysis simply to determine whether a filing is required. Other jurisdictions require subjective decisions to be made regarding the information to be included in the initial filing. In turn, this gives rise to uncertainty as to whether a filing will be considered to be complete if there is a disagreement

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[7] U.S. Department of Justice, Merger Review Process Initiative, October 12, 2001. See http://www.usdoj.gov/atr/public/9300.htm.

[8] These include Spain, Portugal, Turkey, Tunisia, Estonia, Kazakhstan, the Slovak Republic, the Czech Republic, Greece, Colombia, Israel, India, Tunisia and Latvia. See Michael Cicero, "International Merger Control", (Spring 2001) *Antitrust* 15. The BIAC/ICC Best Practices, the FIESOLE Best Practices, and the ICPAC Report advocate the elimination of market share tests for determining whether a transaction should be notified. See *supra*, note 1, at §2.1.2.3, *supra*, note 2, at Part 1, §4, and *supra*, note 3, at 107.

over whether sufficient information was provided. For example, the Commission's *Form CO* requires a substantial amount of information to be provided in respect of highly subjective concepts such as relevant product markets, relevant geographic markets, and "affected markets", as well as the "structure of demand", market shares and matters relating to entry into affected markets.[9]

A further best practice would be for decision-making criteria to be "consistently applied".[10] A related best practice would be to adopt tests that remain reasonably stable over time (with the possible exception of *annual* adjustments for inflation).[11]

Finally, certainty and predictability could be significantly increased by publishing detailed reasons for decisions to challenge and decisions not to challenge mergers in close cases, as well as by addressing topical issues in speeches that are posted on the agency's web-site.

2. Nexus

After the adoption of readily ascertainable objective tests for determining whether a transaction is notifiable, arguably the most important best practice that could be adopted by jurisdictions around the world would be to incorporate into their pre-merger notification regimes a meaningful jurisdictional nexus test.[12] The optimal test in this regard would be the one suggested in the FIESOLE Best Practices, i.e., that at least two parties to the transaction have some local presence in the jurisdiction, as reflected either in a minimum level of revenues or assets exceeding some meaningful value threshold.[13] This would eliminate the need to file where only one party has a presence or where both parties to the transaction have only minor sales in a particular jurisdiction. A further best practice would be to establish threshold

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9 European Commission, *Form CO Relating to the Notification of a Concentration Pursuant to Regulation (EEC) No. 4064/89*, OJL 61 of 02.03.1998, at Sections 6, 7 and 8.

10 FIESOLE Best Practices, *supra*, note 2, at Part I, §19.

11 More frequent adjustments for inflation, as contemplated by tests based on the monthly minimum wage (Russia, Colombia) or "the minimum general wage prevailing in the Federal District" (Mexico) have been a significant source of uncertainty for parties to multi-national transactions and their legal advisors. See Cicero, *supra*, note 8, at 16 and 18.

12 For a more detailed discussion of this topic, see the ICPAC Report, *supra*, note 3, at 98 *et. seq.*

13 *Supra*, note 2, at Part I, §§1 and 2.

calculation methods that are consistent with the methods employed by jurisdictions in the region. This would address the type of situation that exists in Europe, where turnover typically is determined by reference to where the customer is based, while under Belgian case law it is determined by reference to where the service is rendered.

3. Non-Discrimination

Another fundamental principle that should be reflected in merger control laws, regulations, practices and procedures is the principle of non-discrimination. That is to say, companies should not be discriminated against on the basis of nationality. As recognized in the BIAC/ICC Best Practices, this includes not applying laws, regulations, practices or procedures in a way which furthers the interests of local firms or industries, relative to foreign entities.[14]

4. Triggering Event/Filing Deadlines

The laws of many jurisdictions require pre-merger notification filings to be made within a very short period of time after a triggering event.[15] In most of these jurisdictions, the triggering event is the signing of a definitive merger agreement, and it is not even possible to file until after that event has occurred. The former constraint has imposed an excessive and highly time-impacted burden upon merging parties, who are forced to sort through a maze of disparate notification regimes and prepare filings virtually simultaneously in multiple jurisdictions. The latter constraint (i.e., the inability to file prior to the triggering event) has eliminated the flexibility of merging parties to stage their filings according to the relative importance of the filings, and in a less frenetic atmosphere.

