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Cross-Border Mergers and the Experience of Developing Countries

Cross-border mergers often test the mettle of any national competition agency (NCA) due to their transactional complexity that is heightened by commercial presence in multiple jurisdictions. While even experienced and well-developed NCAs like those in the EU and US have come to conflicting decisions or have taken protracted periods to investigate cross-border mergers, it is anyone's guess how complicated such mergers can be for less experienced NCAs in developing countries.

This paper aims to examine the experience from developing countries in dealing with cross-border mergers by studying the possible constraints they have faced and their response in various cases. It also discusses international guidelines and efforts to address some of these constraints.

I

Introduction

The US, the EU and Japan (collectively) are home to more than 80 percent of the world's largest 500 multinational corporations (MNCs). They account for 90 percent of the world's foreign direct investments (FDIs) and carry out half of all trade, often in the form of inter-company sales between subsidiaries.[1] Thus, the US and EU NCAs occupy a central position in cross-border merger review and virtually any sizeable transaction involving international businesses these days is likely to be subject to review under both the US and EU merger regimes.[2]

The chief feature of any cross-border merger is the multiplicity of jurisdictions involved. A key problem of multiplicity of jurisdictions is the potential problem of inconsistent decisions about the same merger.[3] Relief in merger cases is typically injunctive – either permitting a merger to proceed in its entirety, permitting a modified merger to proceed after divestitures or forbidding the merger in any form. If several jurisdictions review a merger and each relies on injunctive remedies, the rule that prevails will be the strictest. Some authors argue that this would lead to a scenario where countries would make domestic merger laws more stringent than the optimal global policy and ultimately lead to a "race to the strictest".[4]

However, this may also be a slightly exaggerated view. Another problem of multiplicity of jurisdictions is that different merger regimes follow different principles thereby leading to a conflict of principles, e.g. generally competition laws are designed to promote consumer welfare but in some cases they explicitly account also for producer welfare.

Responses to these primary problems associated with cross-border mergers vary from conditional approvals by NCAs, which is most widely practiced to other remedies that include suggestions to replace the traditional injunctive remedy with a damages remedy. Permitting firms to merge in all jurisdictions but one is not feasible in cases involving numerous markets. Typically, mergers that involve many local markets can appropriately be addressed by local divestitures.

One other suggested response is a 'lead jurisdiction approach'[5] where local jurisdictions cede authority to a lead competition authority. The least intrusive of this is a co-coordinating agency model, where a lead jurisdiction can co-ordinate a review of the merger for all affected countries, reach a dispositive decision with respect to its own jurisdiction and merely make findings and recommendations for all other countries. Such a model will not only prevent divergent outcomes but will also reduce transaction costs with regard to activities affecting supranational geographic markets.

This is probably one that will find the most takers among small economies whose main constraints, as we will see, are related to their resource allocation, lack of experience and fear that their sanctions may prove ineffectual. An immediate limitation of this approach that comes to mind is that the variance of competition laws

from one country to another would result in different NCAs using different competition laws: what may be regarded as anti-competitive in the lead jurisdiction may not be anti-competitive in the other jurisdiction and a potential area of harm in one country may not be harmful in another. The coordinating agency would have to devise a process to address such variations or lay down a harmonising standard to address such skews in competition laws.

II
Cases of Cross-border Mergers

In the following section, some cases of cross-border mergers involving developing country NCAs and developed country NCAs are discussed.

A. *Gillette / Wilkinson* (1990)

This transaction related to the acquisition by Gillette of the consumer product division of Stora AB through a company called Eemland Holdings NV. Wilkinson Sword's wet-shaving business was only one of the businesses in Stora's parent company.[6] Wilkinson Sword had manufacturing facilities in UK, Germany, Zimbabwe and Brazil. The acquisition was structured differently in EU and non-EU jurisdictions to avoid the competition laws of UK, Germany and EU. In the EU, Eemland acquired the Wilkinson Sword business but Gillette ensured that its minority holding in Eemland was composed of non-voting equity shares and debt. Outside the EU, Gillette purchased the entire Wilkinson Sword business by an outright acquisition.

From a competition law standpoint, the transaction raised several concerns as Gillette competed directly with Wilkinson Sword in the wet-shaving market of many countries. The notification requirement was voluntary in almost all the jurisdictions. The transaction was investigated by the competition and regulatory authorities in 14 jurisdictions. Due to the difference in structuring the transaction in the EU and non-EU countries, the authorities were in effect looking at two very different transactions.

