INTERNATIONAL COMPETITION LAW SERIES

Globalization and the Limits of National Merger Control Laws

Joseph Wilson

KLUWER LAW INTERNATIONAL

Globalization and the Limits of National Merger Control Laws

by

Joseph Wilson

KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by:
Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and Distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA

Sold and Distributed in all other countries by:
Turpin Distribution Services Limited
Blackhorse Road
Letchworth
Herts SG6 1HN
United Kingdom

A CIP Catalogue record for this book is available from the Library of Congress

Printed on acid-free paper.

Typeset by *Steve Lambley Information Design*, The Hague.

ISBN 90-411-1966-5

ACKNOWLEDGEMENTS

This book is the fruit of doctoral studies undertaken at McGill University's Faculty of Law. During the course of studies, a number of people provided support in one way or another. I would like to thank all of them.

First and foremost, I would like to thank Professor Richard Janda, my thesis supervisor, who encouraged me to undertake the Doctor of Civil Law programme and supported me, in every respect, all the way to its completion. Frequent discussions with Prof. Janda and his review of all stages of my work shaped the current form of this book.

A large debt of gratitude is owed to Prof. William E. Kovacic for agreeing to be the external examiner of my doctoral thesis, for commenting on the earlier draft of the manuscript and for writing the Preface to this book.

I am also indebted to Professors Daniel Jutras, Roderick A. Macdonald, and Ivan A. Vlasic for their comments on earlier drafts of the manuscript. A special debt of gratitude is owed to Maria D'Amico for her encouragement during the course of studies, and for her assistance in preparing the final manuscript.

Finally, I would like to thank my mother, Bimla Wilson, brother, Ricky Wilson, and sister, Sabrina David, for their never-ending support, encouragement, and love.

Joseph Wilson
Montréal, Canada
April, 2003

ABSTRACT

From an economic perspective, globalization is dismantling national barriers to entry and is transforming domestic markets into a global market. To meet the challenges posed by the integration of markets, corporations are joining forces with their former competitors to expand their presence in the global market. Rapid growth in transnational mergers to create global corporations is one of the key features of globalization. As multinational corporations are uniting, so should antitrust agencies that regulate them.

Antitrust agencies around the world are realizing that the consumers whom they are mandated to protect are being adversely affected by decisions made beyond their national borders. By using the "effects" test, countries bring within their jurisdiction review of any merger or acquisition involving foreign companies with significant revenue or assets within their jurisdiction.

The proliferation of merger control laws, in the absence of a mechanism to coordinate the transnational merger review, places an unnecessary burden on merging parties, and runs the risk of divergent outcomes, which at times cause friction among nation-states.

Both to alleviate unnecessary burdens imposed on corporations and to reduce inefficiencies produced by the disparate review of a single transnational merger by several countries, this book proposes an International Merger Control Regime integrated into the WTO. The proposal focuses on ways to operationalize a "Lead Jurisdiction" model of oversight rather than on the creation of a new supranational decision-making agency. WTO dispute settlement and arbitration would be used to resolve conflicts arising out of the inability of a Lead Jurisdiction to arrive at an outcome satisfactory to other significantly affected jurisdictions.

RÉSUMÉ

D'un point de vue économique, la mondialisation des marchés abolit les barrières à l'entrée que constituaient les frontières nationales et transforme les marchés nationaux en un seul marché mondial. Afin de relever le défi posé par l'intégration des marchés, les compagnies unissent leurs forces à celles de leurs compétiteurs d'hier dans le but d'augmenter leur présence sur le marché mondial. La mondialisation se caractérise notamment par une croissance rapide des fusions transnationales dont résultent des firmes multinationales. À l'heure où les multinationales réunissent leurs ressources, les organismes antitrust responsables de régir ces puissances mondiales devraient en faire autant.

De plus en plus, les organismes antitrust, dont le mandat est de protéger les consommateurs, réalisent que ces derniers sont souvent lésés par des décisions prises au-delà de leurs frontières. En utilisant le critère « de l'effet d'une transaction », les pays se donnent compétence pour examiner toutes les fusions ou acquisitions impliquant des compagnies qui possèdent des actifs significatifs dans leur juridiction.

La prolifération des lois sur le contrôle des fusions, alors qu'il n'existe aucun mécanisme pour coordonner les divers processus d'examen, impose un fardeau inutile aux parties contractantes qui risquent d'obtenir des résultats différents selon les juridictions, S'ajoutent à cela les inévitables frictions pouvant surgir entre pays concernés.

Afin d'atténuer l'inutile fardeau imposé aux compagnies et dans le but de réduire les inefficacités découlant de la multiplication des procédures d'examen disparates par différents pays, ce livre propose un Régime international de contrôle des fusions (RICF) qui ferait partie de l'Organisation mondiale du commerce (OMC). Cette proposition favorise l'élaboration de critères types pour l'examen des transactions qui serait mené par la juridiction « la plus appropriée » dans les circonstances, plutôt que d'envisager la création d'un organisme supranational. Les mécanismes de résolution de conflits de l'OMC et d'arbitrage seraient utilisés pour résoudre les différends entre pays affectés qui contesteraient la décision de la juridiction choisie par le RICF.

