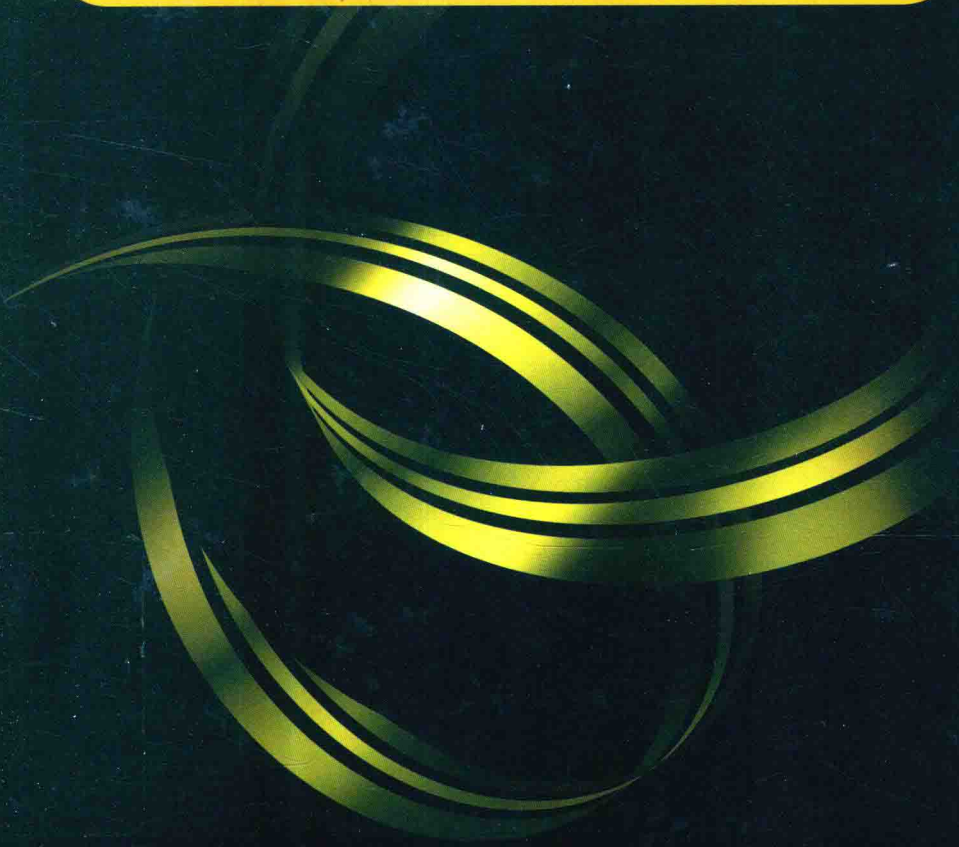




JULIE CLARKE

INTERNATIONAL MERGER POLICY

Applying Domestic Law
to International Markets



International Merger Policy

Applying Domestic Law to International
Markets

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International Merger Policy

Preface

Corporate mergers are a worldwide phenomenon. Not only do they involve trillions of dollars and have the potential to significantly affect national economies but they are frequently transnational in nature because the merging firms operate, or the merger has an impact on competition, in more than one jurisdiction. As most countries now seek to control mergers through competition law regimes, because of this transnational dimension an increasing number now invite multiple regulatory responses. This presents a significant challenge: how are the costs and conflicts associated with overlapping applications of national merger control regimes to be managed? This challenge has been highlighted in recent years by the introduction of pre-merger notification regimes in a number of significant global jurisdictions, including China, India, Brazil and Russia.

There is no international body or treaty governing the way in which transnational mergers are to be regulated. With limited exceptions, the regulation of such mergers remains the subject of national laws. As a result, because these laws typically operate extraterritorially, the requirements of all jurisdictions potentially affected by the merger need to be considered by the merging firms, regardless of where a merger takes place, or the location of the parties. The increasing prevalence of pre-merger notification regimes also means that companies proposing to merge are frequently subject to advance notification obligations in dozens of jurisdictions.

