THE INTERNATIONALISATION OF MERGER REVIEW: THE NEED FOR GLOBAL SOLUTIONS

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The Explosion of Merger Laws

In 1990, the European Community's merger control regulation was barely a year old, while the United States was ending a decade-long fairly permissive approach to mergers. One could count on two hands the countries with serious enforcement systems in place to deal with mergers under the competition laws. Five years later, at least 25-30 countries provided for serious competition law review of mergers. Today at least 60-70 countries assert such jurisdiction and another 20 have laws in the works.

Even these dramatic statistics understate the reality. As markets have become more global, there has been ever more pressure to create larger cross-border enterprises to draw on broader pools of skill, capital, and connections (well illustrated by the Vivendi-Seagram merger in 2000, Daimler-Chrysler merger in 1998 as well as British Petroleum's acquisition of Amoco and Atlantic Richfield). Also, as markets become more global, the merger of two substantial firms headquartered in the same country may well have large effects in a variety of places (as illustrated by GE-Honeywell or Hewlett Packard-Compaq this year). In addition, the tremendous growth of network industries has enormously accelerated the number of proposed transactions and mini-markets (as illustrated by WorldCom's successful acquisition of MCI in 1998 and its unsuccessful effort to acquire Sprint in 2000).

The recent merger wave has resulted in a startling jump in the number of notifications in the U.S., the E.U., Canada and in a bewildering array of other jurisdictions. In the U.S., 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.[1] An astonishing 1,200 additional filings were made in 2000 – an increase of nearly 33 percent in two years – for a total 4,926.[2] In the E.U., notifications to the Merger Task Force of the European Commission have increased almost 28-fold since 1990 (when 12 were filed) and have more than tripled since 1995; from 110 in 1995 to 345 in 2000.[3] Similarly, the

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[1] Antitrust Division United States Department of Justice, *10-year Workload Statistics Report FY 1990-99* (Washington: U.S. Government Pricing Office, 2000).

[2] Federal Trade Commission and Dept of Justice, 2000 *Annual Report* (1999), (Washington, U.S. Government printing office, 2000) Appendix B at p 39

[3] Commission of the European Communities, 25*th Report on Competition Policy – 1995* (Brussels: European Commission, 1997) at 61 and Commission of the European Communities, *30th Report on Competition Policy – 2000* (Brussels: European Commission, 2000) at 69. See also "first decade of E.C. merger control: A few statistics from the

number of notifiable transactions reported in Canada has mushroomed from 213 in 1994/95 to 471 in 1999/2000.[4] And these are only the tip of the iceberg.

The net result is that the number of mergers requiring multiple filings in various jurisdictions has increased exponentially in the 1990s. . In the case of transnational mergers, it is now routine in large deals to face filing requirements in 20, 30 and 40 jurisdictions. On the government side, the agencies are understaffed in relation to the merger boom; and many appear to be spending an increasing proportion of their limited resources in reviewing trans-border mergers.

The Recognized Need for a Global Solution

Against this backdrop, the last year has witnessed a remarkable change in thinking amongst antitrust authorities as to the nature, and the manner of addressing issues arising from the near geometric growth of national antitrust regimes. What is new (and notable, given previously held views to the contrary in the U.S. agencies) is the now widely held view that the time has come for a multilateral initiative to complement existing bilateral agreements and institutional arrangements to address necessary convergence of multiplying processes.

In this context, the endorsement of the concept of a Global Competition Initiative or Forum[5] (GCI or GCF) in February at a multinational meeting at Ditchley Park, outside Oxford in the United Kingdom, constitutes a quantum forward leap. The Ditchley meeting saw more than 40 of the world's senior competition law officials and professionals, acting in an individual capacity, discuss the concept and role of such a multilateral Forum.[6] The resulting consensus set the stage and for the formal launch of the initiative late this year or early next.

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past ten years minus ten days," EC Merger Control 10th Anniversary Conference, Brussels, Belgium (14-15 September 2000) at 3.

[4] 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). Data for 1996-2000 are from the Competition Bureau *Annual Report of the Commissioner of Competition for the Year Ending March 31*, (Ottawa: Industry Canada, 2000). The statistical data are now only available in the on-line versions of the Annual Reports.

