Section II: Summaries of Interest Group Member Contributions

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James F. Rill

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The Internationalization of Competition Law and the Need for Global Convergence

Within the last decade, we have witnessed significant efforts by antitrust enforcement agencies to promote greater international cooperation and convergence in order to support common enforcement objectives and to prevent or manage possible conflict. These efforts are the product of a number of factors, principally the dramatic expansion in multi-jurisdictional business activity and the proliferation of national competition laws.

International convergence is a pressing issue for the private sector as well, particularly in the area of merger review, where disparate time and notification requirements, together with multiple substantive reviews, create the possibility for delay, uncertainty and inconsistent results (as in the GE/Honeywell case). Divergence in substantive policies is an issue in other areas as well, such as with respect to vertical restraints, abuse of dominance and anti-cartel enforcement.

The benefits of increased cooperation and convergence include a reduction in the cost and time of investigations, less duplication of effort, an enhancement of the level of transparency and certainty afforded in the legal process and less frictions arising out of the multiplicity of national laws.

There have been a variety of convergence initiatives in response to the changing business and enforcement environment. To date, the most successful efforts have been at the bilateral level, with the Canada/US relationship a model in this regard. There also have been regional efforts, such as through the FTAA. Most recently, attention has been focussed on multilateral efforts, involving organizations such as the OECD, WTO and UNCTAD and the new "virtual' forum for convergence initiated in October of this year, the "International Competition Network".

While the benefits associated with convergence are clear, this development raises a number of questions, such as: (i) particularly in light of the GE/Honeywell case, is it realistic to expect a meaningful degree of reconciliation among the laws and procedures of numerous antitrust regimes?; (ii) will the convergence effort lead to a "lowest common denominator" approach to enforcement?; (iii) will the multiplicity of initiatives prove to be counterproductive, in the sense of creating duplication and inconsistency of effort?; (iv) what input will the private sector have in this process and what protections will be afforded confidential business information?

Although these issues (and others) should not be minimized, they are capable of resolution and current indications are that they are being addressed seriously by those involved in the convergence process. Accordingly, we are optimistic that cooperation efforts will continue to proceed in a productive fashion. We also believe that the input of the business sector is critical in this regard, to ensure that the steps taken are grounded in real-world practicalities

Patrice J. Thys

Executive Vice-President Legal & Corporate Affairs, Interbrew N.V.

As with any other business, Interbrew expands on the basis of business opportunities. It simply has to deal with any merger regulation that is in place where expansion occurs.

At present roughly half of all countries worldwide have merger regulations. Of these about 60 have pre-merger notification legislation with a variety of different procedures, different substantive rules and different enforcement methods and implementation. This leads to substantial losses in time and money, which hurts both industry and the consumer.

For any company choosing to pursue mergers or acquisitions it is vital to know it can provide security to both shareholders and financial markets in terms of what can be expected as a result of any legal procedure. Security is provided by transparency of procedure, of substance and of the decision making process which should be swift, anti-protectionist and anti-interventionist.

The experience of Interbrew over the course of the past 10 to 15 years indicates that the major obstacles have been of a procedural rather than of a substantive nature. Interbrew's recent experience in the UK may serve as an example.

Of vital importance for any company in the field of mergers and acquisitions is to have the fullest legal certainty and equal treatment wherever a merger case might occur. Ideally this should apply at all times regardless of legislative differences. It is thus of importance that, at the highest possible international level, convergence of mergers and acquisitions legislation occurs.

Consequently Interbrew is in favour of legislative convergence. However since this may take quite some time, Interbrew can live with divergent competition rules as long as there is a swift and transparent method of securing results. In the event of a lack of convergence, Interbrew would object to any re-nationalisation of competition policy in the European Union and feels particularly that Article 9 of the Merger Regulation should provide for the continued involvement of the European Commission, as a central player, in the event of a referral of a case back to a Member State.

Interbrew views as un-welcome the idea of a switch to a US style merger test. As a result of unclear obligations and deadlines, US merger control amendments raise fears of inefficiency and loss of legal certainty. Such a situation should be avoided.