Canada and other jurisdictions have no such constraint, and this does not appear to have led to a significant number of filings in respect of transactions that fail prior to the

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[14] *Supra,* note 1, at §2.2.2.3. See also the ICPAC Report, *supra*, note 3, at 63.

[15] For example, under the European Merger Regulation, a filing must be made within one week following the execution of a definitive agreement, although a more relaxed informal practice has been developed which has effectively extended this time period. Similar statutory requirements are imposed in Denmark (one week), Finland (one week), Argentina (one week), the Czech Republic (one week), South Africa (one week), Greece (10 days), Hungary (eight days), Poland (14 days) and the Slovak Republic (15 days). In the case of Brazil, filing must be made within 15 days of the signing of a letter of intent. See generally Cicero, *supra*, note 8, at 18-22.

execution of a definitive agreement.[16] This is no doubt attributable to the significant expense and diversion of management time that can be required in respect of such filings. The adoption of filing fees in several jurisdictions around the world has further increased the costs associated with these filings. In any event, as noted in the BIAC/ICC Best Practices, the concern about unduly burdening regulatory agencies with such filings can be addressed with a "good faith intention to consummate" representation in the form of an affidavit.[17] This would permit merging parties to make their filings at an earlier time of their choosing, which would be in everyone's best interest.

5. Information to be Included in the Initial Filing

Given that the vast majority of notifiable transactions do not raise significant competition issues, merging parties should not be forced to submit more than the minimum amount of information required for an enforcement authority to determine whether a proposed transaction raises potentially significant competition issues.[18] In this regard, certain aspects of the OECD's Model Form would provide a useful starting point for jurisdictions considering amending their current laws or adopting a new pre-merger notification regime.[19]

An additional best practice would be to provide merging parties with an opportunity to exclude information from the initial filing on the basis that it is not relevant, although the agency also should have the ability to disagree and require any excluded information to be provided. This is a feature of the Canadian pre-merger notification regime that has worked very well over the years.[20]

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16 There are plenty of transactions that fail after the execution of a definitive agreement or the launching of a tender offer. However, these would have to be notified even under the laws of the regimes identified in the previous footnote.

17 *Supra*, note 1, at §2.1.3.1.

18 See the BIAC/ICC Best Practices, *ibid.*, at §2.1.4.2; the FIESOLE Best Practices, *supra*, note 2, at Part I, §9; and the ICPAC Report, *supra*, note 3, at 98.

19 OECD, Committee on Competition Law and Policy, *Framework for a Notification and Report Form for Concentrations*, (Paris: 1999). As noted in Part D of that document, the type of information contained in Parts A, B and C thereof, "along with a few reports and documents from the parties' files" as discussed in Part E of the document, could be sufficient to enable a competition authority to identify potentially harmful transactions. *Ibid.*, at 8-9.

20 *Competition Act*, R.S.C. 1985, as amended, s. 116.

6. Requests for Additional Information, Interviews, Plant Tours, etc.

In the course of reviewing typical multi-jurisdictional mergers which raise *prima facie* issues requiring further analysis, enforcement agencies often impose substantial burdens on merging parties and third parties by issuing disparate information requests and/or by requesting interviews of key company personnel, or plant tours, at different times.

