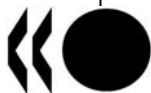


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## **Global Forum on Competition**

### **ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES**

#### **Contribution from BIAC**

-- Session I --

*This contribution is submitted by BIAC under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.*

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## CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- BIAC<sup>1</sup> --

### 1. Introduction

1. The author and the Business and Advisory Committee (BIAC) to the OECD appreciate the opportunity to submit these comments to the OECD Global Forum on Competition concerning the challenges faced by developing and emerging economies in the area of cross-border merger control.

2. The Global Forum's consideration of this topic is particularly timely. New enforcement agencies continue to proliferate, and this expansion in competition law enforcement—most often accompanied by merger control—shows no sign in abating. Concurrently, there has been a recent increase in cross-border mergers and acquisitions, as part of a broader increase in M&A activity in general and as a consequence of the increasing pace of globalization of business, as many OECD Members and other countries gradually emerge out of recession.

3. As an initial observation, the challenges arising from cross-border mergers are not limited to competition agencies in developing and emerging economies. The coordination of cross-border merger control is complex for all competition law enforcement agencies, regardless of their size and experience. These complexities are likely to be most attenuated, however, with smaller or relatively inexperienced competition law agencies, due to fewer resources and less relevant experience in merger review. Not all of these smaller or relatively inexperienced competition law enforcers come from developing and emerging economies. Similar challenges may be faced by relatively newly established competition law enforcers in transition economies (such as Russia, Ukraine, or China) and new competition law enforcers in relatively developed economies (such as Jersey or Mauritius). Thus, the proper focus of this discussion should be on challenges in cross-border merger control faced by developing and emerging *agencies*, which are not necessarily limited to developing and emerging *economies*.

4. On the whole, great strides have been made in the past decade in identifying the common problems associated with the review of mergers by new and evolving competition regimes. Numerous jurisdictions have built their regimes or made changes to their existing notification and merger review mechanisms in light of best practice recommendations authored initiated by the OECD Competition Committee and carried forward in more detail by the ICN Mergers Working Group. These have sometimes necessitated amendments to laws, regulations and rules of practice and reflect the dedication and commitment of agency officials to improve the efficiency and effectiveness of their process. These efforts are to be commended. With regard to other jurisdictions, however, enough has not been done by way of implementation of best practices, largely as a result of a failure of many jurisdictions to consider the externalities of their systems with respect to multi-national mergers. In some cases, there is a failure to

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<sup>1</sup> This paper is submitted by John M. Taladay as a panelist for this session and on behalf of the Business and Industry Advisory Committee of the OECD. Special thanks are made to Chuck Webb, a partner at Howrey LLP and former Executive Director of the Jersey Competition Commission, who provided significant assistance in the preparation of these comments.

realize that their practices are not “best” or a dismissal of such best practices as inconsequential to an efficient global scheme for merger review.

5. In other cases, the cause of the shortfall stems instead from a fundamental capacity problem. Small economies and developing agencies often do not have the resources necessary to identify and adopt a comprehensive merger review mechanism in view of a global economy. These jurisdictions need help from more established agencies and experts and need the opportunity to observe and share in the experience of other agencies – not just developed agencies – that have faced similar problems and successfully have undertaken efforts to implement and amend their procedures to reflect best practices.

6. In addition to training provided by more experienced agencies, smaller agencies may take a number of steps to conserve their resources engaged in merger review. These steps include focusing their analysis exclusively on the potential economic effects arising from the transaction in local markets (while ignoring other, noneconomic considerations); cooperating with larger, more experienced agencies that may be reviewing the same transaction; and, potentially, free-riding on remedies imposed on the transaction by more experienced agencies, if these remedies are sufficient to address competition concerns in local markets.

7. It is important that jurisdictions representing economies and agencies at all levels of development undertake the challenge posed by the process of implementing merger review schemes that are compatible with the scores of established merger regimes already in operation around the world. Like other areas of competition law enforcement in the field of dominant-firm conduct or cartel conduct, a poor review system can have far-reaching effects that can slow or deter efficiency enhancing conduct, including cross-border mergers. It is in the interest of all who participate in the global economy, including consumers and workers, to ensure that this does not occur.