This book provides a comparative assessment of domestic merger laws and procedures, identifying broad themes in the regulation of transnational mergers. It then assesses existing levels of international cooperation and identifies the cost burdens associated with transnational merger review before evaluating possible mechanisms by which these costs might be reduced. While there is no single panacea for transnational merger regulation, a multi-faceted approach, focussed on improving harmonization toward best practices and enhanced international cooperation, supported by firm government level commitments can assist in stemming increases in regulatory costs as more jurisdictions introduce and enforce merger regimes.

I am very grateful for the guidance I received from Professor Stephen Corones when conducting the research upon which this book is based.

I would also like to thank my husband, Philip, without whose support and encouragement this book could not have been completed.

Julie Clarke
Geelong
September 2013

Abbreviations

AAA	Administrative Arrangement on Attendance (US/EC)
ABA	American Bar Association
ACA	Antitrust Cooperation Agreement
ACCC	Australian Competition and Consumer Commission
AMAA	Antitrust Mutual Assistance Agreement
AML	Anti-monopoly Law (China)
ANZCERTA	Australia/New Zealand Closer Economics Relations Trade Agreement
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
BIAC	Business and Industry Advisory Committee
BRIC	Brazil, Russia, India and China
CAFTA-DR	Central America-Dominican Republic-United States Free Trade Agreement
CARICOM	Caribbean Community and Common Market
CEMAC	Economic and Monetary Community of Central Africa
CIS	Commonwealth of Independent States
COMESA	Common Market for Eastern and Southern Africa
Compact	Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and the State Attorneys General (US)
DG-COMP	Directorate General of Competition (EU)
DIAC	Draft International Antitrust Code
EAC	East African Community
ECA	European Competition Authorities
FTC	Federal Trade Commission (US)
GATT	General Agreement on Tariffs and Trade
HHI	Herfindahl-Hirschman Index

HMT	hypothetical monopolist test
HSR Act	Hart-Scott-Rodino Act
IAA	International Antitrust Agency (proposed as part of the DIAC)
IAP	International Antitrust Panel (proposed as part of the DIAC)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
ITO	International Trade Organisation
LIDC	International League of Competition Law
MITT	Ministry of Industry and Information Technology (China)
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission (China)
OECD	Organisation for Economic Cooperation and Development
PMN	Pre-merger Notification
SAARC	South Asian Association for Regional Cooperation
SACU	Southern African Customs Union
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition
SSNIP	Small but Significant Non-transitory Increase in Price
UNCTAD	United National Conference on Trade and Development
WAEMU	West African Economic and Monetary Union
WGTCF	Working Group on the Interaction of Trade and Competition (WTO)
WTO	World Trade Organization

Competition agencies

Albania	Albanian Competition Authority (Alb-CA)
Argentina	Argentina National Commission for the Defence of Competition (ANCDIC)
Armenia	Armenia State Commission for the Protection of Economic Competition (SCPEC)
Australia	Australian Competition and Consumer Commission (ACCC)
Austria	Austrian Federal Competition Authority (AFCA)
Barbados	Fair Trade Commission (BFTC)
Belarus	Ministry of Economy, Division of Antimonopoly Regulation (BME(DAR))
Belgium	Belgian Competition Authority (BCA)
Bosnia and Herzegovina	Council of Competition (BHCC)
Brazil	Administrative Council for Economic Defense (CADE)
Bulgaria	Commission for Protection of Competition (CPC)
Canada	Canadian Competition Bureau (CCB)
CARICOM	CARICOM Community Competition Commission (CCCC)
Channel Islands	Channel Islands Competition and Regulatory Authorities (CICRA)
Chile	Fiscalia Nacional Economica (FNE)
China	Ministry of Commerce (Antimonopoly Bureau) (MOFCOM)
Colombia	Colombian Competition Authority (SIC)
COMESA	COMESA Competition Commission (CCC)
Costa Rica	Commission for the Promotion of Competition (COPROCOM)
Croatia	Croatia Competition Agency (CrCA)