[5] European regulators have recently shown a marked preference for the term Global Competition Forum rather than the term Global Competition Initiative favoured by the authors of the ICPAC Report. In the end, some new descriptive such as the Global Competition Network may well emerge. In the meantime, both terms are used interchangeably in this paper.

[6] 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,

Despite this very positive news, over the spring and summer the disturbing question has arisen as to whether the momentum gained at Ditchley has been put at risk by the length of the change of leadership process at the U.S. Antitrust Division, and the seeming insistence by leading antitrust agencies that they alone should manage the GCF's design and planning (not surprisingly, the agencies' incentives and time frame for moving forward are different from those who bear the principal burden imposed by the present patchwork approach.).

Given the serious and increasing marketplace costs imposed by multiple and divergent antitrust regimes, particularly as regards merger clearances, international business community leaders need to take responsibility to catalyze action and reform. The questions to be addressed by a GCF are sufficiently pressing that the formal launch of the initiative, which provides an ideal platform to address these issues, should not be delayed.

Divergent Approaches to Merger Control

Not surprisingly, the politically-laden subject of merger control has produced a considerably greater range of substantive principles (and processes too) than has been the case in cartel enforcement, or abuse of market dominance, or control of resale prices – the other recurring classics of antitrust law.

As we shall see in this volume, most of the substantive merger control regimes fall into one of three categories.

(a) *Market dominance schemes*: these essentially provide that a merger that enables a leading or dominant firm to achieve or strength a dominant position in a market may be struck down for this reason. This approach can be viewed as a particular application of the "monopolisation" concept found in legislation such as the United States Sherman Act or the "abuse of dominant position" provisions of Article 82 of the Treaty of Rome;

(b) *Substantial lessening of competition schemes*: these essentially look at market structure in the relevant industry and allow (or call for) a merger to be struck

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France, Germany, Hungary, Israel, Japan, Italy, Mexico, the Netherlands, South Africa, Spain, Switzerland, the United Kingdom, the United States and Turkey.

down if it is likely to tighten the control of a small group of oligopolists over the market, lead to the dominance (or "market power") of a single firm, or create the risk of a conspiracy. These schemes tend to echo Section 7 of the U.S. Clayton Act, which prohibits any merger "whose effect may be to substantially lessen competition" in any relevant market. The same basic test has been adopted in Canada (1986) and Australia (1994) amongst others.

(c) *Public Interest schemes*: these tend to provide that a merger is to be reviewed by the antitrust agencies, and perhaps other authorities, under an open-ended standard in which all elements of the "public interest" are relevant – including competition but also such politically laden factors as employment preservation, export promotion or international comparative advantage. Examples which fall squarely into this category include the regimes of France and Spain (and until, very recently, the United Kingdom)

The actual working out of substantive principles depends a great deal on *precisely who* is deciding on their application. Potential market effects in many merger cases are so elusive or double-edged that different decision-makers have a good deal of room to come to different conclusions. This can mean that a single-minded antitrust enforcement agency applying a "public interest" test may well be tougher on mergers than a politically motivated Cabinet Minister who is called upon to apply a "substantial lessening of competition" standard.

Although these different substantive standards of review are an area of real concern, there have been encouraging signs of convergence in the analytical approaches taken by enforcement agencies around the world in the assessment of merges. As Robert Pitofsky has noted in the U.S/E.U. context, "both jurisdictions have come to share economic premises about the benefits and competitive threats of mergers. Once premises are shared, common approaches may not be inevitable but they are far more likely."[7]

Procedural Differences and Problems Abound

If substantive law differences are a lesser concern than had originally been envisaged, (GE-Honeywell excepted), one thing is clear: compliance with divergent procedural requirements of the multiplicity of reporting regimes presents a serious challenge (and an even more serious

[7] R. Pitofsky, "E.U. and U.S. Approaches to International Mergers – Views from the U.S. Federal Trade Commission," E.C. Merger Control 10th Anniversary Conference, Brussels, Belgium (September 14-15, 2000) at 3.

expense). The pace of change and the lack of reliable sources of information in many jurisdictions – a problem that this volume should ameliorate – compounds the problem. Even the identification of jurisdictions that have filing requirements is often difficult; compliance with these requirements, much less compliance in a timely and cost-effective manner, is becoming increasingly burdensome.

A few examples illustrate the extent of the problem.

