



Michele Giannino

International cooperation and regulation of transnational mergers

A review of possible strategies for effective
assessment of transnational mergers

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This book is dedicated to my wife Oleksandra.

Michele Giannino

December 2009

Cagliari, Italy

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Chapter 1

INTRODUCTION

1.1 The aim of the book

The purpose of this book is to explore the possible strategies for the regulation of transnational mergers. It may be helpful to clarify at the outset that the meaning given to the term of transnational mergers in the present context includes those merger operations whose economic effects are felt in the territory of more than one country.¹

The globalisation of economic activities has greatly innovated the traditional structure and dimension of markets. The liberalisation of the international trade regime, which has removed the barriers hindering the flow of trade and investment across countries, has triggered the process of globalization. Accordingly, economic activities have an increasingly international breadth and firms strive to expand their business by entering foreign markets. Mergers enable firms to acquire the control of the assets they need to establish or consolidate their market positions more rapidly than is provided by mere internal growth. Thus mergers are a useful medium through which firms can pursue expansionary strategies.²

Statistics reveal that over the last decade the number and value of transnational merger operations have constantly increased- with the notable exception of the years affected by economic recession. In 1990 the value of transnational merger and acquisition deals was \$151 billion. By 1999 this figure had soared to \$720 billion.

¹ For a more detailed explanation see chapter eight.

² Joseph Wilson, *Globalization and the Limits of National Merger Control Laws* (Kluwer Law International, The Hague/London/New York 2003) 29. For an explanation of the reasons underlying the merger & acquisitions activities, see UNCTAD, Press Release, TAD/INF/PR055 03/10/00, Survival in Global Business Arena is Key Driver of Cross Border Merger and Acquisition Boom. Questions Mount in Developed and Developing Countries as Merger Activities Hits Record Levels, States New UNCTAD Report.

The annual growth rate in the number of transnational mergers and acquisitions between 1991 and 1995 was 23%. By 1998 this rate had more than tripled, reaching 76,4%.¹

1.2 The problems regarding the regulation of trans-national mergers

Ictu oculi, the basic question that competition law enforcers and practitioners have to address when dealing with transnational mergers is which national competition authorities can exert jurisdiction on a given transaction. The identification of the competent competition authorities in transnational mergers is complicated by two factors. Firstly, transnational mergers affect several national markets; but, on the other side, the scope of application of national competition laws and - of national merger control laws- is usually limited to the territory of the regulating countries. Secondly, the great number of countries that have adopted competition law in their national legal systems must be borne in mind. Some scholars have estimated that in 2002 about 90 countries have enacted competition law and many more are planning to do so.² As of March 2006, almost 100 competition authorities have joined the International Competition Network. Thus, if a merger affects several national markets, the competition authorities of the countries where such effects are felt may wish to regulate this operation with the aim of protecting their national economic interests. Transnational mergers are therefore likely to be subjected to the review of several national competition authorities, each applying their respective national competition laws. National laws, however, may regulate the various aspects of merger control regime differently, such aspects ranging from procedural to substantive rules; from policy goals to the allocation of regulatory powers.

The multi-jurisdictional review of trans-national mergers can raise several problems which may be subsumed into three general categories:

- Legal problems. The regulating competition authorities may take inconsistent decisions on the validity of mergers. For example, one authority

¹ UNCTAD, World Investment Report 2000 Cross Border Merger and Acquisitions and Development, <http://www.unctad.org/en/docs/wir2000_en.pdf> (visited 2 October 2006); *ibid.*, World Investment Report 2002, Trans-national Corporations and Export Competitiveness, Overview, Table 1.1, Selected Indicators of FDI and International Production 1982-2001.5, <http://www.unctad.org/en/docs/wir2002overview_en.pdf> (visited 2 October 2006).

² Wolfgang von Meibom and Andreas Geiger, 'A World Competition Law as an *Ultima Ratio*', [2002] *ECLR* 445, 445.

may decide to approve an operation, another authority may decide to disallow it, while a third authority may decide to conditionally authorize the merger. The risk of inconsistency may be attributed to the different substantive standard tests adopted by national merger control laws. Inconsistency may be also created by diverging policy goals pursued by national competition laws and by the discretionary power of competition authorities in the evaluation of facts.¹

- Business problems. The merging parties may have to notify the merger operation to many competition authorities and handle many merger control procedures. The parties and their counsels have therefore to examine the different national laws applicable to the merger control procedure. The application of different national laws may result in negative consequences for the merging parties: for example, they may be required to provide different data in the notification forms, which obliges the parties to collect different sets of data for each merger control procedure. Multi-jurisdictional review compels the merging parties to commit considerable financial and human resources to deal with the different merger control procedures, thus increasing compliance costs. Furthermore, the multi-jurisdictional review may decrease the legal certainty with respect to the outcome of the review of mergers.
- Political problems. The divergent views of competition authorities about mergers may fuel diplomatic tensions between the countries concerned. This is all the more true when the merger operations affect important national interests. Inevitably, such frictions may complicate the execution of the proposed merger operation.

These problems will be labelled as the ‘global competition problems’ in the field of merger control. They emerge when a competition authority assesses the competitive effects of a transnational merger by focusing on the effects of the transaction on its domestic markets. The priority attached to national interests and policies seriously undermines the capacity of competition authorities to take into account the foreign economic interests that are equally affected by the transaction. The consequence is that competition authorities are unable to appreciate the overall economic effects of the merger on international markets. There exists a gap between the international

¹ The most famous case on which the regulating competition authorities take conflicting decisions is the *General Electric/Honeywell* merger that will be comprehensively examined below in chapter four.