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Convergence in International Merger Control

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A key consequence of the lack of any meaningful system of international competition law is that international mergers and acquisitions must comply with a plethora of national merger control regimes. In the absence of an international equivalent to the EU one-stop-shop, and in the context of globalised markets, merging parties must either notify the proposed transaction to each and every jurisdiction where the thresholds are satisfied, or engage in a risk assessment and only notify those jurisdictions that are most closely associated with the merger, and/or where the merging parties have 'assets on the ground'. Some sources suggest in excess of 70 jurisdictions have ex ante notification requirements, and most of those impose mandatory suspension pending review. Crucially, the triggering thresholds for notification vary and it is possible for merging parties to be legally obliged to notify the transaction even in the objective absence of a substantial nexus to the reviewing jurisdiction. There have been efforts to agree common principles in this area by the ICN and other international bodies, yet key points of divergence remain, which exacerbates the burden of compliance experienced by the merging parties. This article identifies some of the key 'unnecessary costs' that can be experienced by merging parties subject to multi-jurisdictional merger review and explores the extent to which international convergence efforts and case cooperation can benefit merging parties. In discussing international convergence, the article focuses more on procedural rather than substantive matters and also looks to the recently enacted merger control laws in China and India to determine whether internationally agreed best practices have been adhered to. The article also calls for a transparent debate between regulators, practitioners and academics as to the merits and demerits of multilateral cooperation in specific and appropriate cases, which does not take place at present in spite of the ever-increasing number of merger control regimes.

INTRODUCTION

Mergers and acquisitions have been diminishing in number and value since the height of the last merger wave,[1] but will likely be stimulated by consolidations in the wake of recent economic turmoil. Nonetheless, international M&A remain an important feature of global trade and they are phenomena that are presumptively viewed as beneficial and encouraged in market economies.[2] While inconsistent enforcement or conflict between

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1 According to figures sourced from Dealogic the value of global M&A in the first half of 2008 dropped by one third of the comparative figures from 2007, to $1,860 billion, see 'Value of M&A tumbles as buy-out boom ends', by Julie MacIntosh, *Financial Times*, June 26, 2008. Additionally analysts are now speaking of a 'material decline' in global M&A over the next 12 months, see 'M&A falls victim to sombre look', by Liba Saigol, *Financial Times*, July 13, 2008.

2 Former US Assistant Attorney General Thomas Barnett has stated that 'multijurisdictional mergers are an important part of global commerce.' May 31, 2007, at the Sixth Annual ICN Conference, Moscow.

competition authorities is infrequent (the 2001 *GE/Honeywell* case[3] remains the most-oft cited example), Barnett notes that 'as more and more jurisdictions become more deeply involved in merger review, however, the risk of divergence increases dramatically.'[4] There appears to be renewed concern about conflicting decisions among some practitioners in light of the new Chinese anti-monopoly law and the revised competition laws in India, that both regimes 'could delay or thwart high-profile cross-border mergers and acquisitions.'[5] The concern arises for many reasons including the cumulative effect of multi-jurisdictional review and the level of expertise and experience of administrative and judicial personnel,[6] but a more specific concern relates to the thresholds set by the new laws in both developing economic powerhouses. A recent Financial Times editorial has succinctly stated that 'if every country looks at every deal, then not only will the increased bureaucracy mean cost and delay, but the country with the toughest antitrust interpretation of a particular transaction will make a de facto decision for everybody else'.[7] There are at least 80 jurisdictions with some form of merger control,[8] and successful advocacy and training is gradually equipping these jurisdictions with the tools necessary for effective enforcement. Whilst high profile conflicts may seem unlikely, this article will highlight ongoing convergence and cooperation efforts that are necessary in order to minimise the burden on merging firms, with a particular focus on the benefit to be gained from procedural convergence. The success of procedural convergence can be quickly gauged by assessing the impact of best practice recommendations on the drafting of recent laws introduced in China and India, and for that reason both jurisdictions will also be discussed within this article.

A key concern of the business community regarding China and India relates to aspects of the mandatory *ex ante* review mechanism in both jurisdictions, *ex ante* review has

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3 See Commission Decision in *General Electric/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1. Discussion in E.M. Fox, 'Mergers in Global Markets: GE/Honeywell and the Future of Merger Control' (2002) 23 *University of Pennsylvania Law Review* 457; A. Burnside, 'GE, Honey, I Sunk The Merger' (2002) 23 *ECLR* 107. See also discussion in a speech by M. Delrahim, Deputy Assistant Attorney General, DOJ, 'Facing The Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies of The US and EU', ABA Fall Meeting. Washington DC, October 22, 2004.

4 Op cit, n 2.

5 'Asian antitrust laws "threaten deals"' by Sundeep Tucker and Patti Waldmeir, *Financial Times*, July 27, 2008.