As the world's Local Brewer, Interbrew has made "Think Global, Act Local" into a catchphrase for its further expansion. By that very standard, Interbrew respects national traditions and strengthens choice and variety for the consumer. In Europe and all other regions of this world such respectful policies lead to effective Foreign Direct Investment. Such investments cannot thrive unless legal security and equal treatment are guaranteed.

David McAusland

Senior Vice-President Mergers & Acquisitions and Chief Legal Officer, Alcan Inc.

Transatlantic non-convergence – the cost of failure to change?

At the aluminum industry level, the globalization of economic activity has led to massive increases in trade and investments. Freer trade, the pursuit of new customers, and limited growth prospects in home markets restricted or limited access to resources such as power, new technology and standardization, have provided us a powerful impetus for international expansion.

Although there has been some unilateral movement towards greater conformity, multi-jurisdictional mergers continue to be complicated by many substantive and procedural variances between domestic merger review regimes. These differences, coupled with the prospect of reviews in numerous jurisdictions, make multi-jurisdictional mergers complex, time-consuming and expensive. There is enormous economic leakage.

The costs imposed by multiple are sizeable, and one may legitimately question what it is about mergers as a form of business activity that warrants such a time-consuming and costly approval process?

Competition policy is an important market place regulatory instrument. However, it seems clear to me that local or regional economic policies are greatly affected by an ever-increasing international competition in a greater and freer global market, and that merger review procedures themselves must now be seen as the top candidate for antitrust rationalization and harmonization. The difficulty, however, has been to move from academic acknowledgement of a problem to practical action towards a solution—not a small challenge.

I must acknowledge that generally speaking the entire MTF merger review process was very professional and that the European "one-stop-shop" approach with its speed-to-complete process emphasis is unquestionably the right directional model for a more universal system.

The discussion on global competition policy highly relevant as a fundamental contributor to the establishment of a set of rules within which our industrial organizations can play the game fairly and make the system acceptable for our respective local and regional governments.

If this is the path to convergence, the principal enforcement agencies have a vital leadership role to play by transforming themselves to ensure that the industrial organizations play the merger game fairly and that the regulators apply one and only one set of process rules.

Now let me briefly underline some of the principles which I believe should guide the design of a more integrated review process.

1. Any attempt to integrate domestic merger review systems without respecting cultural and legal differences among jurisdictions is bound to fail.
2. The second relevant principle is transparency.
3. Therefore, the third principle suggests an "opt in" or an "opt out" approach giving merger parties the appropriate flexibility to utilize a multi-jurisdictional review process.
4. The fourth principle provides for a common filing form with waiting periods that are uniform for each jurisdiction.
5. Finally, the fifth principle concerns the need for inter-agency exchanges of confidential information and the appropriate safeguards.

It is those who pay the price of complexity and uncertainty who demand reform. Therefore, I strongly believe that the important incentives to propel such a process clearly lie within the business community. Only when business leadership takes ownership of a complex problem can we realistically expect to motivate governments and international institutions to address this challenge. This Symposium is timely.

Chris Scott-Wilson on behalf of EADS

Director, Chris Scott-Wilson Partnership and Chair, Industry Forum on Competition Policy

The benefits of converging standards in merger review procedures

Convergence is not an end in itself. Benefit will flow not from the fact of convergence, but from enshrining best practice in the standards towards which Countries converge. There is a need to establish a consensus regarding what constitutes best practice with regard to the correct application of Competition Law and with regard to the procedures by which it is applied. In this the following basic principles ought to prevail:

- Competition Laws should not be used to impose political solutions or market structures. As an instrument of policy they should be limited to securing the benefits of competition without penalising winners or undermining investments.

- The Law should be applied objectively. In particular the tests and definitions on which decisions are founded should be sufficiently clear to permit legal certainty and predictability.

- Given that an element of subjectivity is inevitable, the competent authorities ought not to be judges in their own cause and decisions having legal consequences should be open to a timely appeal as to substance.

- The procedures by which decisions are reached should be fair, giving the parties the opportunity to present their case and to test the evidence against them before an open-minded and independent tribunal.

- The procedures by which decisions are reached should be open and transparent: and this requires more than the publication of an *ex post facto* rationalisation of the decision.