In EU jurisdictions and later in the US, the question was whether there was a merger or concentration or structural link between Gillette and Wilkinson Sword. Gillette defended itself stating that there was no such structural link but appears to have conceded that if such a link existed, competition would have been affected.

In other jurisdictions where there was an outright acquisition, Gillette took one of the two positions: in some instances, it claimed that the merger was outside the scope of the relevant national merger rules. In other instances, it claimed that the merger would not have impermissible effects on competition in the wet-shaving market of that country.

The EC exercising its powers under Articles 85 and 86 of the EU Treaty adopted a decision that Gillette had abused its dominant position (despite its careful structuring of its holding in Eemland) and ordered divestiture of Gillette's equity and debt interests in Eemland. Before Gillette could appeal this decision, Eemland divested Wilkinson Sword's business to Warner-Lambert. The UK authorities, the Office of Fair Trade (OFT) and the Monopolies and Mergers Commission (MMC), also reached a similar decision. Neither EU nor UK authorities examined the non-EU arm of the transaction. In the US, the courts and Gillette entered into a consent decree whose elements included provisions prohibiting Eemland from transferring trademarks to Gillette in the US or EU and prevented Gillette from acquiring Wilkinson's business in the US, but allowed it to acquire Eemland's production facilities and assets in Zimbabwe and Brazil.

Interestingly, despite the decisions of the EU and UK with adverse findings against Gillette's far less tangible control of Wilkinson's business, the rulings of the Brazilian and South African NCAs did not find the transaction anti-competitive. While Brazilian authorities publicly expressed concern about the proposed acquisition of the Wilkinson Sword business (including manufacturing operations) in Brazil by Gillette, upon investigation and submissions from the company, the transactions was approved and completed in 1991. The South African NCA sought information from Gillette about the acquisition. Since the Wilkinson business in South Africa is owned by a subsidiary of South African Breweries, and not by Gillette or Eemland, the NCA took no further action.

In 1993, Eemland sold its Wilkinson Sword business to Warner-Lambert and Gillette transferred back the acquisitions it had made in Poland, Hungary, Turkey, Canada and other countries excluding Brazil. This put to rest the concerns of all the NCAs.

B. *Glaxo Wellcome / Smithkline Beecham* (2000)

The two global pharmaceutical companies Glaxo Wellcome and Smithkline Beecham (SKB) merged to become Glaxo-Smithkline Beecham (GSK) which created a leading global pharmaceutical company with headquarters in the UK. It supplies to about 140 markets in the world. The investigations of the transaction in select countries are examined.[7] In EU, the EC was concerned that competition would be adversely affected in some therapeutic categories and agreed upon certain undertakings with the parties after which the merger was approved.

The decisions of the NCAs in certain developing countries are examined more elaborately. In South Africa, pursuant to a pre-notification, the Competition Commission had to determine whether the merger would substantially prevent or lessen competition and also consider certain public interest issues (including employment) as required under the South African Competition Act.[8]

Initially, the transaction was prohibited on public interest grounds and because it substantially prevented or lessened competition in certain therapeutic categories. To apply a consistent approach on the latter issues, the Commission consulted the EU which provided insights

and also let the Commission see a copy of the agreement between the EU and the merging parties with due safeguards to protect confidential information.

With regard to public interest, the parties submitted that only some of the employees at the middle management level would lose jobs; the Commission was satisfied with the explanation, as this loss in employment did not outweigh the competition considerations that the Commission had agreed upon with the parties. The final agreement provided for a divestiture by the parties of products in some therapeutic categories where they would have market power. The products were those in respect of which intellectual property rights (IPRs) had almost expired, i.e. generics would become soon available. The Commission allowed the parties to retain the products over which the IPRs had not yet expired.

Some South Asian NCAs took a radically different approach to this transaction. As India, for example did not have a merger review provision in its Monopolies and Restrictive Trade Practices (MRTP) Act, the merger was not investigated.

The Sri Lankan NCA (the Fair Trade Commission) apparently took up the Glaxo-Smithkline Beecham merger on the basis of the effects doctrine but the Board was later persuaded that the merger did not fall within the purview of the FTC's jurisdiction. The merger was not examined any further. As CUTS, a Jaipur-based research and advocacy organisation (www.cuts-international.org) argues, invoking the effects doctrine was unnecessary and misplaced as both Glaxo and Smithkline Beecham had a commercial presence in Sri Lanka.[9]

In Pakistan, the NCA (the Monopoly Control Authority) took the initiative to investigate the merger of Glaxo and Wellcome subsidiaries there but failed to take any action and abandoned the case purportedly due to resource constraints. This case is illustrative of several trends in global competition law. Apart from competition criteria, public interest criteria such as employment may be taken into account in evaluating the impact of a merger, depending on the provisions of the statute.