## **2. Challenges faced by newer competition agencies in cross-border merger control**

8. This is not the first time the Global Forum has considered the challenges faced by younger competition law agencies. In February 2009, the Global Forum considered the challenges faced by younger agencies in competition law enforcement in general.<sup>2</sup> Many of the common challenges considered in that Roundtable included “meager resources for the new agency, limited indigenous expertise on the subject, tepid support for competition policy (what today is called “competition culture”), deficient judicial systems and limited access to business information.”<sup>3</sup>

9. Unlike other areas of competition law enforcement such as cartels or dominance, merger control relies predominantly on an *ex ante* assessment of likely economic effects. This sometimes requires a complex legal and economic assessment of competitive conditions in the affected sector before and after the proposed merger or acquisition. In addition, unlike other areas of competition law enforcement, with merger review timing is of the essence, often as a matter of statutory imperative. Enforcement agencies most often have to conduct their investigations and make decisions under strict timetables set out in national laws or agency guidelines. These time-frames reflect the business reality of the pressure the parties are under in financial markets to conclude the merger or acquisition. In light of these broader ramifications, the challenges faced by younger competition enforcers, and the consequences of their action (or inaction), can be particularly acute for cross-border merger control.

<sup>2</sup> OECD Global Competition Forum, *Challenges Faced by Young Competition Agencies*, Note by the Secretariat (Feb. 11, 2009), available at <http://www.oecd.org/dataoecd/2/53/42073659.pdf>.

<sup>3</sup> *Id.* at 3.

10. One of the main challenges to younger competition law agencies identified in the February 2009 Roundtable was a lack of capacity, in terms of financial and human resources. Jurisdictions establishing competition law enforcement systems may have limited domestic expertise in competition law enforcement.<sup>4</sup> Often, as a newer agency's staff gains relevant experience through casework and training, the agency faces the additional pressures of retaining its key, experienced staff members.<sup>5</sup> These problems are made worse if the agency lacks the financial resources necessary to recruit and maintain qualified and experienced staff. In the February 2009 Roundtable several newer competition law agencies cited challenges arising from inadequate financial resources contributing to high staff turnover.<sup>6</sup>

11. Problems in capacity can be made worse for a younger competition law agency by a lack of a competition culture in the jurisdiction. A lack of a competition culture can also increase the risk that local political interests may interfere with effective competition law enforcement and potentially favor local interests or noneconomic considerations – risks discussed in more detail below. Insufficient awareness of competition law concepts, precedents and analytical tools may also plague a country's judiciary, giving little comfort to both the reviewing agency and the parties.<sup>7</sup> The February 2009 Roundtable found a lack of a basic competition culture to be a problem in virtually every country implementing a new competition law.<sup>8</sup>

12. The potential problems of a lack of resources and a sufficient competition culture are typical across all areas of effective competition law enforcement for newer agencies. However, these challenges become greater in the context of cross-border merger review, which as noted above is typified by complex *ex ante* legal and economic assessments made under strict time pressures. In this regard, the following observations can be made:

- The review and approval of mergers and acquisitions within strict time-frames is greatly facilitated by *both* established procedures and case handling experience. Newer competition enforcement agencies may not have detailed case handling procedures, or may be in the process of developing them. Even if procedures exist on paper, agency staff may have a lack of experience in dealing with them in actual merger cases. While training from bilateral exchanges with more experienced agencies, as well as best practices learned from forums such as the OECD and ICN are extremely valuable, they are no substitute for actual case handling experience.
- Newer agencies may also lack industry-specific experience that can greatly facilitate merger review. Merger reviews in industries such as pharmaceuticals, airlines, e-commerce, and other industries, which often are cross-border, often involve very complex and detailed questions of fact, many of which are peculiar to the industry. It is largely for this reason that more established

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<sup>4</sup> See, e.g., William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1092 (1998) (“Most transition economies embark in the process of implementing new antitrust systems with relatively little indigenous expertise in competition law or industrial organization economics.”).

<sup>5</sup> *Id.* at 1093 (“Transition economy competition agencies often find that professionals who have become experts in antitrust economics or law become extremely attractive to private sector employers.”).

<sup>6</sup> These included competition law agencies from Argentina, Brazil, Chile, Estonia, Latvia, Mexico, Peru, Russia, and Ukraine. See *supra* note 2, at 4.

<sup>7</sup> See International Competition Network (“ICN”), *Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies* at 35 (2003) (“If there is one common concern expressed across the diverse jurisdictions that responded to the questionnaire, it is directed at the perceived difficulty of the judiciary to come to grips with competition law.”)

<sup>8</sup> See *supra* note 2, at 4, 16.

competition law and antitrust agencies have dedicated “shops” that regularly handle merger reviews arising in particular industries.<sup>9</sup> With limited resources and experience, younger agencies often do not have this luxury of specialization.