6 These concerns have increased in light the recent decision by China's Ministry of Commerce (Mofcom) to prohibit Coca Cola's $2.4 bn takeover of Huiyuan Juice, which some fear will result in strengthening protectionist tendencies. See 'Lawyers criticise Beijing bar of takeover', *Financial Times*, March 20, 2009 and 'Beijing's retort to Coke stirs fears of retaliation', *Financial Times*, March 26, 2009.

7 'Editorial: Antitrust explosion', *Financial Times*, July 28, 2008.

8 See R. Whish, *Competition Law*, (6th Ed, Oxford, OUP, 2009) at p 801. Other sources have comparable figures; the ICN suggested there were 75 merger control regimes in 2004, *Report on the Costs and Burdens of Multijurisdictional Merger Review* prepared by the ICN Mergers Working Group, Notification and Procedures Subgroup, November 2004 at p 4. Available from: <http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf>.

been adopted in at least 73 of the jurisdictions with merger control laws.[9] Specifically, the 'low' notification thresholds adopted in both countries have been controversial,[10] as well as the lengthy review period in India; the transaction is suspended for the 210 day review period expires or the Competition Commission of India (CCI) clears the deal.[11] These new laws could subject global M&A to further, unnecessary competition law scrutiny and delay, which is not a new concern for competition law practitioners, but is likely to exacerbate any undue burden or 'unnecessary costs' imposed on merging parties as a result of multi-jurisdictional merger review.

UNNECESSARY COSTS

Merging parties experience particular costs as a result of multi-jurisdictional merger review in terms of: working time devoted to gaining competition law approval; direct pecuniary costs incurred; and, the implications of the delay and legal uncertainty arising from the review process (i.e. costs resulting from lost merger synergies arising as a result of the delay, particularly relevant when jurisdictions prohibit 'closing' pending a completed merger review).[12] Costs associated with each of these will vary depending upon the stage of the merger review process. Costs tend to heighten at particular points in the process, such as at the actual point of submitting pre-merger notification, and, if a second phase merger investigation is initiated, requiring further information and market analysis from the parties by the competition authorities. The seminal Pricewaterhouse Coopers survey on the costs involved in multi-jurisdictional merger review ('the PWC survey'), suggested that the burden imposed upon firms represents 'a relatively small, [0.11%] regressive tax on mergers', and noted that 'while merger review costs do represent a substantial proportion of the overall costs of a merger, they do not amount to a significant tax on the overall value of deals.'[13] Nonetheless, as Rowley and Campbell have argued:

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[9] Figure sourced from *Merger Notification Filing Fees: A Report of the International Competition Network* (April 2005) at p 2, available from <http://www.internationalcompetitionnetwork.org>.

[10] See Financial Times articles, op cit, n 5. Also see M. Lorenz, 'Legislative Comment: The new Chinese Competition Act' [2008] ECLR 257, and Freshfields Bruckhaus Deringer Briefing 'China publishes merger control notification thresholds' August 4, 2008, available at <http://www.freshfields.com/publications/pdfs/2008/aug05/23614.pdf>.

[11] Section 31(11) of the Indian Competition Law 2002, as amended. Note that the 210 day period vastly exceeds the ICN best practices guidance for a 30 day limit for the first stage of a merger review, with which many jurisdictions including China comply with. See 'Linklaters snaps up India's antitrust expert' by Sundeep Tucker, *Financial Times*, August 31, 2008. Also see the discussion in A. Bhattacharjea 'India's New Competition Law: A Comparative Assessment' (2008) 4/3 Journal of Competition Law and Economics 609, particularly at pp 634–635.

[12] See the Pricewaterhouse Coopers survey (commissioned by the International and American Bar Associations), *A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews*, June 2003. PWC survey available at: <http://www.globalcompetitionforum.org/gcfpaper.htm>. Also see the ICN report on the costs and burdens of multi-jurisdictional merger review, op cit, n 8.

[13] Ibid, at p 42.

> 'Some officials and [practitioners] have focused on survey responses which indicated that merger review costs were a small fraction of deal value and that they have not deterred subsequent transactions. This misses the point: unnecessary inefficiency is a serious policy concern precisely because the costs are borne by businesses that have no alternative to avoid such regulatory processes.'[14]

The degree to which unduly interventionist merger control regimes deter M&A activity is debateable but leading competition law authorities, practitioners and academics have long recognised the need to reduce the undue burden, or 'unnecessary costs', that are associated with multi-jurisdictional merger review. In its November 2004 report, the ICN sought to build upon the PWC survey by identifying four categories of 'unnecessary costs' that merging firms encounter in multi-jurisdictional merger review:

> 'i) ascertaining notification and filing requirements;
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> ii) complying with notification requirements for transactions lacking an appreciable nexus to the notified jurisdiction;
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> iii) complying with unduly burdensome filing requirements; and
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> iv) unnecessary delays in the merger filing and review process.'[15]

Competition authorities, practitioners and various international fora have sought to minimise unnecessary costs by working towards procedural convergence in merger control. The EC-US joint merger working group,[16] the OECD, the International Chamber of Commerce (ICC),[17] the so-called 'Merger Streamlining Group',[18] and, more recently, the ICN have all been active in seeking to facilitate greater convergence in merger control.[19] Their efforts have focused on identifying the potential for procedural over substantive convergence, due to the greater difficulty with the latter, which is often far more entrenched in policy choices and concerns regarding sovereignty. Procedural convergence is likely easier to facilitate and it can reduce the

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[14] J.W. Rowley and A.N. Campbell, 'A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews' (2003) September *The Antitrust Source* at p 3.

[15] ICN report on the costs and burdens of multi-jurisdictional merger review, op cit, n 8.

[16] The joint working group involving the EC Commission, the US Department of Justice and FTC has produced a set of best practices on cooperation in merger investigations, available at <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

[17] The business and industry advisory committee to the OECD (BIAC) and the International Chamber of Commerce (ICC) produced a Recommended Framework for Best Practices in International Merger Control Procedures on October 4, 2001, available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>.

[18] The group was funded by leading international companies and consisting of leading antitrust practitioners, produced a set of best practices for the review of international mergers in October 2001. See J.L. McDavid, P.A. Proger, M.J. Reynolds, J.W. Rowley & A.N. Campbell, 'Best practices for the review of international mergers', October 2001, available at <http://www.globalcompetitionforum.org/regions/n_america/canada/MergerSep21.pdf?id=323>.

[19] See discussion in J.J. Parisi, 'International Regulation of Mergers: More Convergence, Less Conflict' (2005-2006) 61 NYU Ann. Surv. Am. L. 509

number of jurisdictions scrutinising a merger as well as the delays and other compliance costs experienced by merging firms.

CONVERGENCE

Reducing the number of jurisdictions reviewing a proposed transaction to a level where fewer notifications are required is an obvious and particularly effective means of reducing the burden upon merging firms. As Hawk has stated:

> 'there is a proliferation of merger controls throughout the world. What is the problem? The problem is volume … The solution is volume control … the trick is minimizing all this volume of merger control and all these costs or somehow try to reduce the volume so that transactions that have little or no antitrust importance are screened out.'[20]

The means by which the international community has sought to reduce the 'problem of volume' is by seeking convergence on various elements of the merger notification procedure. The ICN appears to have consolidated and clarified the previous best practice recommendations as to: what is an appropriate jurisdictional nexus as a basis for notification; the clarity and transparency required of notification thresholds; timing requirements for notification; and, the amount of information required in initial notifications.[21] This work is aimed at addressing most of the 'unnecessary costs' previously identified by the ICN.

JURISDICTIONAL NEXUS

While there has been no attempt to provide a precise template for determining when a merger has a sufficiently proximate or 'material' nexus to the reviewing jurisdiction, the consensus is clearly that notification thresholds should require that mergers have a minimum 'local nexus' to the reviewing jurisdiction. A minimum level of sales or assets within the jurisdiction could establish such a local nexus, and the ICN recommendations suggest that the test should require at least two of the entities involved to satisfy a local nexus test. Regarding implementation, it is noteworthy that in a 2005 survey of 53 ICN member jurisdictions only 35 had a local nexus requirement within their notification thresholds.[22] Interestingly, both alternative notification thresholds set by the Chinese State Council for the Chinese Anti-monopoly Law require a local nexus, in the form of a turnover threshold, of at least two of the parties

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[20] Barry E. Hawk, in an oral statement to the ICPAC Hearings, Washington DC, November 3, 1998. Transcripts of Committee Hearings are available from <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

[21] See the ICN recommended practices for merger notification procedures, available at <http://www.internationalcompetitionnetwork.org>.