TABLE OF ACRONYMS

ABA	American Bar Association
DoJ	U.S. Department of Justice
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
EC	European Community
EEA	European Economic Area
EFTA	European Free Trade Agreement
ESA	EFTA Surveillance Authority
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
HHI	Herfindahl-Hirschman Index
ICPAC	International Competition Policy Advisory Committee
IMCR	International Merger Control Regime
ITO	International Trade Organization
M&As	Mergers and Acquisitions
MEGs	Merger Enforcement Guidelines
NCAs	National Competition Authorities
NCs	National Courts
NGBT	Negotiating Group on Basic Telecommunications
OECD	Organization for Economic Cooperation and Development
SIC Codes	Standard Industrial Classification Codes
SSNIP	Small but Significant Non-transitory Increase in Price
WTO	World Trade Organization

PREFACE

When I was a college undergraduate in the early 1970s, the required reading for the introductory course in economics included Joseph Heilbroner's much-read text, *The Great Ascent*.[1] Published in 1963, Heilbroner's volume examined prospects for economic development in what economists and political scientists then called the Third World. Heilbroner encouraged policymakers in the United States to accept the need for "political authoritarianism and economic collectivism" to spur economic development.[2] Less-developed countries, he argued, deserved "the strongest possible encouragement – not merely a grudging acquiescence – in finding independent solutions along indigenous socialist lines."[3] Above all, Heilbroner concluded, the United States "must forge a foreign policy model that begins with the explicit premise that democratic capitalism, as a model for economic and political organization, is unlikely to exert its influence beyond the borders of the West, at least within our lifetimes."[4]

My instructor in the introductory economics survey course was fond of Heilbroner's work. The final examination for his class included a heavily-weighted question that went something like this: "Discuss the likely path of economic development in the Third World for the remainder of the 20th Century." In my examination answer, I dutifully recited Heilbroner's thesis and endorsed his view that policies featuring central planning, state ownership, and comprehensive control of the economy would be the methods of choice for achieving economic growth

---

1 Robert L. Heilbroner, *The Great Ascent B The Struggle for Economic Development in Our Time* (Harper Torchback Edition, 1963).

2 *Id.* at 148-149.

3 *Id.* at 150.

4 *Id.* at 149.

in less developed countries for the rest of the century. With three decades of hindsight, I wonder how I would have fared had I composed an answer along the following lines. By the end of the century, market-based reforms will provide the foundation for economic development in virtually all of the world's nations. A dramatic impetus for this development will be the dissolution of the Soviet Union, whose former member states will repudiate central economic planning. Even nations that retain socialist systems of governance, such as China and Vietnam, will rely heavily on private ownership and market-oriented mechanisms to achieve economic growth. By 2000, only a handful of nations will repudiate markets and rely entirely on central economic control.

The latter answer, no matter how fully explained, probably would have received a dismal grade. This would have been understandable, and not simply a consequence of my instructor's taste for Heilbroner. To have predicted an alternative, market-oriented course for economic development in the last quarter of the 20th Century would have struck most scholars and casual observers as delusional. Yet this fanciful forecast came to past. Despite continuing uncertainty and turmoil in the transition to markets, economic liberalization remains the strategy of choice today.

To a remarkable degree, the adoption or enhancement of competition laws has become a key ingredient of market-oriented legal reform in both transition economies and in nations with longstanding market systems. In 1950, the United States alone had a system of actively-enforced competition laws. By 1975, the roster of nations with significant competition law regimes had expanded to include the European Union and some of its member states. Today, over 90 countries have competition laws, and the number is likely to increase to well over 100 in the coming decade. Not all of the nations with nominal statutory commands enforce them actively, but a growing number of countries, including Brazil, Hungary, Israel, Mexico, Poland, South Africa, South Korea, and Taiwan, do.

The expansion in the number of competition law systems has important implications for policymakers, practitioners, and academic researchers. Nowhere is this more evident that in the control of mergers. With increase frequency, mergers today implicate the competition laws of more than one jurisdiction. Of the nations with competition laws, nearly 70 have merger control mechanisms, and most of these require companies to give competition agencies advance notice of proposed mergers and delay completing certain deals until the agencies have had an opportunity to examine the transactions. Not only must companies learn and heed the technical requirements of these notification mechanisms, they must account for differences in the purposes and substantive standards that animate the operation of merger control in each jurisdiction. Variations in procedure and substantive stand-

ards have caused competition authorities to reach dissimilar outcomes in a number of highly publicized matters, such as Boeing's acquisition of McDonnell Douglas in 1998 and General Electric's failed effort to purchase Honeywell in 2001. With increases in the number of merger regimes around the world, the system of competition policy controls on cross-border transactions promises to become increasingly complex, and the possibilities for friction among different jurisdictions may grow accordingly.

All of which makes this volume uniquely timely and valuable. Joseph Wilson's examination of economic globalization and merger control provides an exceptionally informative treatment of the underlying trends in global commerce and the application of competition policy to mergers with cross-border consequences. Moreover, he supplies an instructive, well-argued proposal for devising an international mechanism for reducing costs associated with the operation of national merger systems. His proposal is sure to advance the quality of the debate about how best to control anticompetitive transactions at the lowest possible cost. Those engaged in wrestling with these questions, whether in the context of the competition policy work of the International Competition Network, the Organization for Economic Cooperation and Development, or the World Trade Organization, cannot help but benefit from this volume.

Beyond enriching our understanding of international competition policy in a crucial area of substantive concern, Dr. Wilson signals an important path for future research. The modern process of economic law reform, the experimentation with specific reform measures within individual jurisdictions, and the establishment of international networks to address cross-border phenomena have combined to create an unprecedented opportunity for research by those interested in comparative studies and institutional design. This volume recognizes and seizes that opportunity. Dr. Wilson not only teaches us a great deal about the operation of the merger control regimes of the European Union and the United States, but he also builds upon the new literature on international institution-building to consider how experimentation inside specific jurisdictions might inform the development of multinational regulatory structures. More than examining key issues of competition policy, Joseph Wilson has shown us how to think about larger questions of international cooperation and law reform. In its perspective and methodology, Dr. Wilson's research sets an excellent standard for the years to come.

William E. Kovacic
Washington, D.C.
March 20, 2003

CONTENTS