- In their efforts to learn about the facts of an industry, newer agencies may have limited access to relevant information, compared to more established agencies in larger jurisdictions.<sup>10</sup> For smaller jurisdictions in particular, major suppliers in their markets may conduct business through imports or agents only, and have no subsidiaries or on the ground presence in the jurisdiction— even if their sales are substantial for the jurisdiction in question. While, for more established agencies, the ability to conduct joint investigations on each other’s behalf may be facilitated by formal interagency cooperation agreements; the Background Note recognizes such agreements are relatively rare between more established and newer agencies.<sup>11</sup>
- Finally with respect to cross border merger reviews, there are potential challenges associated with prioritization of a newer agency’s limited resources. Even with limited resources, a developing competition agency will almost always have various and potentially conflicting priorities. These include, in the competition law field, enforcement efforts against cartels and abuses of dominance as well as competition advocacy efforts. In addition, newer agencies often have non-competition law responsibilities, such as consumer protection or sector-specific regulatory responsibilities.<sup>12</sup> Thus, merger control, and the review of a potentially complex cross-border merger in particular, can be just one of many pressures faced by a newer competition law agency’s limited staff and resources. While additional resources can always be acquired on a case-by-case basis (and indeed, review of complex mergers often is facilitated by specialized economic assistance) this could place additional pressure on a newer agency’s limited financial resources, which may not necessarily be recovered.

13. In addition to potential challenges faced by younger competition agencies in cross-border merger review arising from a lack of sufficient resources and insufficient competition culture, effective merger review may also be impeded by complex and multifaceted institutional arrangements. Brazil, for example, has a tripartite merger control system, with responsibility for merger investigations and decisions split among the Secretariat of Economic Law, the Secretariat for Economic Monitoring, and the Administrative Council for Economic Defense. Challenges arising from multi-agency jurisdiction over merger decisions are not unique to newer competition law agencies,<sup>13</sup> nor are they unique to merger review. Given the

<sup>9</sup> To take one example, both the US DOJ and the EC have merger teams dedicated to the energy sector.

<sup>10</sup> See *supra* note 4, at 1095 (“Transition economy antitrust agencies typically must operate with limited access to data that offers an accurate view of existing market conditions and the competitive significance of individual firms.”)

<sup>11</sup> See OECD Global Competition Forum, *Cross-Border Merger Control: Challenges for Developing and Emerging Economies*, Background Note, 22-23 (Jan. 13, 2011), available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF\(2011\)1&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF(2011)1&doclanguage=en).

<sup>12</sup> For example, in Jersey the Jersey Competition Regulatory Authority (“JCRA”) is responsible for telecommunications and postal regulation in addition to competition law enforcement. Similarly, in Barbados, the Fair Trading Commission is responsible for telecommunications and electricity regulation and also consumer protection, in addition to being a competition law enforcer.

<sup>13</sup> In the UK, for example, there currently is a two-stage process for merger review, with the OFT conducting the initial assessment and referring cases that raise potentially serious competition concerns to the Competition Commission for a detailed assessment. In the US, battles for so-called “clearance” between the DOJ and FTC can occur and result in duplication of effort, delay and additional expense to the merging parties.

potential challenges identified above; however, the effects of such institutional challenges may be more pronounced in merger enforcement.

### **3. Potential challenges for companies in dealing with developing and emerging competition agencies in cross-border mergers**

14. Corresponding to the challenges faced by younger competition agencies in dealing with cross-border merger control are the challenges faced by companies seeking to engage in cross-border mergers and acquisitions. Multinational companies and their legal representatives make large investments in understanding and complying with the laws of the jurisdictions in which they operate.

15. Companies engaging in cross-border mergers and acquisitions must identify jurisdictions where their transaction is subject to merger control. This task has become immensely more complex over the past decade with the proliferation of national competition laws that incorporate some form of merger control (either mandatory or voluntary). In less than 20 years the number of countries with competition regimes has grown from less than 30 to more than 100. Determining whether or not a merger requires notification and approval in these jurisdictions typically requires the merging parties to receive localized legal advice, which can add considerably to a transaction's costs. The difficulty and complexity of this task can have other important adverse effects. For example, where there are competing bidders seeking control of a business enterprise or an important collection of productive assets, the relative merits of a transaction with any particular bidder often depend – sometimes in a critical way – on the burden, expense and delay that will be experienced due to merger notification obligations. The inability to identify and assess the extent and nature of these obligations for each bidder clearly and promptly often creates uncertainty in the process of evaluation. The resulting burden and uncertainty can delay a transaction, significantly enhance the burden and expense of assessing competing bids, and even lead to the choice of a specific transaction that ultimately is not in the best of interests of competition and consumers, to say nothing of the transacting parties and their shareholders.

16. This task is made more complicated by the widely diverging jurisdictional thresholds among countries with merger control systems. While the ICN Recommended Practices calling for notification thresholds to be based on objectively quantified criteria and to have an appropriate jurisdictional nexus have been widely adopted, their implementation is not complete, particularly in countries with newer competition law systems. Some countries still rely on market share or share of supply based merger thresholds,<sup>14</sup> while others still incorporate global turnover thresholds.<sup>15</sup>

17. Even for countries with jurisdictional thresholds that do comply with ICN Recommended Practices, turnover or asset-based thresholds for the country in question are often set at very low levels.<sup>16</sup> This means that, in practice, multinational companies operating in those countries may have to file for merger approval simply by virtue of their presence in jurisdiction for a merger or acquisition that has *de minimus* or no actual or potential local effect.