[22] ICN Report, 'Implementation of the ICN recommended practices for merger notification and review procedures', April 2005, at Annex B: Compliance with recommended practices, RP I: Nexus. Report available at: <http://www.internationalcompetitionnetwork.org>.

to the transaction.[23] While the amendments to the Indian Competition Law and the new mandatory notification thresholds do require a local nexus, based on either assets or turnover in India, the Act itself does not require a minimum local nexus of at least two parties to the transaction,[24] although apparently this has been addressed by the draft implementing regulations.[25]

CLARITY OF NOTIFICATION THRESHOLDS

Clarity and transparency of notification thresholds has often been highlighted as an issue that can reduce unnecessary costs, which can be achieved by avoiding opaque and subjective thresholds. The Merger Streamlining Group was at the forefront in stating 'market share (or other judgement-based) tests should not be used as the basis for pre-merger notification thresholds because they require up-front analyses of product and geographic markets which are time-consuming and uncertain.'[26] The ICN best practices and others have endorsed this position, although the majority of ICN members surveyed in 2005 responded that their merger notification thresholds used subjective criteria contrary to the ICN recommended practices, with 18 jurisdictions adopting a variant of a market share test.[27] Another consequence of recommending objective thresholds, is that local assets and/or sales thresholds, should be expressed in currency values and not other economic measures such as wage multiples.[28] Both Chinese and Indian notification requirements appear to be expressed in relatively clear, objective thresholds. Perhaps proving that the best practices and competition advocacy can influence the drafting of new competition laws, Freshfields notes of the new Chinese merger notification thresholds, 'as expected, the market share threshold that had previously been proposed as a third alternative test is not included in the final merger

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[23] The first threshold is satisfied if the worldwide turnover of all parties exceeds c.$1.32 billion, as well as the turnover within China of each of at least two parties exceeds c.$52.6m in the previous financial year. The second threshold is satisfied if the combined turnover in China of all parties exceeds c.$263m, as well as the turnover of each of at least two parties exceeds c.$52.6m. Data sourced from Freshfields Briefing paper, op cit, n 10.

[24] See section 5 of the Indian Competition Act 2002, as amended. Available at: <http://www.cci.gov.in/images/media/competition_act/act2002.pdf>.

[25] See presentation to the ICN Annual Conference by V. Dhall, former Chairman of the CCI, April 13, 2008 available at <http://www.icn-kyoto.org/documents/materials2/Dhall/16Apr08.ppt#257>. The draft regulations state that each of at least two parties have c.$50m of assets in India, or c.$150m of turnover in India, as well as satisfying the other thresholds, before notification is required.

[26] Part I(4) of the MSG best practices, op cit, n 18.

[27] Op cit, n 22, at RP II: Notification thresholds/pre-notification guidance.

[28] The oft-cited example of a jurisdiction with merger notification thresholds that are partially expressed in terms of monthly wage multiples is Russia. Pre-merger notification is currently required to the Russian Federal Antimonopoly Service (FAS), when, inter alia, the total amount of assets involved in the merger exceeds 30 million times the Russian Federal monthly minimum wage (currently Rb100). For further information see the Global Competition Review Publication, 'Getting the Deal Through: Merger Control 2006' at chapter 39: Russia, as well as the ICN Russian merger notification and procedures template (July 2006), available at: <http://www.internationalcompetitionnetwork.org>.

control thresholds, in recognition that market share thresholds are, by nature, difficult to apply and as a result tend to create legal uncertainty.'[29]

TIMING

The issue of timing is crucial throughout the whole merger review process, particularly for the merging parties themselves, and this also applies at the pre-merger notification stage. Notifications tend to require the coordination of legal and commercial strategies designed to 'get the deal through.' Hence for merging firms and their counsel, the issue of notification timing, including notification triggers and any associated deadlines, is crucial and easily complicated by the burden of multiple notifications. There is a tension regarding notification triggers for while they ostensibly establish a point in the commercial M&A process from which merging firms must notify within a set time period, the triggers often act to prevent premature notifications. In essence, notification triggers balance the interests of legal certainty (which is furthered by early notification) with the need to ensure efficient and effective use of resources (flexible triggers may encourage notifications that are at very early stages of the commercial negotiation stage, with the obvious risk that a merger review is initiated while the deal collapses for commercial reasons). The ICN recommended practices suggest that parties 'should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.'[30] A secondary issue regarding notification timing, is whether jurisdictions should impose deadlines for notification after the trigger point has occurred. Whilst there is the general and obvious point that deadlines should allow merging parties a 'reasonable time' for compiling the relevant information and submitting the notification, there is a consensus against the imposition of notification deadlines in jurisdictions that suspend the merger transaction pending merger review.[31] The ICN implementation survey highlights a wide divergence between the 53 respondents with regard to triggering events, with 10 jurisdictions requiring the parties to conclude a definitive agreement pre-notification. 12 jurisdictions allow notification upon evidence of a good faith intent to consummate the merger, and 13 jurisdictions have very flexible notification triggers.[32] While the Chinese AML is vague on the issue of notification triggers, India is likely to allow notifications on the basis of certification of a bona fide intent to merger/acquire control, but contrary to the best practices there is a 30 day filing deadline after stated notification triggers.[33]

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[29] Op cit, n 8.

[30] ICN recommended practices, op cit, n 21, at III.A.

[31] Ibid, at III.B. The rationale is that in such situations there are sufficient incentives to ensure timely notifications and prevent parties from prolonging the review.