Some countries, such as Brazil and Russia, have merger notification thresholds based on worldwide assets or turnover. Tests like these, which look only to the worldwide assets or revenues of the merger parties, have the clear potential to subject many international transactions to merger notification obligations in countries around the world in which the parties have minimal activity. Logic would suggest that a merger have at least local effects before an obligation to notify is triggered. But where there is no specific domestic reference, a filing may be required when the nexus between merger and market is minimal.

In many jurisdictions the filing timeframe, or triggering event, is also far from clear and numerous countries require filings to be submitted very quickly after a transaction emerges. In more than two dozen jurisdictions, filings may be required within seven to 15 days of signing or announcing a merger agreement. In some cases high fines may be the consequence of a late filing. In Argentina, failure to file a required report can result fines of up to US$1 million per day; in Brazil, more than 20% of the filings made in 2000 were ruled to be late, with fines imposed averaging over US$80,000.

Although some deadlines are flexible, many statutory requirements can be totally unrealistic for transactions which emerge quickly (even if completion may be far distant). In both hostile and confidential situations, the problem is exacerbated, with lawyers often unable to get deep enough into an organisation to get the information needed to complete worldwide filings on a timely basis.

Many regimes call for notifications that require detailed substantive "competitive effects" analyses to be made at an early stage of the transaction (unlike the US Hart-Scott-Rodino merger

filing, which largely requires the parties to submit pre-existing documents). This is true in a host of other jurisdictions that require filings to be submitted soon after the signing or announcement of a merger agreement or the launch of a bid.

Numerous jurisdictions also require merger parties to supply quantities of data that are often difficult, time-consuming and expensive to obtain yet add little real insight into the relevant substantive issues. Many notification forms, for instance, require transaction documents to be translated into the local language. These sorts of requirements frequently make it necessary for parties involved in multi-jurisdictional transactions to translate hundreds of pages into dozens of languages.

Some jurisdictions require documents such as balance sheets to be notarised or apostilled and legalised before submission. Many others require merger parties to establish the existence of the merger parties by submitting documents such as articles of incorporation (which sometimes need to be translated and usually need to be notarised or apostilled and legalised). In Mexico, for example, merger parties are frequently asked to provide translated copies of the bylaws of all of their subsidiaries. The notoriously burdensome Argentine form F1 requires merger parties to provide detailed information about sales of overlapping products broken down by local customs code categorisation (which itself is often extremely difficult to determine).[8]

Many jurisdictions appear to be 'cashing-in' on merger filings by charging high filing fees. In Canada the fee is presently $25,000; relatively modest by international standards. Since February the US has employed a sliding scale fee, with the fee for large mergers being an astonishing US$280,000. Although the new US fee has significantly increased transaction costs for large mergers with a US dimension, the real worry is that the trend of introducing filing fees or increasing existing fees elsewhere in the world will impose a high and inappropriate "merger tax" as new countries bring competition laws on-line.

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[8] Section 5 (g) of the Form requires parties to "[i]nform the total Argentine exports and imports of each of the Involved Products and the Substitute Products, annually for the three last years, indicating FOB and CIF values, and the correspondent volume (in measure units). Present the information by customs duties nomenclator's position (number and description), by enterprise (in case of imports) and by origin and destination, as applicable. Attach the documentation that proves the figures that are informed, for example, INDEC listings."

To date, insufficient work has been done to measure the costs of reviews under multiple notification regimes. This is set to change.

Late last year, the International Bar Association, together with ABA's Antitrust Section, launched a joint year-long global study to analyse and quantify the direct and indirect costs of compliance with the ever multiplying systems of merger notification and review. The IBA and ABA, as sponsors, have retained experts in the fields of economics (LECG LLC), polling (Pollara) and valuation (Low Rosen Taylor Soriano) to design and implement a worldwide survey to measure and report on the mushrooming costs of merger review for multi-jurisdictional mergers. Results are hoped to be published in early 2002.

Clearly, the systemic cost consequences of the present state of affairs needs to be addressed soon. The real question mark is the right forum for the discussions to take place. As Alexander Schaub, Europe's DG Competition chief, observed in mid-March "the transnational character of today's competition cases clashes with the traditionally territorial scope of domestic antitrust rules."[9]

Existing Co-operation Agreements and Fora are not the Answer

At present, international co-operation amongst antitrust authorities occurs formally through a multiplicity of bilateral co-operation agreements and arrangements, most notably the series of bilateral agreements between countries such as Australia, Canada, Israel, Japan, the US and EU.[10] Informal co-operation and contacts between agencies also obviously occurs on a daily, case-by-case basis as part of, for example, a merger review or cartel investigation.