If the process of convergence results in a system which more closely approximates to these principles: and one in which Countries can be held to account if they do not observe them, then that would be a benefit.

Rufus Ogilvie Smals

Head of Legal Department, GKN plc, Chairman of Competition Panel, Confederation of British Industry (CBI)

The Benefits of Converging Standards in Merger Control Procedures

Urgent international action must be taken to resolve the problems currently being faced by the business community resulting from the explosion of merger control laws across the world over the last decade. Such action could be by way of "soft convergence", whereby influence is exerted on all jurisdictions to adhere to a set of principles, which might be described as "best practice". Such principles could include:

- introducing threshold tests which ensure a meaningful jurisdictional connection to justify notification in a particular jurisdiction, i.e. requiring reasonably substantial minimum levels of assets/turnover and overlapping presence between the merging parties in that jurisdiction;

- limiting the information required to be included in notifications to matters of fact avoiding the need for sometimes complex and inevitably subjective market share analysis;

- setting common time-limits for filings of notifications and time-tables for clearance; the one month initial review with a three to four month detailed review in problematic cases would be an acceptable norm;

- reducing the need to file in numerous different languages;

- the adoption of similar substantive tests for determining the impact on competition of the transaction in question;

- compliance with measures to improve transparency in the decision-making process by competition authorities including avoidance of discrimination;

- consistent and predictable application of the rules;

- fair procedures for review of decisions, such as the right to be heard (for both the merging companies and interested third parties), and the right to speedy access to an independent court or tribunal to challenge a merger-blocking decision;

- respect for the confidentiality of business information provided by the parties in the course of the process.

Considerable benefits could flow from the adoption of converging standards in merger control procedures, not just to business, but to regulators and the general public as well. Likewise, no country should have anything to fear from such a process, since it need in no way impinge on the essential sovereignty of a country to decide a case which genuinely affects its economy in whichever way it chooses, under its own legal rules.

Recommended Framework for Best Practice in International Merger Control Procedures

That transactions having potentially significant competitive effects in a number of jurisdictions are now subject to multiple notification and review requirements is neither remarkable nor, in the abstract, objectionable. Where a transaction may have a significant competitive effect on the local economy in any given jurisdiction, there should be no dispute as to the local antitrust authority's legitimate interest in reviewing the transaction notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or proportionate sales volume) lies outside its national boundaries.

In short, BIAC and the ICC firmly support the sovereignty of each jurisdiction to apply its own laws to mergers which have effects on its market. At the same time, however, it must be recognized that the proliferation of merger control regimes is imposing significant -- and unnecessary -- transaction costs on virtually all international transactions, and in particular on those transactions which do not raise any significant competitive concerns whatsoever.

BIAC and the ICC believe that a fundamental objective of "best practices" in the international merger review process should be directed at eliminating these unnecessary transaction costs in a manner which does not compromise the legitimate interests of any jurisdiction in enforcing its competition laws. Consistent with this objective, we believe that "best practices" should include the following basic elements:

- The adoption of clear, objective tests for determining whether any given transaction is subject to merger notification requirements;
- The elimination of notification requirements as to transactions lacking any appreciable jurisdictional nexus with the jurisdiction concerned and the adoption of clear, objective de minimis thresholds below which notification will not be required;
- The limitation of notification requirements to those aspects of a transaction which have some jurisdictional nexus with the jurisdiction concerned or, at a minimum, the elimination of suspensive effect as to those aspects of a transaction lacking any jurisdictional nexus with the jurisdiction concerned;
- The elimination of unnecessary timing restrictions on the parties' ability to file merger notifications and to trigger formal review of their transaction;
- The elimination of arbitrary filing deadlines, provided that it does not prejudice the ability of the local authority to review the transaction prior to implementation;
- The adoption of reasonable initial notification requirements designed to elicit the basic information needed to determine whether the notified transaction raises potential competitive issues meriting further examination by way of a more extensive investigation; and
- The adoption of reasonable deadlines within which review of the transaction will be completed.

We believe that the foregoing principles, if adopted, would promote greater efficiency and confidence in the international merger review process without jeopardizing the legitimate enforcement interests of any jurisdiction concerned. To the contrary, adoption of these proposals would also promote more efficient utilization of enforcement resources and greater efficiency in cooperative enforcement efforts in the increasingly prevalent international context.