[32] Op cit, n 22, at RP III: Timing of Notification.

[33] See the Draft CCI (Combinations) Regulations, available at <http://www.cci.gov.in/images/media/Regulations/combination_0107008.pdf>. Also see presentation by V. Dhall, op cit, n 25.

REQUISITE FILING INFORMATION

The information requirements, or so-called 'form filing requirements', in a notification have been the subject of harmonisation efforts for many years, with various attempts to achieve consensus on the type and amount of information required by jurisdictions. There have been ambitious attempts to produce a common filing form, spurred on by recommendations in the influential OECD Whish/Wood Report in 1994.[34] Whilst recommending the creation of 'one or two model filing forms, which request common information in a single format, and which use different country annexes as appropriate',[35] the Whish/Wood Report highlighted some of the difficulties of such a task by stating 'the notification form and the timetable in themselves are a reflection of the substantive criteria by reference to which mergers are judged.'[36] Hence the implication is that harmonising procedural requirements, such as the information required in pre-merger notification, is often very difficult without accompanying harmonisation, or at least convergence of the substantive legal tests involved. The United Kingdom, France and Germany produced a voluntary common filing form in September 1997, to be used when a merger would be subject to review in two or more of the jurisdictions.[37] The OECD also produced a somewhat vague template notification form in February 1999,[38] although it failed to be implemented by its relatively homogenous membership. In spite of these apparent developments, common notification forms appear destined to failure unless they are built upon substantive convergence, and also receive the support of merging firms and their legal counsel, in the form of common usage. In the absence of substantive convergence, common filing forms are likely to require a level of information so as to satisfy the most onerous jurisdiction among the signatories. Furthermore, a common form may simply necessitate supplemental information to be provided to particular jurisdictions at the notification stage, following the submission of the common form. In the absence of substantive convergence, a common filing form simply masks diverging legal tests and requirements, and the incentive remains for merging parties to notify jurisdictions individually where less information may be required, and direct contact is more efficient.[39] A key objective of the best practices in this area is to minimise the notification burden for merging firms; jurisdictions should only require information in a

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[34] R. Whish & D. Wood, *Merger cases in the real world – a study of merger control procedures* (Paris, OECD, 1994).

[35] Ibid, at p 108.

[36] Ibid, at p 109.

[37] See discussion in J.W. Rowley & A.N. Campbell 'Multi-jurisdictional merger review – is it time for a common form filing treaty?' at VI, in *Policy Directions for Global Merger Review, a Special Report by the Global Forum for Competition and Trade Policy*, published by the *Global Competition Review*, 1999. Also see the UK Office of Fair Trading guidance document, *Mergers: Procedural Guidance* (OFT 526), at paragraphs 3.26 and 4.30.

[38] *OECD Report on notification of transnational mergers* (DAFFE/CLP(99)2/FINAL), 24 February 1999, specifically the appendix which provides a 'framework for a notification and report form for concentrations'.

[39] In spite of apparent support among practitioners for a common notification filing form, many others have expressed strong concern about such a form in the absence of substantive convergence. See J.W. Rowley & A.N. Campbell, op cit, n 37. There is also a question over the efficacy of a common form if the proposed merger gives rise to different competition concerns in the different jurisdictions involved.

notification that is necessary to determine whether the proposed merger would pose serious competition concerns meriting a more detailed review. The ICN recommended practices also suggest alternative notification formats, depending on whether the transaction appears to represent 'material competition concerns',[40] this is a means of significantly minimising the notification burden for merging parties. Indeed the Form CO and Short Form used by DG Comp at the European Commission[41] exemplifies such an approach, although at least 17 ICN jurisdictions do not provide for such flexibility in notifications depending upon the anticipated level of competition law concern.[42] India has adopted Long and Short Form notifications,[43] but China's position is currently unclear as the AML or subsequent rules make no mention of the expedited/simplified procedure included in earlier drafts.

The value of these convergence efforts is surely beyond doubt, as former US Assistant Attorney General Barnett has stated:

> 'On merger enforcement, the adoption by multilateral organizations such as the OECD and the International Competition Network of best practices for merger notification regimes has helped convince many governments and agencies to reduce procedural burdens.'[44]

Beyond advocating convergence around key principles and procedural issues, the most obvious means for competition authorities to minimise the unnecessary costs borne by merging parties is to cooperate during concurrent merger reviews.

CASE COOPERATION

There are many examples of close cooperation between the EC Commission and the US Federal Trade Commission (FTC) or Department of Justice during concurrent merger review. Cases regularly involve cooperation on procedural matters such as synchronising the timing of the review and facilitating observers in each other's key hearings with the merging parties. Cooperation can even extend to substantive matters such as discussion of market definition and remedies, although the line between procedural and substantive cooperation is difficult to delineate and is less relevant in the context of practical cooperation relating to a particular case. The *Bayer/Aventis CropScience* case[45] is often cited by the FTC, where the European Commission and FTC had to closely cooperate on the remedies required to satisfy competition concerns, so as

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40 Op cit, n 21, V.B: Comment 2.