18. If a cross-border merger or acquisition requires merger control filings in multiple countries, merging parties face additional challenges in dealing with differing filing requirements, filing deadlines, information requirements and waiting periods. While such problems are not specific to merger control in small or developing agencies, they have been made much more complex by the proliferation of merger control systems.

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<sup>14</sup> See, e.g., Barbados, Israel, Jersey, Spain, Turkey.

<sup>15</sup> See, e.g., Austria, China, Denmark.

<sup>16</sup> See, e.g., Faeroe Islands, Germany, Norway, Ukraine.

19. Furthermore, parties engaging in cross-border mergers often face different substantive standards for merger review. The main focus of merger control is to prevent the creation, enhancement or exploitation of market power through a substantial lessening of competition arising from the transaction under review. However, there are still instances—in both developing and developed economies—where noneconomic considerations are either explicitly or implicitly incorporated into merger review.<sup>17</sup> While common to both developing and developed economies, the risk associated with including potential noneconomic considerations in merger review may be greater in jurisdictions with a limited competition culture, where outside political influences can come into play, or where competition has to be balanced against other perceived national interests, such as a merger’s potential effects on domestic companies or national champions, domestic employment, or regional dislocations or development opportunities within a country.

20. Even if a jurisdiction follows sound economic analysis in its approach to merger assessment, there is still a risk of inconsistent outcomes in merger assessment by distinct jurisdictions. Given its *ex ante* nature, the risk of inconsistent outcomes among jurisdictions is perhaps more pronounced in merger control compared to cartel enforcement and possibly compared to other areas of competition law enforcement.<sup>18</sup> The risk of inconsistent outcomes among different jurisdictions reviewing the same cross-border merger is not particular to younger competition agencies—as evidenced by differing outcomes between U.S. and E.U. competition enforcers in transactions such as GE/Honeywell or Boeing/McDonnell Douglas. The risk of potential divergence in outcomes, however, increases with the greater diversity of agencies and jurisdictions engaging in merger control. Merger analysis is a highly fact-dependant inquiry, and the facts that exist in markets of different sizes or in different states of development may differ substantially. Therefore, “[t]wo different national agencies may reach legitimately different conclusions on the basis of the same data, simply because standards are imprecise, the evidence is uncertain, and the core biases are different—or even because factual evidence of adverse market effects is different in different geographic markets. Thus, having a common substantive standard (especially one that was a vague compromise between opposing viewpoints) does not seem a likely or promising form of harmonization.”<sup>19</sup>

21. At the same time, there are situations in which differing outcomes are difficult to justify, particularly where the merger involves commodity goods sold in a global geographic market. In such situations, divergent outcomes create a level of uncertainty that can have a chilling effect on cross-border mergers and can highlight some of the “non-economic” interests that risk the credibility of competition law enforcement on the whole. Although few actual mergers fall into this category, there are a number of attempted mergers, frequently involving China either as a buyer or reviewing agency, that have been shouted down or rejected, calling the objectivity of the process into question.

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<sup>17</sup> In South Africa, for example, a merger is reviewed based on public interest considerations, in addition to whether or not it substantially lessens competition. These public interest considerations include the impact of the merger on employment, small businesses, and the ability of national industries to compete in international markets.

<sup>18</sup> See Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW at 72 (Global Forum for Competition and Trade Policy 1998) (“Merger review is an unusual activity because it requires *ex ante* judgments on often imponderable questions concerning the medium- or long-term future of markets and enterprises . . . . Thus, there is more room for inconsistency and controversy in merger review than when more than one antitrust agency prosecutes a global cartel.”).

<sup>19</sup> *Id.* at 75, accord Charles Webb, *One Size May Not Fit All – Merger Control in Small Market Economies*, Concurrences 3/2008 at 11 (“[W]hile large and small economies may engage in the same type of merger analysis, economic circumstances that exist in smaller economies may materially influence the outcome of the assessment.”).

22. These challenges of adhering to the merger notification requirements of scores of jurisdictions can add immensely to the costs of cross-border mergers and acquisitions. These increased costs arise from the out-of-pocket expenses for legal and economic advice for the merging parties, as well as costs associated with delayed implementation of efficiencies arising from mergers and acquisitions, and the diversion of management time to the regulatory process. A 2003 PricewaterhouseCoopers Study, commissioned by the American Bar Association and International Bar Association, estimated that an average transaction involving competition filings in eight jurisdictions had external merger review costs of approximately €3.3 million.<sup>20</sup> These estimated costs most likely have increased further as a result of the greater proliferation of merger control systems since 2003. Given that a merger of €100 million would trigger the notification requirements (as a “size of transaction”) of many jurisdictions, these costs are not insubstantial to a significant number of mergers.