Multilateral discussions of competition policy matters ordinarily occur as part of a member states' participation in organisations such as the OECD, WTO or United Nations Conference on Trade and Development (UNCTAD). The question naturally arises as to whether one of these institutions might provide an appropriate home to global work on the identified issues.

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[9] See *The Global Competition Forum: How it should be organised and operated*, Dr Alexander Schaub, Director General for Competition, European Policy Centre, Brussels, 14 March 2001, available online through http://europa.eu.int/.

[10] See generally, ICPAC Report at 181.

Bilateral agreements do not provide scope

Bilateral co-operation occurs both formally and informally between domestic enforcement officials and their overseas colleagues. Although such agreements are vital to effective international antitrust enforcement, they are primarily designed to facilitate co-operation between enforcers on a case-by-case basis. They allow for custom-tailored solutions to specific cross-border antitrust issues whilst permitting differences in markets, legal traditions and other aspects to be accommodated.[11] These agreements have the beneficial side effect of allowing enforcers to learn from each other permitting over time conversions in the thinking and approach of antitrust authorities to shared problems. However, they have not designed to develop policy changes or reform domestic regimes.

Multilateral contact

Multi-lateral discussions between enforcement agencies occur on a number of fronts, primarily under the auspices of the OECD and WTO, although other agencies, such as UNCTAD, also play a vital role.

OECD

The OECD has undertaken substantial substantive work on competition primarily since the formation in 1987 of the Committee on Competition Law and Policy (CLP). It has made a number of important recommendations, most notably the 1995 Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade; the 1998 Recommendation Concerning Effective Action Against Hard Core Cartels; and the 1999 notification framework for transnational mergers.[12] These recommendations, as well as the CLP's other work, such as its country reports on national antitrust regimes and authorities, have lead to a number significant reforms.

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[11] "International Antitrust Co-operation: Bilateralism or Multiliteralism?" Comments of K von Finckenstein QC, Commissioner of Competition, to the ABA Section of Antitrust Law /CBA National Competition Law Section Conference *International Antitrust Issues: Pacific Rim and Beyond* (Vancouver, 31 May 2001).

[12] See generally, <http://www.oecd.org/daf/clp/>.

But, the OECD also has its weaknesses – most notably a limited membership drawn from the world's principal industrialized economies. Although efforts are now under way to involve competition authorities from developing and transition countries, (approximately 50 countries will meet on 17-18 October in Paris to discuss global competition issues – including merger process convergence) the OECD cannot (yet) claim to offer a world forum for debate. More importantly, the OECD membership excludes or provides only limited access to non-national groups (such as businesses, the professions and consumers) that need to be part of multi-lateral antitrust policy reform. [13]

WTO

The WTO's working group on trade and competition law was established during the 1996 Ministerial Conference in Singapore, where the WTO set up two working groups to consider the relationships between trade and investment and competition policies "in order to identify any areas that may merit further consideration in the WTO framework."[14]

The WTO brings to the competition policy table a broad membership and a successful track record on negotiating trade agreements. It also brings the support of several key institutions, including the European Union, which has long called for WTO involvement in international antitrust reform. Mario Monti has recently emphasised that that the EU favours a WTO Agreement on Competition which "would rest on a commitment by member countries to establish and enforce domestic competition laws."[15] According to the Commissioner, "these laws should be based on "core principles" non-discrimination, transparency, and due process reflecting a consensus between WTO members." [16]

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[13] A new OECD Global Forum on Competition will hold its first meeting in Paris during the week of 15 October 2001. This new program which is designed to bring together on a regular basis high-level officials from the 30 OECD Members (plus the European Union), the 5 Observers to the OECD Committee on CLP – Argentina, Brazil, Israel, Lithuania, and Russia – and up to 20 additional non-Members, represents an important initiative to broaden the OECD's scope of activity. If the OECD were prepared to provide for proper representation of others with an interest in the debate, it cannot be excluded that it might have the potential to provide the most appropriate home for the new GCF.