41 See Annex I and II of Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004, OJ 2004, L133/1.

42 ICN Implementation Report, op cit, n 22, at RP V: Requirements for Initial Notification.

43 Op cit, n 33.

44 Remarks by Thomas O. Barnett, former Assistant Attorney General, US Department of Justice, on February 29, 2008, Washington DC.

45 See European Commission Press Release IP/02/570 'Commission clears Bayer's acquisition of Aventis Crop Science, subject to substantial divestitures', 17 April 2003. Commission Decision *Bayer/Aventis Crop Science* Case No.COMP/M.2547, OJ 2004, L107/1.

to avoid conflicting obligations being imposed upon the merging firms.[46] The *Sanofi-Synthélabo/Aventis* case[47] is a further example of very close cooperation between the European Commission and FTC involving multiple pharmaceutical markets with regional variations, ongoing clinical trials, complex intellectual property rights, and third party interests in the US. The merger was cleared by both authorities, but only after extensive investigations and cooperation on market definition and coordinated remedies. Both authorities had particular concerns regarding medicines used in the treatment of colorectal cancer and insomnia, although the investigations highlighted significant differences in the market for these medicines between the EC and US. In order to address competition concerns, Sanofi agreed to a number of divestitures to competitors, but the Commission and FTC had to work closely to ensure that the timing and substance of the divestitures were 'compatible'.[48] Cooperating on remedies is important for a variety of reasons. From a practical standpoint compatibility is crucial so that merging parties can satisfy the concerns of both jurisdictions at the same time. Equally, cooperation can lessen the burden of multiple divestitures on merging firms and can also facilitate an efficient approach to any post-merger monitoring by the respective authorities. The cooperation that regularly takes place between EC and US authorities sets a model for bilateral cooperation in international merger control that has few comparators, setting aside the cooperation possible within the European Competition Network (ECN) and EFTA due to the overarching political framework existing in Europe. Lesser degrees of cooperation have taken place between EC/US authorities and their Canadian counterparts, and there have also been occasional references to cooperation with Japanese, Australian and Mexican competition authorities. Mergers that prompt multi-jurisdictional merger review, resulting in concurrent investigations concerning the same or related markets do not automatically result in cooperation between competition authorities, neither does the existence of a bilateral cooperation agreement guarantee effective or detailed cooperation will take place. In order for cooperation between reviewing authorities, it appears necessary for the authorities to have confidence in each others' practices, to have built up a strong working relationship, and for cooperation in a particular case to be 'mutually beneficial.' The question of whether to engage in cooperation, and to what extent, appears to involve many subjective factors and is therefore difficult to precisely define or predict.

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[46] See discussion in US submission to the OECD Working Party No.3 on Co-operation and Enforcement, entitled 'Roundtable discussion on cross-border remedies in merger review', 9 February 2005 (DAF/COMP/WP3/WD(2005)7), available at: <http://www.ftc.gov/bc/international/docs/compcomm/2005--Roundtable%20Discussion%20on%20Cross-Border.pdf>.

[47] European Commission Decision *Sanofi-Synthélabo/Aventis*, Case No.COMP/M.3354 (decision is in French). Commission Press Release 'Commission approves planned acquisition of Aventis by Sanofi-Synthélabo subject to conditions' (IP/04/545). *Sanofi-Synthélabo/Aventis*, FTC Press Release 'Resolving Anticompetitive Concerns, FTC Clears Sanofi-Synthélabo's Acquisition of Aventis', 28 July 2004, available at <http://www.ftc.gov/os/caselist/0410031/0410031.htm>. FTC Consent Order, Docket No.0410031, July 2004.

[48] See discussion in US submission to the OECD Working Party No.3, *op. cit.* note 45. Also see commentary in R. Tritell and E. Kraus, 'The Federal Trade Commission's International Antitrust Program' at p.4. FTC paper to the ABA Section of Antitrust Law Spring Meeting. Washington D.C., 18 April 2007.

Prima facie, multilateral cooperation in merger investigations is also possible (with the greatest likelihood being trilateral cooperation between the European Commission, US and Canadian authorities), and there are supporting statements, particularly from the FTC,[49] indicating cooperation with multiple international counterparts in particular cases. Nonetheless, extensive multilateral cooperation is perhaps unlikely to take place due to the lack of 'mutual benefit' in such situations. The additional market data and constructive comments received from the third, fourth and fifth (etc) counterpart authority involved in a concurrent merger review will be gradually less likely to justify the resources and effort required to achieve a good degree of multilateral cooperation. There may also be heightened risk of incurring delays and losing focus on the key competition concerns within a particular jurisdiction with multilateral cooperation. For these reasons, what may initially appear to be an example of multilateral cooperation might be more accurately described as a case involving multiple examples of bilateral cooperation.