23. In addition to increasing costs, the proliferation of merger control, and the potential delays associated with it, may actually deter cross-border mergers and acquisitions that are procompetitive. This could be particularly true in rapidly changing industries such as the software industry, which is typified by collaborating development efforts, the need to adapt to rapid changes in technologies, and cross-border operations. As stated by a witness before the U.S. Antitrust Modernization Commission in 2005:

*Here, even more than in other industries, a procompetitive merger transaction that is delayed may be derailed altogether. Whether delay results from procedural overload or duplication, or from the sincere regulatory pursuit of an aggressive but unverifiable theory of competition, the additional time spent in the regulatory process may be the largest and most important transactions cost of all—and the one that thwarts the most potentially procompetitive transactions. Product design decisions occur on short cycles in the software industry. When a transaction is held up for many months, product design decisions—and thus, to a substantial extent, innovation in the merging companies—may be frozen to a significant extent because the companies cannot predict which resources from each company will be at their disposal when the product ultimately reaches market.*

*While this general concern with the pace of regulatory investigations has many hidden costs, our principal specific concern pertains to the fragmentation of antitrust enforcement among dozens of different sovereign states around the world. Because the nature of their business does not depend on significant physical facilities, new economy companies often conduct operations in a large number of jurisdictions. The wide divergence in rules, procedures and standards produces a multiplicity of traps for the wary and unwary alike, while increasing transactions costs and deal risk sufficiently to deter procompetitive alliances and consolidations.<sup>21</sup>*

#### **4. Practical suggestions for improvement**

24. Cross-border mergers potentially raise a number of serious challenges, both for younger competition agencies and for the merging companies that appear before them. To reduce these challenges for both younger competition agencies and private parties, consider the following recommendations.

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<sup>20</sup> See William J. Rowley & Omar K. Wakil, *International Mergers: The Problem of Proliferation*, in INTERNATIONAL ANTITRUST LAW AND POLICY: FORDHAM COMPETITION LAW 2006 at 305 (Barry Hawk ed., 2007).

<sup>21</sup> Testimony of Daniel Cooperman, Senior Vice President, General Counsel and Secretary, Oracle Corporation, before the Antitrust Modernization Commission at 1-2 (Nov. 8, 2005); see also Simon J. Evenett, *How Much Have Merger Review Laws Reduced Cross-Border Mergers and Acquisitions?*, INTERNATIONAL MERGER CONTROL: PRESCRIPTIONS FOR CONVERGENCE (William J. Rowley ed., 2002) (estimating that mandatory merger control laws reduce cross-border M&A activity by almost half).



#### 4.1 *Implement ICN recommended practices on merger notification procedures*

25. As an initial matter, all jurisdictions enforcing competition law – both developing and developed – should adopt and implement the ICN Recommended Practices for Merger Notification and Procedures. Notification thresholds should be based on objectively quantifiable criteria (not on market shares or similar measures) and have an appropriate jurisdictional nexus (not based on global levels of turnover). Even when complying with these recommendations, jurisdictions should attempt to set their thresholds at levels high enough to not capture mergers and acquisitions that may be of no competitive consequence in the jurisdiction's markets. Following these recommendations can both reduce an agency's workload associated with the review of mergers and acquisitions (a factor that may be particularly important to younger or smaller agencies with limited resources) and reduce compliance burdens for companies engaging in cross-border mergers and acquisitions.

26. This recommendation applies equally to developing agencies as well as developed agencies. Many developed agencies have concluded that they are in compliance with ICN Recommended Practices despite clear indications that they are not. This applies frequently to the recommendation that agencies rely on objectively identifiable information in their initial notification form. Many significant agencies observe this recommendation only in the breach and should undertake a realistic self-examination of this point, as well as other recommended practices, in order to set the example for developing jurisdictions.

#### 4.2 *Focus exclusively on local competitive effects*

27. If a merger is reportable in a jurisdiction, the reviewing agency should focus exclusively on the local competitive effects potentially arising from the merger. That is, the reviewing agency should focus its attention on defining relevant markets; assessing pre- and post-merger concentration levels within those markets; determining whether the merger will result in the combined entity being in a position to exercise market power or substantially lessen competition in the jurisdiction; and whether other factors such as entry, potential repositioning, or the merger's efficiencies counteract a risk of anticompetitive effects arising from the merger.