[14] See World Trade Organisation, *Annual Report 1997* at 79. See generally, <http://www.wto.org/>.

[15] See Mario Monti, "The EU Views on Global Competition Forum," ABA Meetings (19 March 2001) at 5.

[16] *Ibid*. Commissioner Monti also emphasised that "In calling for a WTO global competition agreement, it is time to shatter the myth that we are seeking to erode the sovereignty of national authorities. On the contrary, strong national

Although an Agreement on Competition along the lines suggested by the E.U. is seen by many to have obvious merit (and progress recently seems to have been achieved with the U.S. Trade Representative expressing a willingness to discuss the inclusion of an Agreement on Competition Law at Doha), its probability of success remains highly uncertain. Nor, in any event, would an Agreement on Competition be likely to result in quick solutions to the urgent problems associated with proliferation as it will take years, if not decades to develop.

UNCTAD

UNCTAD's role in the field of competition law and policy dates from the early 1970s, when developing countries (in particular) called for work on restrictive business practices. This ultimately lead to the adoption in 1980 by the UN General Assembly of a multilateral code of conduct on such practices that took the form of a recommendation to states.

UNCTAD is also heavily involved in the providing technical assistance to countries seeking to formulate and enforce competition and consumer protection laws and policies. To date, more than 50 developing countries and countries with economies in transition have received UNCTAD's technical assistance in this regard.[17] UNCTAD also helps competition authorities create a "competition culture" by educating the public and private sectors of countries with developing and transitional economies; and by promoting competition advocacy activities of public authorities.

Nevertheless, UNCTAD also suffers in the views of some from a sense of imbalance. If the OECD is thought to be the home of the major industrialised countries, UNCTAD is said to be the champion of developing countries.

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enforcement agencies are indispensable to the success of a framework agreement. The EU is not proposing a harmonisation of substantive competition laws nor that individual decisions of national competition authorities be subject to dispute settlement under the WTO."

[17] In this connection, UNCTAD also publishes and updates a Model Law on Competition (TD/RBP/CONF.5/7): see <http://www.unctad.org/>.

Existing Fora do not include all Stakeholders

One thing is clear from this *brief tour d'horizon* of co-operation – although there are currently a variety of bilateral and multilateral mechanisms and forums which provide the opportunity for competition law enforcers to co-operate on individual cases and meet and talk about competition policy issues - what all of these forums lack is the participation of a full complement of those with a legitimate interest in the development of competition policy.

Such stakeholders, which include businesses whose transactions and practices the agencies review (and which have a unique insight into the system cost now being imposed by multiple oversight through diverse processes); consumers whose interests competition laws are designed to protect; the legal profession, which deals with antitrust laws on a daily basis; and countries with developing and transitional economies that are in the process of formulating and enforcing new antitrust laws.

These and other stakeholders need not (and should not) participate in every aspect of the work of a Global Competition Forum -- giving business a key role in reforming cartel enforcement techniques might be like giving the fox the keys to the hen house in the words of one commentator. But a global initiative which distinguishes itself from existing institutions by adopting a mindset of inclusiveness has the potential to add real value by providing a meeting place for all stakeholders to have their views heard and taken into consideration on those issues that directly affect them.

ICPAC and the development of the GCF

Concerns about the proliferation of merger control regimes and the difficulty in enforcing cartel laws in the international context, as well as the shortcomings of existing bilateral agreements and multilateral forums, were recognised in the Report of the International Competition Policy Advisory Committee (ICPAC Report).[18] The ICPAC Report released in February 2000, recommended 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.

[18] ICPAC Report at 281 ff.

Two elements of such an initiative were seen as fundamental. First, membership in the forum was envisioned to be inclusive with representation of government officials, private firms, non-governmental organisations and others. Second, the formation of the GCI would not and should not preclude the continued use of existing international organisations and venues such as the WTO, the OECD, and UNCTAD to address competition policy topics. Indeed, the proposed initiative was seen to be complimentary to these institutions.

Somewhat surprisingly, ICPAC's recommendation to create a GCI initially received a muted reception, perhaps because of the United States' historic commitment to bilateral co-operative efforts. As noted above, all of this changed last September when Joel Klein endorsed in Brussels the establishment of a new global approach at the EC's 10th Anniversary Conference on the Merger Regulation.[19] Although the official views of Charles James (newly confirmed head of the Antitrust Division of the US Department of Justice) and Tim Muris (now Chairman of the FTC) have yet to be made known publicly, it is understood that each (as well as the Attorney General) are keenly supportive of the need for a multilateral approach to the global issues which now confront us.