Regarding information requests, unnecessary burdens may be imposed because of the format in which the agencies request their information. For example, one agency may request certain information on a calendar year basis while another may request information on a fiscal year basis; or one agency may request gross dollar sales while another may request net dollar sales or unit sales. In other cases, the agencies simply ask the questions in different ways. To the extent that this imposes extra burdens and delays on the merging parties, it would be a desirable best practice for agencies to coordinate their information requests to strive for the maximum degree of commonality. Among other things, this hopefully would lead to a greater willingness of agencies to accept, in substantial compliance of responses to their own information requests, information that has been supplied to another agency in response to a similar request for information. This is something that the Canadian Competition Bureau has been increasingly prepared to do in the last year or so, with consequent huge savings of time and resources for merging parties.

It also would be very helpful if agencies coordinated the timing of their information requests, so that personnel within companies could gather information relating to a particular subject matter in a more efficient manner, rather than having to go back and review documents that have already been reviewed or having to recontact persons who previously had to be reached in the course of gathering the information required to respond to a similar question posed by a different agency.

Likewise, it would be helpful if agencies would coordinate with respect to their requests for interviews of company personnel and tours of company facilities, once again, to minimize the disruption of companies' day-to-day businesses.

Additional desirable best practices recommended by BIAC and the ICC would be for agencies to articulate to the merging parties at the commencement of a second stage review

the specific competitive concerns that have been identified,[21] and to avoid multiple requests for information unless justified by the discovery of new facts or necessary for purposes of clarifying prior submissions.[22]

7. Translations

Given that the vast majority of mergers do not give rise to serious competition issues, the fact that some jurisdictions routinely require translations of detailed transaction and other documents to be provided as part of an initial filing increasingly is viewed as imposing inordinate and unnecessary costs on merging parties. As suggested in both the BIAC/ICC Best Practices and the FIESOLE Best Practices, agencies should be prepared to accept summaries, excerpts or other means of reducing the translation burden, unless and until a merger review appears to indicate the need for full translations.[23]

8. Remedies

Under an increasing number of merger laws around the world, subject matter jurisdiction can be asserted over a foreign transaction that is likely to have a local anti-competitive effect, even if neither party to the transaction has local assets or operations. While the exercise of extraterritorial jurisdiction in such cases may be entirely appropriate, it is much less defensible when one or more of the parties to a transaction have local assets which lie at the heart of the local competition issue, and which can be the subject of a fully effective potential remedy to the local competition issue that has been identified.

In such cases, it would be a best practice to maintain a policy of exercising jurisdiction only over the local aspect of the transaction, rather than over the entire transaction. Indeed, as recommended in the BIAC/ICC Best Practices, aspects of a transaction which are entirely foreign and have no relevance to the local jurisdiction arguably should not even be subject to notification in that jurisdiction.[24] In any event, those aspects of a transaction should

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[21] *Supra*, note 1, at §2.1.5.1. See also the U.S. DOJ's recent Merger Review Process Initiative, *supra*, note 7, at Parts III and IV; as well as the ICPAC Report, *supra*, note 3, at 122.

[22] *Supra*, note 1, at §2.1.5.1.

[23] *Ibid*., at §2.1.4.8; *supra*, note 2, at Part II, §4.

[24] *Supra*, note 1, at §2.1.2.6.

not be subject to suspensive effect under the local competition law, if an effective hold-separate undertaking can be provided with respect to the local assets or other operations of the merging parties, pending the completion of the local enforcement agency's review of the merger and, if necessary, pending divestiture of all or part of those assets or operations.

Another issue relating to remedies that arises in connection with multi-national mergers concerns coordination between enforcement agencies. To the extent that the absence of full cooperation between reviewing agencies can result in somewhat inconsistent remedies, "double dipping" (and therefore "overkill") or in last-minute scrambles to attempt to address these or other problems, it would be a desirable best practice for agencies to closely coordinate with each other from the time they begin to contemplate and assess potential remedies, until the remedy is ultimately settled upon.[25]