Paul Crampton

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Best Procedural Practices in Multi-Jurisdictional Merger Review

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 contribution 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.

Transparency, Certainty and Predictability

- All material parameters of legislation, regulations, practices, policies and procedure should be transparent.
- A fixed maximum review period of 30 days should be adopted with respect to the initial review stage. Consideration should be given to adopting a four month maximum review period for mergers requiring a second stage review, with extensions only by agreement of the merging parties.
- Enforcement agencies should grant waivers to allow merging parties to close their transactions prior to the expiry of the statutory waiting period or suspension period, once it has been determined that a transaction is unlikely to have anticompetitive effects or once a remedy has been agreed upon.
- Enforcement agencies should adopt other best practices that would expedite merger review.
- Objective, rather than subjective, tests should be used, particularly in relation to the jurisdictional tests for determining whether or not a filing is required.
- Decision making criteria should be consistently applied.
- Detailed reasons for not opposing mergers in close cases, as well as for opposing mergers, should be made public.

Nexus

- At least two parties to a merger should have some local presence in the jurisdiction, as reflected either in revenues or assets exceeding a meaningful minimum threshold, to trigger a notification obligation.
- Jurisdictions should strive for harmony in the methods by which calculations are made to determine whether such thresholds are exceeded.

Non-discrimination

- Companies should not be discriminated against on the basis of nationality.
- Laws should not be applied in a way that furthers the interests of local firms or industries, relative to foreign entities.

Triggering Event/Filing Deadlines

- Merging parties should be permitted to file at any time, provided they sign an affidavit confirming their "good faith intention to consummate" the merger.

Information to be Included in the Initial Filing

- Initial filings should require only the minimum amount of information necessary to enable the enforcement agency to determine whether a proposed merger raises potentially significant competition issues.

Requests for Additional Information, Interviews and Plant Tours

- Agencies should coordinate their requests for additional information, interviews, plant tours, etc., in an effort to minimize the burden on recipients of such requests.
- Agencies should identify to merging parties areas of potential concern at the outset of the second phase of a review, and should avoid multiple requests for information.

Translations

- Agencies should accept summaries or excerpts unless and until a merger review appears to indicate the need for full translations.

Remedies

- Agencies should exercise jurisdiction only over the local aspect of a merger, and should coordinate from an early stage with respect to remedies.

Filing Fees

- Filing fees should be no more than necessary to cover the reasonable administrative costs of reviewing a merger.

Exchange of Confidential Information

- Any information exchanged between enforcement authorities should be limited to the necessary minimum.
- Such exchanges should be conducted pursuant to a legal framework which requires cooperation to be (i) undertaken in accordance with bilateral or multilateral cooperation treaties or agreements and which describe the minimum requirements that such treaties should contain; or (ii) conducted pursuant to a waiver or limited waiver by the disclosing party.
- The various safeguards and protections identified in the BIAC/ICC *Recommended Framework for Best Practices in International Merger Control Procedures* should be endorsed by CERT.

Waivers

- Enforcement authorities should make it very clear when requesting a waiver that no adverse consequences will arise if the request is not granted.
- Limited waivers should be used where possible.
- Enforcement agencies should develop model waivers and limited waivers.

Due Process

- Merging parties should have the benefit of timely and effective rights of appeal before a court or other independent arbiter with respect to final clearance decisions by enforcement agencies, as well regarding 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.

Jean-Pierre Le Goff

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The Business Case for Convergence: A Focus on Procedures

On the basis of trends in cross border M&A's, of the considerable research on convergence already undertaken, and salient features of past Canadian experiences, we attempt to identify the most relevant steps that should be taken, in the near future, by private firms and organisations such as CERT, so that cross-border M&A examinations by respective competition authorities can be undertaken more efficiently.

We conclude that:

- the focus should be on procedures;
- firms involved in cross border M&A's should pressure the competition and trade authorities to complete the work that has been done on convergence;
- firms involved in cross border M&A's should document the costs, private and social, associated with recent experiences, and offer their assistance to evaluate and improve a new set of procedures.
- Regulatory and trade experts, assisted by firm representatives, should propose, in the very near future, a common set of procedures, to be submitted to national competition authorities.