The *Alcan/Pechiney II*[50] case has been highlighted during DoJ speeches as a more recent model for international cooperation in merger investigations,[51] and is an example of the distinction outlined above. In a press release the DoJ stated: 'The Department cooperated closely with the European Commission and the Canadian Competition Bureau (CCB) in its review of this transaction',[52] a view echoed by the CCB,[53] yet unusually the European Commission case documents do not mention cooperation with international counterparts.[54] Nonetheless, anecdotal evidence from practitioners suggests that the case was far from an exemplar for international cooperation, and this view would seem logical in light of the facts and the relevant markets involved in the respective investigations. The reviewing authorities likely coordinated on the timing of review if possible and engaged in preliminary discussions, but there is little evidence to suggest more extensive cooperation took place. Alcan and Pechiney produced aluminium, with products spanning a very wide range of markets. The European Commission and DoJ investigations identified distinct geographic markets of concern that also concerned different product markets. The focus of the EC investigation was

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[49] See FTC press releases e.g. 20 April 2006 Press Release: 'FTC Requires Asset Divestitures Before Allowing Boston Scientific's $27 Billion Acquisition of Guidant Corporation', Boston Scientific/Guidant, FTC Consent Order, Docket no. C-4164, 21 July 2006.

[50] Commission Decision *Alcan/Pechiney (II)* Case No.COMP/M.3225 of 29 September 2003.

[51] US submission to the OECD Working Party No.3, op cit, n 46. Also see reference in a speech by J.B. McDonald, DAAG, 'Antitrust update: Trinko and Microsoft' to the Houston Bar Association, 8 April 2004.

[52] DOJ Press Release, 'Department of Justice will require a divestiture of Alcan Inc. to complete its pending tender offer for Pechiney SA', 29 September 2003. Available at: <http://www.usdoj.gov/atr/public/press_releases/2003/201302.htm>.

[53] Annual Report of the Commissioner of Competition for the year ending 31 March 2004 – Reviewing Mergers, available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1345&lg=e>. Canadian Competition Bureau Press Release: 'Alcan's Offer for Pechiney Cleared by the Competition Bureau', 14 October 2003.

[54] European Commission Press Release 'Commission clears Alcan takeover bid for Pechiney, subject to conditions' (IP/03/1309), Commission Decision, op cit, n 50.

threefold: firstly the worldwide market involving alumina refining technology and the IP rights of the respective parties in this market; secondly the flat rolled aluminium product market, particularly the sub-market for 'aluminium can end/tab stock'; and the related third market of particular concern was the sub-market for beverage and food can sheet.[55] The second and third markets were limited to the EEA and Switzerland.[56] The DoJ, however, was particularly concerned with brazing sheet, an aluminium alloy used in manufacturing radiators and parts of vehicle engines. The relevant geographic market in the US investigation was the North American market.[57] In order to resolve the competition concerns, different and unrelated remedies were also required by the EC and US. Clearly there was little need for close cooperation in *Alcan/Pechiney II* in light of the unrelated relevant markets. With regard to the merger investigation by the Canadian Competition Bureau (CCB), it is unclear whether the CCB had any significant concerns regarding the merger, and indeed acknowledged that there was no actual overlap between Pechiney and Alcan assets in Canada.[58] The primary focus of the CCB investigation would appear to be the North American brazing sheet market, as with the DoJ investigation. In closing its investigation, the CCB stated that the enforcement activities of the DOJ and European Commission resolved Canadian competition concerns in the case, and there was no need to take further action. The CCB essentially deferred to the enforcement activity of its international counterparts. Hence, in spite of initial indicators of close cooperation between the European Commission, DoJ and CCB in *Alcan/Pechiney II*, it appears unlikely that extensive cooperation in this case could have produced any significant benefit for the merging parties or the authorities involved, given the minimal overlap in the competition concerns. Therefore the case could probably not be accurately described as a strong example of trilateral cooperation. The timing issue is also important in assessing the extent of cooperation undertaken, and the decision of the CCB two weeks after the EC and DOJ press releases support the view that a deferential approach was adopted. There is no evidence of the CCB engaging in detailed cooperation with either the DOJ or European Commission, and no evidence of the EC or US authorities proactively trying to take account of CCB concerns when devising their own remedies. Other possible cases involving multiple cooperation include *Boston Scientific/Guidant,*[59] *Dow Chemical/Union Carbide*[60] and *Alcoa/Reynolds*[61] with the latter two involving three-way teleconferences

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[55] Op cit, n 50.