Cyprus	Commission for the Protection of Competition (CCPC)
Czech Republic	Czech Republic Competition Authority (CRCA)
Denmark	Danish Competition and Consumer Authority (DCCA)
ECOWAS	ECOWAS Competition Authority (ECOWAS-CC)
Ecuador	Commissioner for the Control of Market Power (ECCMP)
Egypt	Egyptian Competition Authority (Egypt-CA)
Estonia	Estonian Competition Authority (Est-CA)
European Union	Directorate General of Competition (DG-COMP)
Finland	Finnish Competition Authority (FCA)
France	Competition Authority (France-CC)
Germany	Federal Cartel Office (Bundeskartellamt) (FCO)
Ghana	Ghanaian Ministry of Commerce (GMC)
Greece	Hellenic Competition Commission (HCC)
Guernsey	Guernsey Competition and Regulatory Authority (GCRA)
Hong Kong	Competition Commission (HKCC)
Hungary	Hungarian Competition Authority (HCA)
Iceland	Icelandic Competition Authority (ICECC)
India	Competition Commission of India (CCI)
Indonesia	Commission for the Supervision of Business Competition (KPPU)
Ireland	Irish Competition Authority (Ir-CA)
Israel	Israel Antitrust Authority (IAA)
Italy	Italian Competition Authority (It-CA)
Jamaica	Jamaica Fair Trade Commission (Jamaica-FTC)
Japan	Japan Fair Trade Commission (JFTC)
Jersey	Channel Islands Competition and Regulatory Authorities (CICRA)
Kenya	Kenya Competition Authority (KCA)
Korea (South)	South Korea Fair Trade Commission (KFTC)
Latvia	Competition Council (Lat-CC)

Lithuania	Competition Council of the Republic of Lithuania (CCL)
Luxembourg	Luxembourg Competition Council (LCC)
Macedonia	Commission for the Protection of Competition (MCPC)
Malaysia	Federal Competition Commission (Malaysia-FCC)
Malta	Malta Competition and Consumer Affairs Authority (MCCAA)
Mauritius	Competition Commission of Mauritius (CCM)
Mexico	Mexican Federal Competition Commission (Mex-FCC)
Mongolia	Authority of Fair Competition and Consumer Protection (AFCCPM)
Namibia	Namibian Competition Commission (NaCC)
Netherlands	Netherlands Competition Authority (NMa)
New Zealand	New Zealand Commerce Commission (NZCC)
Nigeria	Nigeria Competition Commission (NCC)
Norway	Norwegian Competition Authority (NCA)
Pakistan	Competition Commission of Pakistan (CCPak)
Panama	Authority for Consumer Protection and Defence of Competition (ACPDC)
Papua New Guinea	Independent Consumer and Competition Commission (ICCC)
Peru	Peruvian Competition Authority (INDECOPI)
Poland	Office of Competition and Consumer Protection (UOKiK)
Portugal	Portuguese Competition Act (Port-CA)
Romania	Competition Council (RCC)
Russia	Federal Antimonopoly Service of Russia (FAS)
Serbia	Commission for Protection of Competition (RSCPC)
Seychelles	Fair Trading Commission (Seychelles-FTC)
Singapore	Competition Commission of Singapore (CCS)
Slovakia	Antimonopoly Office of Slovakia (AOS)
Slovenia	Slovenia Competition Protection Agency (SCPA)
South Africa	Competition Commission South Africa (CCSA)
Spain	National Competition Commission (NCC-Spain)

Sri Lanka	Consumer Affairs Authority (SLCAA)
Swaziland	Swaziland Competition Commission (Swaziland-CC)
Sweden	Swedish Competition Authority (NCA)
Switzerland	Swiss Competition Commission (SCC)
Taiwan	Taiwan Fair Trade Commission (TFTC)
Thailand	Trade Competition Commission (Thai-CC)
Tunisia	Competition Council (Tun-CC)
Turkey	Turkish Competition Authority (Turkish-CA)
Ukraine	Antimonopoly Committee of the Ukraine (AMCU)
United Arab Emirates	UAE Ministry of Economy (UAE-ME)
United Kingdom	Competition Commission (UK-CC) Office of Fair Trading (OFT) Competition and Markets Authority (CMA)
United States	Department of Justice (Antitrust Division) (DOJ(AD)) Federal Trade Commission (FTC)
Uruguay	National Competition Authority (UNCA)
Uzbekistan	State Committee of Uzbekistan on Privatization, Demonopolization and Development of Competition (SCUPDDC)
Venezuela	Superintendence for the Promotion and Protection of Free Competition (Procompetencia)
Vietnam	Vietnam Competition Authority (VCA)
Zambia	Competition and Consumer Protection Commission (ZCCPC)
Zimbabwe	Competition and Tariff Commission (CTC)

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1. Introduction

1. INTRODUCTION

Globalization and the expansion of markets beyond geographic boundaries¹ 'has generated an increase in international mergers as firms seek to strengthen their position for strategic advantage'.² The widening of markets has also increased the potential for the effects of transnational mergers to extend beyond the physical location of the firms involved, thereby arousing the interests of multiple agencies. This, combined with the explosion of national merger regimes over the past two decades,³ means that more mergers are now being subjected to multiple filing requirements, with the result that parties and their advisers must navigate, at considerable time and expense, a maze of different substantive, analytical and procedural rules.