28. Focusing an agency's review solely on competitive effects in local markets corresponds with both OECD and ICN Recommended Practices concerning merger review.<sup>22</sup> As stated by the ICN's Recommended Practices for Merger Analysis: "The legal framework for competition law merger review should focus *exclusively* on identifying and preventing or remedying anticompetitive mergers. A merger review law *should not be used to pursue other goals*."<sup>23</sup> Focusing exclusively on identifying and preventing or remedying anticompetitive mergers should facilitate a younger or smaller agency's review of cross-border mergers, as all other potential considerations that local interests may wish to bring (such as the protection of local competitors, local employment, or regional disparities in development) become irrelevant to the question of the merger's potential effect on consumer welfare. The agency's review of a

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<sup>22</sup> See, e.g., OECD, *Recommendation of the Council on Merger Review* (Mar. 23, 2005), available at [http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C\(2005\)34](http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C(2005)34) ("When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.").

<sup>23</sup> ICN, *ICN Recommended Practices for Merger Analysis*, ¶ I.A., Comm. 1, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf> (emphasis added).

cross-border merger should focus solely on potential effects in local markets, taking into account potential competition from imports and international competition.<sup>24</sup>

29. In conducting a substantive merger review, a younger agency should match its criteria of assessment to its resources and capabilities. In particular, recently issued Horizontal Merger Guidelines by the U.S. Department of Justice and Federal Trade Commission, which incorporate advanced techniques such as reliance on the “upward pricing pressure” index, may be difficult to apply – considering both the sophistication of the technique as well as the numerous caveats and qualifications that are necessary when attempting to use it – even for experienced antitrust lawyers and economists. Given their inherent complexity and difficulty, such concepts may not be particularly useful to younger agencies with less resources and limited experience in merger review. More standard analysis, such as that set out in the ICN’s Recommended Practices for Merger Analysis, may be more useful for younger agencies to frame their merger analyses.

#### **4.3 Seek international inter-agency cooperation in information sharing and substantive assessment**

30. As noted above, younger competition agencies may potentially face challenges in collecting information from merging parties located outside its jurisdiction. Less experienced agencies may also lack experience in dealing with particular industries. In addition, parties engaging in cross-border mergers may face added and unnecessary expense in satisfying duplicative or closely analogous information requests from different countries.

31. To reduce these challenges, younger agencies should seek to cooperate with more experienced agencies in reviewing the same merger, and potentially coordinate their reviews with the more experienced agency. In turn, more experienced agencies should provide assistance to younger agencies in mergers reportable in both countries.

32. Such cooperation among younger and more experienced agencies in merger review is consistent with both ICN and OECD recommended practices.<sup>25</sup> The ability to share information between agencies can facilitate the merger review process and lower compliance burdens. A younger agency with less experience in a particular industry may be able to gain valuable insight into the industry in question through cooperation with more experienced agencies. It may even be efficient for younger agencies to base their own assessment of a merger’s competitive effects in a jurisdiction on a more experienced agency’s analytical framework, if the competitive conditions in the two countries correspond. Doing so can both reduce compliance burdens and facilitate consistent outcomes across jurisdictions.<sup>26</sup>

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<sup>24</sup> See MICHAL GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 237 (2003) (“If entry barriers are low and importers enjoy a significant cost advantage over domestic producers, contestability might provide sufficient checks on the exercise of market power, even in highly concentrated markets.”).

<sup>25</sup> See OECD, *supra* note 22 (“Member countries should, without compromising effective enforcement of domestic laws, seek to co-operate and to co-ordinate their reviews of transnational mergers in appropriate cases.”); ICN, *Recommended Practices for Merger Notification Procedures*, ¶ X.A, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (“Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.”).

<sup>26</sup> See Michal Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT’L L.J. 1, 41 (2009) (“the type of evidence gathered and the economic and legal analysis may be common to all countries, large and small, developed and developing. This might save resources for small and developing countries wishing to bring cases and provide a better prospect for reaching a similar legal outcome.”).

33. The exchange of information in merger reviews often depends on the willingness of the merging parties to give consent. Such consent is routinely given by merging parties when they have assurance that the confidentiality of their information will be protected. Thus, younger agencies should ensure that appropriate safeguards exist under their national laws to ensure the protection of confidential information and thereby facilitate inter-agency cooperation.<sup>27</sup>

#### **4.4 Apply flexibility on timing**

34. There may be instances where a particular agency's statutory time-frame for review may not correspond to the timing of a merger or acquisition. This can be particularly true for public tender offers, where the timing of the acquiring party gaining beneficial control over the acquired party's shares may be externally driven by national stock exchange rules. This type of situation could place merging parties in a difficult situation: such parties want to comply with all national merger control laws but they also need to consummate their acquisition by a particular date. Even newer agencies should strive to complete merger review within a reasonable timeframe that allows a multi-national transaction, unless anticompetitive, to be completed in a timely manner. At times, however, this may not be possible.