9. Filing Fees

While the FIESOLE Best Practices recommend that filing fees should be discouraged,[26] the BIAC/ICC Best Practices adopt a more conciliatory approach by recognizing that jurisdictions are entitled to require the parties to a transaction to pay a reasonable filing fee.[27] However, in the event that a decision is made to impose filing fees, both the BIAC/ICC Best Practices and the FIESOLE Best Practices recommend that filing fees should be no more than necessary to cover the reasonable administrative cost of reviewing a transaction.[28]

10. Exchange of Confidential/Privileged Information

There has been a longstanding high degree of concern within the international business and legal communities regarding the nature of the safeguards and protections afforded to any confidential business information that may be exchanged between enforcement authorities. To address this concern, the BIAC/ICC Best Practices offer a fairly detailed and

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[25] A similar recommendation is made in both the BIAC/ICC Best Practices, *ibid.*, at §2.1.5.5, and in the FIESOLE Best Practices, *supra*, note 2, at Part II, §9. See also the ICPAC Report, *supra*, note 3, at 66.

[26] *Supra*, note 2, at Part I, §8.

[27] *Supra*, note 1, at §2.1.5.6.

[28] See the two previous notes.

laudable set of recommendations that we recommend be endorsed by CERT.[29] As a general principle, BIAC and the ICC advocate that any information exchanged between enforcement authorities should be limited to the necessary minimum. They also suggest that considerations of transparency and due process dictate that any cooperation among foreign enforcement authorities should be conducted pursuant to (i) a legal framework which requires such cooperation to be undertaken in accordance with bilateral or multilateral cooperation treaties or agreements and which describes the minimum requirements that such treaties or agreements should contain, or (ii) a waiver or limited waiver provided by the party supplying the information. In addition, enforcement agencies should develop and make public a policy regarding the framework within which they exchange confidential information with other enforcement agencies.

11. <u>Waivers</u>

Enforcement authorities should make it very clear when requesting a waiver that no adverse consequences will arise if the request is not granted. In addition, they should endeavour to use limited waivers where possible, particularly where the issues in the local jurisdiction are relatively narrow in scope or there is a limited nexus between a merger and the local jurisdiction. Moreover, it would be helpful if they coordinated with each other to develop model waivers and limited waivers which contain the types of basic provisions identified in the BIAC/ICC Best Practices.[30]

12. <u>Due Process</u>

An issue that has been raised with increasing frequency in the context of multi-jurisdictional merger review is the practical absence in some jurisdictions of any ability to challenge decisions of enforcement authorities, not only regarding their final conclusion in relation to a merger, but also with respect to, among other things, the interpretation of laws, regulations and procedures; decisions relating to substantial compliance with filing requirements; and the scope of information requests issued by the enforcement agency or of any oral examinations that may be sought. Basic considerations of due process would suggest that

[29] See the various recommendations made in *supra*, note 1, at §2.2.4.1.

[30] See generally the BIAC/ICC Best Practices, *supra*, note 1, at §2.2.4.2; the FIESOLE Best Practices, *supra*, note 2, at Part II, §6; and the ICPAC Report, *supra*, note 3, at 68 *et. seq.*

merging parties should have the benefit of timely and effective rights of appeal before a court or other independent arbiter with respect to these types of decisions by enforcement authorities.

13. Conclusion

Divergences in merger control procedures are imposing inordinate costs and other burdens on parties to multi-jurisdictional mergers as well as on third parties who may have an interest in such mergers. This has led to increasing calls within the Canadian and international business and legal communities for greater cooperation and convergence between enforcement agencies and merger control regimes. It is hoped that at least some of the suggestions in this paper, which have much in common with the BIAC/ICC Best Practices and the FIESOLE Best Practices, ultimately will be embraced by enforcement agencies and lawmakers in an effort to reduce these costs and other burdens. At a minimum, jurisdictions should adopt more objective tests for determining whether a notification filing is required in respect of a transaction, and should adopt a jurisdiction test that requires a meaningful minimum local nexus threshold (whether measured in revenues or assets) to be satisfied in order to trigger a notification obligation.