Despite significant international effort toward identifying and promoting best practice and cooperation, the emergence of new and significant regimes, particularly in China, Brazil and India, has resulted in merger review processes for transnational mergers becoming more complex and

¹ See generally Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008) 8.

² Michael A. Utton, *International Competition Policy: Maintaining Open Markets in the Global Economy* (Edward Elgar, 2006) 73. See also Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar, 2008) 29 and Noonan, above n 1, 9. Peter Lattman, 'Confidence on Upswing, Mergers Make Comeback' (New York Times Dealbook, 14 February 2013) <<http://dealbook.nytimes.com/2013/02/14/confidence-on-upswing-mergers-make-comeback/?hp>> accessed 18 February 2013.

³ From 20 in the early 1990s to well over 100 today. See Bill McConnell, 'US Pushes for Waivers in Cross-Border Mergers' (The Street, 25 September 2013) <<http://www.thestreet.com/story/12049435/1/the-deal-us-pushes-for-waivers-in-cross-border-mergers.html>> accessed 28 September 2013. See also Maher M. Dabbah and Paul Lasok QC (eds), *Merger Control Worldwide* (Cambridge University Press, 2nd edn, 2012) 2. See also Avery, et al, *The Essentials of Merger Review* (American Bar Association, 2013).

less predictable.⁴ Although it is difficult to quantify precisely the cost attributable to the review of transnational mergers, that there is a significant cost to business is now widely acknowledged and has been the subject of detailed study.⁵ The increased costs associated with compliance are not restricted to the firms involved, but extend to regulators whose workloads and associated costs remain significant.⁶ These regulators are typically financed either by the parties making application, the taxpaying public or a combination of the two. The consumer public may also suffer loss if potentially pro-competitive mergers are delayed or thwarted by regulation⁷ and indirectly as firms seek to pass on their costs through increased prices.

The existence of these costs does not, in itself, demonstrate any need for reform; these 'costs' might be considerably less than the cost society would incur, social and economic, should anti-competitive mergers be allowed to flourish.⁸ However, it is clear that the potential for merger

⁴ Anna Tzanaki, 'CPI Report: Competition Policy in Global Markets – Efficiencies and Remedies in Lean Times' (*CPI International*, 26 June 2012) <<https://www.competitionpolicyinternational.com/cpi-report-competition-policy-in-global-markets-efficiencies-and-remedies-in-lean-times>> accessed 14 February 2013 and Utton, above n 2, 73.

⁵ See PriceWaterhouseCoopers, 'A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews' (June 2003) and ICN, 'Report on the Costs and Burdens of Multijurisdictional Merger Review' (Mergers Working Group, Notification and Procedures Subgroup, November 2004). See also ICPAC, 'International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust – Final Report' (Department of Justice, United States, 2000) 91.

⁶ See, for example, Competition Bureau (Canada), *Merger Review Performance Report* (2007) 6–7.

⁷ See Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, 2007) 911–12 and John E. Lopatka and William H. Page, '“Obvious” Consumer Harm in Antitrust Policy: the Chicago School, the Post-Chicago School and the Courts' in Antonio Cucinotta, Roberta Pardolesi and Roger Van Den Bergh (eds) *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2002) 132.