The next steps that can be undertaken with CERT support:

- According to members, procedures account for a large part of the costs of non-convergence. Also, procedures do not seem to be at the core of strong differences of opinion between different competition authorities. CERT should then strongly push for a concerted effort on the sole matter of procedures, without going into the basic principles and political considerations, or the nature of the organisation which would be responsible for the joint effort. While it is true that there is more to convergence than procedures, it is also true that the issues are extremely complex, and related to concerns outside of CERT's expertise.
- It is also true that the procedures should not be drawn that would not be in line with basic principles. Given the past record, I expect that the differences in the basic principles are not so great that the attempt at convergence of procedures will be fruitless. Also, discussions on procedures will shed light on divergence in basic principles, and quite likely will be relevant to greater harmonisation.
- Success or near success in the matter of convergence of procedures will also put pressure on trade and competition authorities to move more swiftly on the other dimensions.

Beware of Expectations

The convergence process is well under way. However, we must not overstate the anticipated effects. Convergence on procedures will reduce considerably the cost of submitting M&A projects to the different competition authorities. But convergence on procedures does not necessarily increase the probability that a given M&A will meet approval in all jurisdictions.

Allan Asher

Campaigns and Corporate Communications Director at the Consumers' Association, former Deputy Chairperson of the Australian Competition and Consumer Commission

Making Global Markets Work Through Competition and Consumer Protection

Competition policy, which aims to ensure more efficient allocation of resources, usually through the prohibition of price fixing or market sharing cartels, abused by dominant firms and control of concentrations will assist the creation of markets responsive to consumer signals, through success of firms which are best able to satisfy quality, choice and price requirements of consumers and exit through failure of those which are not competitive.

There is a growing consensus on the need for ensuring fair competition in the market as an essential ingredient for enhancement and maintenance of competitiveness in the economy. With the advent of globalisation and the gradual opening of economies, domestic competition is important to enhance or maintain competitiveness. Michael Porter in his study (1990) containing a major survey of international industrial performance found that it is the firms which face strong domestic competition which perform best in international markets. More recent work by Porter (2000) shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn – examples include cameras, automobiles and audio equipment.

Efficient allocation of resources leads to increased competitiveness resulting in higher growth and development. This also means higher output, better quality and lower prices leading to increased consumer welfare. This needs sound industrial and trade policies, complemented by a suitable competition policy and law.

So what practically can be done to enhance convergence between competition policy and consumer protection?

It is all very well to note the trends in the global economy and to recognise the important forces that are driving changes in the way that we utilise policies to deal with those changes. What we must do however is to focus our attention clearly on what we can do practically to ensure that consumer policy and competition work well together in a globalising world policy environment. The core principles for such policies must be transparency, engagement and co-operation. The following five points highlight actions for better cross border merger administration:

1. Actively seek out representatives of consumers in target markets and engage them in discussions about the proposed merger or acquisition

2. Take positive steps to inform regulators and consumer groups about the proposal. Delay and inadequate disclosure will almost ensure opposition.

3. Where public consultation is too occur, there should be a form of information disclosure which describes the transaction and highlights public benefits and likely competition issues and proposed remedies

4. Where a proposed merger or acquisition involves a number of developed and developing economies, steps should be taken by businesses and regulators to establish developed to developing capacity building twinning arrangements.

5. Competition agencies in all countries should be encouraged to take on an advocacy role for the benefits open and competitive markets

Charles Stark

Partner in the Brussels office of Wilmer, Cutler & Pickering and former Chief of the Foreign Commerce Section of the Antitrust Division of the US Department of Justice

An EU-US Perspective
Time to Reflect on the Future: The Way Forward

At the global level, a US-EU split on key competition policy issues will undercut ongoing efforts to achieve consensus on competition policy issues. There is urgent need to work to ensure that the 90-plus jurisdictions with antitrust laws apply them sensibly in order that they not unduly burden business, constitute anticompetitive regulation in the name of antitrust, and lead to international conflict. The most promising way to achieve this is for the US and EU, the world's most influential antitrust regimes, to work in harmony on such matters as the Global Competition Initiative and OECD and WTO competition policies *(see www.practicallaw.com/ global "Moving the global competition enforcement agenda forward" GC, 2000, V(9), 1*0). Substantive divergence makes that less likely.