There is no doubt of the European position: Competition Commissioner Mario Monti has repeatedly emphasised the need for a multi-lateral, multi-jurisdictional approach and his strong support for the initiative and Alex Schaub has been an active participant in the ongoing work of the post-Ditchley GCF informal planning group.

The Global Competition Forum as envisaged at Ditchley

As a result of these public expressions of support in Brussels, the Ditchley Park meeting addressed as its central question the need for such a forum for dialogue, for sharing experience and expertise, and—insofar as possible—for building consensus among competition professionals around the world.

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[19] See J I Klein, "Time for a Global Competition Initiative?" EC Merger Control 10th Anniversary Conference, Brussels, Belgium (14 September 2000). See also "US Endorses a Global Approach to Antitrust," *Wall Street Journal* (15 September 2000) A15.

The discussions provided an opportunity to consider a variety of fundamental features of the competition forum including its governing purpose, organisational design and activities. A remarkable degree of consensus emerged on the fundamental issues.[20]

GCF Purpose

It was envisioned that the core purpose of the GCF should be to draw together diverse combinations of competition professionals to consider transnational competition problems in open and non-binding discussions. Mario Monti has since said that the "end-objective" of the GCF "should be to achieve a maximum of convergence and consensus between participants through dialogue, and exchange of experiences on enforcement policy and practice."[21] It was also seen to be essential that the global initiative adds practical value to the work of existing institutions and not duplicate existing activities: in particular the remit of the Forum would not duplicate competition work of the WTO, the OECD or UNCTAD.

GCF Organisational design

Although there was general agreement that competition authorities should constitute its core stakeholders, it was thought that the Forum must be an inclusive organisation in which the legal community, academics, and business interests would be appropriately represented. The GCF should not simply be an "antitrust regulators club" with limited membership.

Mario Monti recently confirmed this consensus when he noted that the Global Forum "should be first and foremost a competition authority forum, but would draw together all interested parties – both public (for example other international organisations) and private (for example, business, professional, consumer and academic bodies), who could all be appropriately associated with the forum, as participants and "facilitators."" Such a combination of participants was seen to be a unique feature of the GCF; one which could add real value relative to existing organisations.

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[20] The following overview draws on the official report of the Ditchley Park meeting, *The Initiative for a Global Competition Forum*, prepared by Merit E Janow and available through the International Bar Association's website, <http://www.ibanet.org/>.

[21] See *Transatlantic co-operation and multilateral initiatives in competition policy*, speech at a conference, organised by the European Voice, entitled "US-EU relations at the dawn of anew era: bridging the transatlantic business divide," 20 March 2001.

Indeed, the work to date of institutions such as the OECD, WTO and UNCTAD is seen to have suffered from the lack of sufficient input from those most directly affected by the proliferation of national competition laws. In the case of merger control, for example, this would clearly include members of the international business and professional communities who have the knowledge of the cost imposed by the current morass of conflicting processes.[22]

Another idea floated at the conference, and subsequently discussed at the informal planning group which formed at Ditchley, was a "main event" of an annual conference, perhaps coupled with peripheral or regional workshops and mandated task forces. The workshops and taskforces could consider specific issues and might involve a more limited range of participants tailored to address the particular subject under consideration.

Finally, it seemed clear that the GCF should not be a bricks-and-mortar organisation or employ a new bureaucracy. One possibility might be to guide ongoing activities through a secretariat staffed by interim secondment from sponsoring agencies (perhaps with a very limited number of people employed on a more permanent basis).

GCF Merger Review Activities

Participants were open-minded about the precise activities of the GCF and the topics that it should address. However, there was little doubt that high priority should be given to the escalating concerns surrounding multijurisdictional merger review.

Several participants emphasised that resolving procedural issues involved in multi-national merger review (e.g., divergent notification thresholds, timing and filing requirements) required urgent attention, but discussion was not limited to procedural issues. Participants also recognised that merger control was only one of numerous subjects worthy of international consideration. It

[22] A first task of this group will be to attempt persuade legis lators 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. 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 successful, it would form a powerful model for extension to numerous other jurisdictions involved in reviewing mergers. 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.

was also thought that the Forum should make a particular effort to focus on competition issues of concern to developing countries and of those countries with fledgling competition law regimes.