[56] Op cit, n 50, at paras 66-68.

[57] See *United States* v. *Alcan & Pechiney*, complaint before the Washington D.C. District Court, Case No. 1:03CV02012, September 29, 2003. Available at <http://www.usdoj.gov/atr/cases/f201300/201303.htm>.

[58] Canadian Competition Bureau Press Release: 'Alcan's Offer for Pechiney Cleared by the Competition Bureau', October 14, 2003.

[59] CCB Press Release: 'International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger', May 11, 2006. Also see European Commission Press Release of April 11, 2006 'Mergers: Commission clears, subject to conditions, takeovers of Guidant by Boston Scientific and of Guidant's vascular businesses by Abbott Laboratories' (IP/06/491). Commission Decision *Boston Scientific/Guidant* Case No. COMP/M.4076 of April 11, 2006.

[60] Commission Decision *Dow Chemical/Union Carbide* Case No.COMP/M.1671, OJ 2001, L245/1.

and meetings between the European Commission, CCB and FTC/DOJ respectively. The European Commission press release concerning *Alcoa/Reynolds* also notes some cooperation with the Australian Competition and Consumer Commission (ACCC), although the ACCC appears to have adopted a deferential approach in stating that undertakings offered to the EC and DoJ satisfied their concerns regarding the transaction.[62]

Close cooperation in concurrent merger review is clearly possible and regularly takes place but there also appears to be limited scope for entering into extensive cooperation on more than a bilateral basis for the reasons discussed above. Furthermore, while case cooperation involves the EC and US competition authorities, with notable examples of cases involving the Canadian and Australian authorities, there are very few clear examples of extensive cooperation beyond this small group of relatively homogenous, developed competition authorities (again excluding the ECN and EFTA). The difficulty of engaging in wider cooperation in multi-jurisdictional merger review appears to be in contrast to the closer cooperation that is being fostered between larger numbers of authorities in cartel investigations, yet wider cooperation in multi-jurisdiction merger review would appear to be one of the possible means of further reducing the unnecessary costs borne by merging parties.

CONCLUSION

International efforts to facilitate procedural convergence so as to reduce the unnecessary costs of multi-jurisdictional merger review have had both successes and notable failures. The new merger control regimes in China and India appear to be largely consistent with the ICN best practices on matters of principle, although the 210 day period for the CCI to issue its finding vastly exceeds the initial 30 day limits adopted in most developed merger control regimes. Nonetheless, the drafting processes adopted by China and India at least suggest that the additional burden upon merging parties from the development of new regimes will be managed with a degree of clarity and predictability. The burden on merging parties as a result of new regimes will increase but it can hardly be said to be imposing unnecessary costs at the fault of the new authority if it is consistent with international best practice. In spite of managing the unnecessary costs imposed by new merger control regimes, many current competition laws and authorities do not comply with established best practices. This is an essential first step to minimising unnecessary costs. The next step must be to establish clearer procedures and guidance on when cooperation should take place in multi-jurisdictional merger review, this is a task the ICN can easily work to, and it is necessary to minimise the subjectivity of the process. There are clear benefits to engaging in extensive

[61] European Commission Press Release 'Commission clears merger between Alcoa and Reynolds Metals, under conditions' (IP/00/424). European Commission Decision *Alcoa/Reynolds*, Case No.COMP/M.1693. See discussion in speech by D. Burlone, Assistant Deputy Commissioner, CCB, 'Canada and the internationalization of competition policy', to the Canadian Bar Association, September 21, 2000.

[62] ACCC Press Release 'ACCC not to intervene in ALCOA/Reynolds Metals merger', May 4, 2000, available at <http://www.accc.gov.au/content/index.phtml/itemId/323061>.

cooperation for the authorities and the parties, in appropriate cases, yet very little public discussion of the circumstances when cooperation is appropriate. Competition law authorities can effectively enforce merger control laws and conduct merger reviews without cooperating with other authorities, due to extraterritoriality and mandatory notification requirements, and so it becomes even more important to engage in advocacy and encourage 'soft law' convergence to minimise unnecessary costs. Competition law authorities need to be persuaded of the need to engage in greater cooperation.[63]

In addition to clear guidance on 'triggers' for multi-jurisdictional cooperation there is a need for a transparent debate among antitrust authorities, NGOs and other interested parties on the merits and demerits of engaging in multilateral cooperation in specific merger cases. Multilateral cooperation may be infeasible for practical reasons, but could benefit merging parties and reduce unnecessary costs.

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[63] See discussion in A. Ezrachi, 'The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control' (2004) 36 Geo. Wash. Int'l L. Rev. 433 at 438.