In an ideal world, the US and the EU would share and enforce a single set of sound antitrust rules. They do not, of course - but the two jurisdictions have made extraordinary progress toward *de facto* convergence nonetheless. The disparity in their approaches to the proposed GE/Honeywell merger shows us that we cannot take that progress for granted. But what is the solution?

First, US and EU policy makers need to recognize that their interests and policies are fundamentally compatible - and that those interests and policies are advanced most effectively through co-operation. EU competition authorities have played a leading role in transforming Europe from a continent of state-run monopolies and segmented markets toward a common market in which state monopolies increasingly are challenged by competition from within and outside Europe. The US competition policy community, born into a common market with minimal state involvement in the economy, should recognize these achievements and the shared policies they reflect.

Second, both sides need to recognize their common interest in substantive convergence and continue to work toward it. Where differences appear, both sides need to make every effort to understand why. They need to resist temptation to impute to the other incompatible objectives or cynical, political motives and to recognize, instead, that the two systems fundamentally are aimed at common objectives. Differences in outcome are more likely to result from differences in legal process, standards of proof, and attitudes about appropriate thresholds for government intervention in regulating the economy. Only by correctly understanding the differences and avoiding recrimination will the two sides be able to work constructively to minimize those differences.

Third, the antitrust leaders on each side of the Atlantic need to address doubts about the reliability of their processes. The Commission would do well to allay concerns that it is too reliant on self-serving competitor complaints and that its conclusions too often are conjectural and unsupported by solid facts. The new US leaders, for their part, need to address European concerns that US decisions will be driven more by the abstractions of conservative economic theories than by marketplace realities. However well-or ill-founded these concerns may be, they will be allayed only if each side has confidence in the rigor of the other's analytical and factual methods and conclusions.

Fourth, where differences persist, both jurisdictions should renew their commitment to principles of comity. That means, among other things, applying especially rigorous standards of analysis and proof in cases in which both have an interest and, when the effects are the same in both jurisdictions (as in the GE/Honeywell matter), giving great weight to the conclusions of the jurisdiction in which the companies are based and the preponderance of their activities and sales are centered. The DOJ took this approach in the mid-80s when it deferred to the Canadian authorities' conclusions on close issues in a merger of US and Canadian tractor manufacturers. It is an approach that has contributed significantly to the diminution in conflict and the growth of cooperation in the years since.

Dr. Andreas Möhlenkamp

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Convergence in International Antitrust Law: Business Demands

Business supports the idea of an International Competition Network. Companies have carefully noted, that not only "senior antitrust officials" will be part of this network, but also "the private sector", "legal and economic antitrust practitioners" and "business people". Business offers its participation to strengthen the cooperation efforts between antitrust authorities and to develop best practice rules both for substantive laws and for procedures.

Competition Experts from developed market economies should play a leading role in the Network. Officials from developing countries, though, should participate in the network and should regularly be invited to its meetings. Competition is a means of generating growth and prosperity equally for developed economies and for developing countries.

The idea of due process in international competition law procedures must be promoted. Transparent, non-discriminatory procedures and decisions are equally important. The exchange of information should be carefully handled. Companies involved must be informed and – wherever possible - asked for prior consent.

Representatives from antitrust authorities should seek to reduce time consuming control procedures to a minimum level. Antitrust authorities should step back from using their jurisdiction, especially when well-established antitrust authorities have already analysed a case. Multi-jurisdictional filing must be reduced by all means in order to reduce transaction costs.

Soft convergence by cooperation of antitrust authorities in individual cases seems to be an appropriate way in international competition law. Nevertheless, earlier efforts, like the OECD recommendation for hard core cartels or WTO-projects, must be continued to achieve common competition law standards in the future.

J. William Rowley QC

Mr. Rowley is Chairman of McMillan Binch, heads it Competition law practice and Chairman of the IBA's Global Competition Forum.