35. To resolve such difficulties, merging parties are often willing to consider "hold separate" arrangements with respect to particular countries. Countries with younger competition agencies should consider this alternative in individual cases. Such an arrangement allows the parties to consummate the acquisition abroad while maintaining the local businesses as separate and preserving the domestic agency's ability to impose remedies concerning the local effects of the merger, if appropriate:

- In Jersey, Kraft Foods entered into such an arrangement with the Jersey Competition Regulatory Authority (JCRA) to facilitate that agency's review of the acquisition of Cadbury plc under national competition law. Pursuant to that agreement, while Kraft was required by relevant stock exchange rules to assert beneficial control over a majority of Cadbury's shares, Kraft agreed to not integrate its business associated with Jersey until after the JCRA completed its review. Kraft also agreed to supply the JCRA with all information necessary to complete its investigation, and to agree to any remedies the JCRA may wish to impose to prevent a substantial lessening of competition arising from the acquisition in Jersey.<sup>28</sup>
- While not reported publicly, similar procedures have been utilized in merger reviews in other countries, such as South Africa and Brazil.

#### **4.5 Apply flexibility in remedies**

36. Finally, younger competition agencies should remain flexible in their imposition of merger remedies.

37. The Background Note observes that, while structural remedies may be preferred internationally over behavioral remedies, in practice the ability of a younger agency to impose structural remedies on a cross-border merger may be limited.<sup>29</sup> The Background Note states that this is particularly the case when the merging parties maintain no relevant assets within the jurisdiction in question, or when the merging

<sup>27</sup> See OECD, *supra* note 22 ("Member countries should establish safeguards concerning the treatment of confidential information obtained from another competition authority.").

<sup>28</sup> See JCRA, Decision M547/10, Proposed Acquisition of Cadbury plc by Kraft Foods Inc. at 3-4 (Feb. 24, 2010).

<sup>29</sup> OECD, *supra* note 11, at 28.

parties may have the “upper hand” in dealing with the authority.<sup>30</sup> With respect to smaller economies in particular, Dr Michal Gal has observed that seeking to impose disproportionate merger remedies, such as attempting to prohibit the consummation of a cross-border merger, may not be a practical alternative:

*The main problem is that small economies can rarely make a credible threat to prohibit a merger of foreign firms. Given that trade in the small economy is usually only a small part of the foreign firm’s total world operation, were the small jurisdiction to place significant restrictions on the merger, the foreign firm would most likely choose to exit the small economy and trade only in other jurisdictions. That is, the foreign firm will exit the small economy if its loss of revenue from terminating its trade there is smaller than the increase of revenues it anticipates as a result of the proposed merger elsewhere.*<sup>31</sup>

38. Given the potential practical difficulties in seeking to block cross-border mergers or impose structural conditions on them concerning assets located abroad, younger agencies may have greater need to consider the use of behavioral remedies.<sup>32</sup> Such remedies can include conditions that seek to maintain competitive conditions in local markets. An example is the Israeli Antitrust Authority’s disposition of the merger between Unilever and Best Foods.<sup>33</sup> This transaction concerned the acquisition of Best Foods, an American-based food company, by Unilever, based in the Netherlands and UK. The acquisition of Best Foods by Unilever had been cleared by both the Federal Trade Commission and the European Commission.<sup>34</sup> However, the merger risked a substantial lessening of competition in some Israeli food markets. To remedy this situation, the Israeli Antitrust Authority conditioned its approval of the merger on behavioral remedies. These included limiting information transfer between the local operating companies and maintaining structural or personnel separation between them.

39. Another option that agencies may want to consider is coordination on remedies – in other words to ensure that the remedy of another jurisdiction is sufficient and then “free ride” on that remedy. This could be a useful application of positive comity in a cross-border merger context. In particular, an agency should consider if, in light of the remedies imposed on a merger by other reviewing jurisdictions, the imposition of additional remedies by the agency serves any additional purpose to avoid a substantial lessening of competition in the country in question. Examples of this occurring in practice are the following:

- In its review of the proposed acquisition of the Instrumentarium Corporation by the General Electric Company (“GE”), the Canadian Competition Bureau determined that the proposed acquisition risked a substantial lessening of competition for patient monitors used in high acuity areas of hospitals and healthcare facilities in Canada. However, the Bureau noted that, to resolve competition concerns already raised in Europe and the U.S., GE had already agreed to divestitures and behavioral remedies. At the Bureau’s request, GE confirmed that the behavioral remedies required by the European Commission would apply globally, and the divestiture also applied to the worldwide business. The Bureau therefore concluded that the remedies applied by

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<sup>30</sup> See *id.*

<sup>31</sup> Gal, *supra* note 24, at 242-43.

<sup>32</sup> See Webb, *supra* note 19, at 12 (“Another enforcement consideration is the potentially greater opportunity to consider behavioural remedies, compared to larger economies.”).