Has Momentum been Lost?

One of the great difficulties about a good idea is often in its implementation. In the case of the GCF this may be proving to be the case.

As Ditchley wound down it seemed clear there would eventually need to be some form of a Steering Committee to oversee the Forum's formal birth and ongoing management. In the meantime a small number of participants were asked to serve as an informal interim planning group to address start up questions, including the identification of potential candidates to serve on such a Steering Committee, once formed, and the time and place of a more indusive "formal" launch meeting towards the end of the year.[23]

Although, the planning group has met a number of times by teleconferences and once in person, at the *Bundeskartellamt* conference in Berlin in May, it has not yet spoken publicly of its thoughts and deliberations. This should change as soon as possible. Two obvious occasions suggest themselves – the OECD's global forum meetings in mid-October and the Fordham international competition law conference at the end of the same month. The latter, being a more public occasion would be an ideal time to reinvigorate the initiative.

Prescription for the Major Agencies

Although it is clear that the GCF requires broadly based support at both the agency and *other* stakeholder level, it is obvious that the project will have no chance of succeeding without a wholehearted endorsement (and shared views as to appropriate objectives) from the European and United States agencies.

[23] Members of the interim planning group are Dr Pascual Garcia – Mexico, Frederic Jenny - France, David Lewis – South Africa, John Nannes– USA, Alexander Schaub – EU, David Tadmor - Israel and Konrad von Finckenstein QC – Canada.

This means an early public buy-in to the initiative by the United States would do much to reassure those who are concerned with momentum. This should provide as much detail as possible about the US's stance and aspirations, including a ventilation of points of agreement (or otherwise) between Brussels and Washington. In the meantime, the informal Planning Group might consider how to encourage input to its deliberations. Although it is known that the involved competition authorities are concerned to ensure that GCI will first and foremost be an enforcement institution's network, the legitimate interests of other constituents must not be ignored. Transparency and interaction is bound to yield benefits.

The following action points would seem worth consideration:

- Establishment and publication of a time frame for initial design completion and launch stages of the project. Credibility requires this to happen soon.

- As to the launch itself, every effort should be made to move to a "Ditchley Two" as early as possible next year. In any event, it would be wrong to delay the next public step forward. The cost of lost momentum will be too high, and there is much to be gained from participatory discussion.

- The early, and preferably centralised, publication of papers defining/refining thinking on the GCF's scope, objective, mandate, governance and make-up. Comment from any interested party should be sought and encouraged. The IBA's soon to be launched global competition law website is one natural host for information; the ABA's antitrust site another.

- Funding needs and alternatives should be aired. Agency officials might be surprised at the potential interest in the private sector to assist a global initiative of this sort. And there are sure to be ways to avoid concerns about "agenda capture".

- Obvious areas for post-start-up "Working Group" or "Project" activity should be identified. Three candidate topics suggest themselves - "Merger Best Practices and Process Convergence," "Cartel Enforcement" and "Co-operation and Information Exchanges." It is

not too early to invite all who have an interest to become "members" of those working groups they would like. It is also not too early to invite such volunteers to prepare papers, comments or other input as they consider useful. Ultimately, the working groups will need to establish their priorities, agenda and time frames, but they are unlikely to be ill served by having ready-made material from which to draw.

- Finally, a number of professional, business and non-governmental institutions have volunteered to facilitate further meetings and provide such other services as may be necessary to move the initiative from concept to reality. None of these organisations will have any interest in challenging the core leadership role the competition agencies wish to and should take in the GCF. However, they do have important administrative back-up and a vital interest stake in seeing that the work of the Forum is begun and provided with necessary support. Given the infrastructure of these organisations, further thought might be given as to whether they could be asked to help move matters forward. This could start with distributing minutes or materials which refine the Planning Group's thinking.

With the seeds of a multilateral approach to competition law issues now well planted, the emergence and future health of a Global Competition Forum can only benefit from as much sunlight as possible. it is also the best and most realistic garden in which to cultivate much needed process convergence of today's multifaceted and discordant world of national merger clearances.