Prescription for the International Competition Network

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 widespread acceptance that the time has come for a multilateral initiative to complement existing bilateral agreements and institutional arrangements to address necessary convergence of multiplying processes.

The IBA's international meeting at Ditchley Park this February acted as a springboard to this conclusion[4]. The event 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 forum. The resulting consensus set the stage for the formal launch at Fordham University last month of what is now to be called the *International Competition Network* ("ICN")[5].

Particularly good news is the fact that the ICN will be project-driven, concerned with real world problems and consensus-based. With membership open to national and multi-national competition agencies, it will seek advice and input from the private sector, non-governmental organizations, consumer group, lawyers (and their institutions), economists and academics.

For its first project the ICN will focus on substantive and procedural issues arising from the proliferation of merger review regimes. "Every[6] one will benefit from simplified and predictable reviews", notes Konrad von Finckenstein, Commissioner of Canada's Competition Bureau and chair of the interim ICN Steering Group.[7]

Given the acuteness of concern with the current divergent approach to multi jurisdictional merger review, (not least because it is now common for the parties to a larger international transaction to face filings in 20, 30, 40 or more jurisdictions), the ICN is to be applauded for tackling this issue at the outset of its mandate. The project presents the business community with its first real opportunity to address the practical problems associated with divergent multi agency merger review processes. To succeed, the agency's "merger review customers" must make input to the work of the ICN merger task force a top priority

The following action points would seem worth consideration:

- Transparency and information sharing should be the 1st order of the day. Many will be prepared to contribute to the work of the ICN, but they need to know what is planned, and how and to whom to make input.

- The early, and preferably centralised, publication of papers defining/refining thinking on the ICN's scope, objectives, mandate, governance and make-up is desirable. Comment from any interested party should be sought and encouraged.

[4] Convened and hosted by the International Bar Association, 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.

[5] ICN, Press Release and Backgrounder, 25 October 2001, New York City

[7] Ibid.

- The establishment by the ICN of an interactive website to facilitate communication and awareness of the ICN's proposed activity is an obvious priority.

- As regards the merger project, the ICN merger task force should ensure the early publication of the objectives, mandate, work plan and time frame for the work contemplated. Issues which might be addressed include:
  - Best Practices for the Design of Merger Review Regimes[8]
  - Best Practices for Merger Review Agencies[9]
  - Best Practices for Merging Parties[10]
  - Use of Peer Review by Merger Review Agencies
  - Possibilities associated with a Common Form /Process Filing Treaty.

- Definition of the input sought from and the roles to be played by the private sector, non-governmental organization, legal institutions and others to the work of the merger task force is required. Until the ICN's own website is established, the IBA's soon to be launched global competition website is one natural host for this information, the ABA's antitrust website another. Affected businesses should individually be prepared to make time and resources available to the project to complement the work of the bar and other groups.

- The ICN's funding needs (generally and project specific) 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".

- In addition to the two projects that have been announced (Merger Process Convergence and Competition Advocacy), other obvious areas for "working group" or "project" activity should be identified. Two further candidate topics suggest themselves – "Cartel Enforcement" and "Co-operation and Information Exchanges".

- It is not too early for the ICN leadership to invite all who have an interest to become "members" or "participants in" those working groups/task forces they would like. It is also not too early to invite volunteers to prepare papers, comments or other inputs as they consider useful. Ultimately, the working groups will need to establish their priorities, agenda and time frames, but they will likely be well served by having ready-made material from which to draw.

- Finally, a number of professional, business and non-governmental institutions have volunteered to facilitate meetings and provide such other services as may be necessary to move the ICN forward (i.e., translating concept to reality). None of these organizations will have any interest in challenging the core leadership role if the competition agencies intend to assume in the ICN. However, they do have important administrative back up and a vital interest in seeing that the work of the ICN proceeds efficiently and with necessary support. Given the infrastructure of these organizations, further thought might be given as to how they might help (e.g., conference administration and planning), including the planned Capri meeting this coming summer.

[8] See McDavid, Proger, Reynolds, Rowley and Campbell, Best Practices for the Review of International Merger, October 2001

[9] Ibid

[10] Ibid