<sup>33</sup> The following summary of the Unilever/Best Foods case is based on summaries of that case provided in Gal, *supra* note 26, at 6-7; and Gal, *supra* note 24, at 246.

<sup>34</sup> In the U.S., the HSR statutory waiting period expired with respect to the acquisition. In Europe, the Commission’s approval was conditioned upon certain divestitures to remedy competition concerns in Nordic, UK and Irish markets. See European Commission, Case No. COMP/M.1990, 2000 O.J. (C 311) 6.

enforcers in other jurisdictions resolved the potential competition concerns arising in Canada, and determined that additional remedies in Canada were not necessary to clear the acquisition.<sup>35</sup>

- In Jersey, the JCRA considered the proposed acquisition of the worldwide body care business of the Sara Lee Corporation by Unilever.<sup>36</sup> As a result of its examination of potential market effects in Jersey, the JCRA concluded that the proposed acquisition would substantially lessen competition in Jersey with respect to certain types of deodorants. The JCRA also concluded, however, that the market conditions in Jersey with respect to these products were highly analogous to market conditions in the UK, which the European Commission was already investigating. Thus, the JCRA considered that “it would be more efficient for the Applicants, relevant third parties and the JCRA itself, if the JCRA and the EC coordinated their investigations.”<sup>37</sup> The remedy commitments the parties eventually reached with the European Commission applied to Jersey as well. On that basis, the JCRA determined that it could approve the proposed acquisition without the need for additional conditions.
- An earlier example of positive comity concerned the WorldCom/MCI merger, the investigation of which involved a high degree of cooperation between the DOJ and European Commission, and in which the DOJ followed the Commission’s required remedy of MCI divesting its Internet backbone business to Cable & Wireless.<sup>38</sup>

40. If a younger agency decides that structural remedies must be imposed, they should be targeted to address the perceived substantial lessening of competition arising from merger in the markets in question. For smaller and developing economies, this may be possible without the agency seeking to block the consummation of the cross-border merger.<sup>39</sup> An example of targeted structural remedies is the consideration of the acquisition of Financière Franklin Roosevelt SAS by the German company Südzucker AG by the Hungarian Competition Authority (GVH). This acquisition of a French-incorporated company by a multi-national company based in Germany resulted in a change of control among domestic sugar producers in Hungary. The European Commission approved the acquisition with conditions to address potential competition concerns in sugar markets in southern Germany and in Belgium.<sup>40</sup> The merger also had potential competitive effects in the sugar market in Hungary, however, there were “serious doubts regarding whether a national competition authority could examine the exercising of controlling rights in a foreign jurisdiction, and whether the GVH has enough bargaining power against the companies

<sup>35</sup> See Press Release, Canadian Competition Bureau, Bureau Resolves Competition Concerns with Medical Equipment Merger (Sept. 16, 2003), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00379.html>.

<sup>36</sup> JCRA, Decision M597/10, Proposed Acquisition of the worldwide body care and European laundry care businesses of Sara Lee Corporation by Unilever (Nov. 30, 2010).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> See Press Release, Department of Justice, Antitrust Division, Justice Department Clears Worldcom/MCI Merger After MCI Agrees to Sell its Internet Business (July 15, 1998), *available at* [http://www.justice.gov/atr/public/press\\_releases/1998/1829.pdf](http://www.justice.gov/atr/public/press_releases/1998/1829.pdf).

<sup>39</sup> See Baker, *supra* note 18, at 77 (“Where a merger involves a number of local operations (e.g., distribution and retail facilities), it is quite possible to agree on locally-tailored relief in the settlement process. The same may also be true where the merging companies have local manufacturing facilities and patents in different countries; these may be divested without barring the overseas merger of the parent companies[.]”).

<sup>40</sup> See European Commission, Case No. COMP/M.2530, 2003 O.J. (L 103) 1.

concerned.”<sup>41</sup> As a practical alternative to attempting to seek prohibition, the merger was approved in Hungary conditioned on the divestment of a controlling interest in a sugar manufacturing facility in Hungary.

## **5. Conclusion**

41. Developing agencies face a formidable task in implementing a merger review mechanism that meets the needs of their local consumers while at the same time comporting with a global business environment. The task need not be daunting, however, as tools exist to assist developing jurisdictions to strike the right balance. Meeting international norms requires looking outside one’s own borders to the best practices developed by the international community. With these practices in place, the challenge is now for developing – and also developed – agencies to implement these practices in a thorough manner. Doing so will preserve the ability of firms to consummate efficient mergers without imposing costs that will undermine the very efficiencies sought to be achieved.

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<sup>41</sup> See ICN Merger Working Group: Analytical Framework Subgroup, *Merger Remedies Review Project*, Report for the fourth ICN Annual Conference at 44 (June 2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>.