⁸ See Federal Trade Commission, *Performance and Accountability Report: Fiscal Year 2008* (2008) 38. Compare Philip Nelson, 'A Review of the Antitrust Agencies Estimates: Consumer Savings from Merger Enforcement' (2001) 15 *Antitrust ABA* 83 and Philip Nelson and Su Sun, 'Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates' (2001) 69 *Antitrust Law Journal* 921.

regulation to significantly impact on business,⁹ regulators¹⁰ and, ultimately, the consumer and taxpaying public, renders the study of alternative approaches aimed at ensuring the regulation is both appropriate and efficient in its application, one of considerable importance. This has been recognized in recent years, with merger processes occupying the forefront of international competition law debate. Over the past decade, recommendations of the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), as well as an increased level of bilateral cooperation, have significantly improved consistency and cooperation. However, high compliance costs, duplication and uncertainty remain a feature of the transnational merger review process. The inefficiencies associated with the current regulation of transnational mergers¹¹ have generated widespread acknowledgment of the need for continued efforts directed toward minimizing cost and uncertainty.¹²

When assessing cost it is necessary to draw a distinction between procedural and substantive compliance costs. Although it is against the substantive merger prohibition(s) that the validity of a merger will be assessed, it is the procedures supporting those prohibitions that generate the bulk of the cost associated with merger review, particularly when taking into account the vast majority of mergers which raise no substantive concerns. It is not surprising that early international efforts have been primarily directed toward procedural convergence or solutions, both because of the significant impact on parties of divergence and because it presents less scope for philosophical conflict, and therefore tends to be less politically sensitive, than substantive law issues. Nevertheless, the existence of divergent legal systems and structures supporting merger enforcement limit the extent to which procedural harmonization can be achieved in practice.

⁹ See PriceWaterhouseCoopers, above n 5 and ICPAC, above n 5, 3.

¹⁰ See, for example, Lise Davey and John K. Barker, *Merger Review Benchmarking Report* (Competition Bureau (Canada), 2001) 5.

¹¹ See generally Robert Paul, 'The Increasing Maze of International Pre-Acquisition Notification' (2000) 11 *International Company and Commercial Law Review* 123. See also J. William Rowley and M. Opashinov, 'The Internationalisation of Merger Review: Towards Global Solutions', in John Davies (ed.), *Merger Control 2003* (Getting the Deal Through, 2003) 5.

¹² See Noonan, above n 1, 14–17, Rowley and Opashinov, above n 11, 5 and Christine A. Varney, 'Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency' (Speech delivered to the Institute of Competition Law, New Frontiers of Antitrust Conference, Paris, 15 February 2010) 2.

Despite these limitations, the desirability for greater procedural harmonization, where appropriate, has achieved wide support, at least at a theoretical level. The same cannot be said of proposals for substantive convergence;¹³ the form any such convergence should take, and the desirability of such a result, remains an issue of considerable debate, with many fearing harmonization could only be achieved by reducing existing standards to a 'lowest common denominator'.¹⁴ The application of substantive merger law, even at a domestic level, is one which arouses passionate differences of opinion between business, economists, lawyers and sociologists. At an international level these differences are magnified, with the result that transnational mergers 'cause some of the most complex problems'¹⁵ for competition policy. It is therefore not surprising that agreement on the nature and scope of merger prohibitions have so far eluded the international competition community.

Unlike other forms of potentially anti-competitive conduct, mergers are time-sensitive and frequently subjected to mandatory *ex ante* review, which imposes significant costs for firms involved in pro-competitive and anti-competitive mergers alike. This has serious implications for the development of policy, both domestically and at a supranational level. In relation to most forms of anti-competitive conduct, and particularly in relation to cartel conduct, the policy goals of deterrence, detection and punishment are likely to be enhanced as the number of jurisdictions implementing and actively enforcing those laws increases. In relation to merger laws, however, the increasing number of countries employing an *ex ante* review process, while potentially capturing a broader range of anti-competitive mergers, also significantly increases compliance costs for firms and for regulators and has adverse implications for a high proportion of mergers that would normally be considered socially desirable.

The challenges posed by the regulation of transnational mergers are unique and merit targeted study.

¹³ See Brendan Sweeney, 'Global Competition: Searching for a Rational Basis for Global Competition Rules' (2008) 30 *Sydney Law Review* 209, 242.

¹⁴ See, for example, A. Douglas Melamed, 'International Antitrust in an Age of International Deregulation' (1998) 6 *George Mason Law Review* 437. Compare Joseph Wilson, *Globalization and the Limits of National Merger Control Laws* (Kluwer Law International, 2003) 238.

¹⁵ Utton, above n 2, 73.