The close cooperation between the EU and South African NCAs shows that such cooperation is feasible and can be successful in helping to resolve serious competition cases despite the lack of a formal cooperation agreement between the NCAs concerned, and despite the fact that it was not possible to exchange confidential information. This simultaneously raises the issue of whether the action taken by the South African NCA would have been as successful had the EC not considered the case in any depth because it did not raise competition problems in European markets.[10]

The action of the other developing countries' NCAs is far from encouraging. Resource constraints and a lack of political and/or bureaucratic will and perhaps the fear of losing FDI may have motivated their decisions. There is no evidence that any of them sought co-operation from EU or even South Africa. Meanwhile, there is the issue of whether any other developing countries which may have been affected by the merger but which did not have local subsidiaries on their territory would have been able to take any action at all.

C. *White Martins / Unigases Commercial Ltd* (1999)

The US acquisition of the US-based CBI Industries Inc. by Praxair Inc. brought about changes in the structure of the Brazilian market for carbonic gas and other gases (oxygen, nitrogen and argon). White Martins, a subsidiary of Praxair Inc., took control of all the South American operations performed by Liquid Carbonic, a subsidiary of CBI Industries through the Brazilian company Unigases Commercial Ltd. This eliminated competition between White Martins and Liquid Carbonic in the southeast region of Brazil making White Martins the sole supplier of carbonic gas.

The Brazilian NCA found that there existed strong barriers against imports of the relevant product and access to the economically viable sources of raw material in the southeast, which were almost entirely owned by White Martins. By 1999, the incumbent's market share was 73.7 percent of the total market. The NCA concluded that though there were efficiency gains from the operation, it gave White Martins substantial market power in the southeast region. The Brazilian authorities conditionally approved the operation with a number of requirements, which included the following:

- The two firms should abstain, over the following six years, from any bidding process for any new source of carbonic gas sub-products which might be held in the southeast region;
- Products should be sold under normal prices to both competitors and distributors;
- The limits of the terms of the acquisition should be settled in the supply contracts;
- Any preferential conditions or exclusivity in gas supply contracts for clients of the company should be eliminated;
- Clients should have total freedom to choose free on board (FOB) or cost including freight (CIF) conditions when buying the company's products;
- An annual report should be submitted to the authority providing information about the evolution of the carbonic gas market.[11]

This case is a good example of how a merger operation in a developed country can have effects upon a developing country's economy, which lead to dominant positions in the whole or part of the latter's markets. NCAs in developing countries should be prepared to take appropriate action in respect of such structural operations where these might potentially give rise to anticompetitive practices. Here, the Brazilian authorities allowed the operation to proceed subject to certain conditions that could prevent the anticompetitive effects arising from the entity's dominant position.

However, one wonders what action might have been taken by the NCA if the only possible means to prevent

anticompetitive effects was to block the merger. Would it have been able to enforce an order made prohibiting this international merger? Given the economic arsenal at the hands of the White Martin, it seems unlikely.

D. *Coca-Cola SABCO and Certain Kenyan Bottling Companies* (1997)

In 1997, Coca-Cola SABCO (the Kenyan subsidiary of Coca-Cola Inc.) and Coca-Cola Africa, headquartered in South Africa, submitted an application for the acquisition of Flamingo Bottlers in Kenya which bottled Coca-Cola.

The NCA's investigations revealed that Coca-Cola SABCO had, in 1995 itself, acquired Nairobi Bottlers, the leading plant bottling Coca-Cola in the country. This acquisition was effected without the approval of the Minister for Finance, as provided under the Kenyan Competition Law. Coca-Cola had a dominant position in the market for branded carbonated soft drinks in Kenya, and the acquisition of SABCO and the previous acquisition of Nairobi Bottlers appeared to be part of a strategy to strengthen and sustain its dominance in the market by taking direct control of production, marketing and supply of inputs in all the Kenyan plants bottling Coca-Cola.[12]

Following detailed investigations, the Finance Minister approved the application subject to certain conditions one of which was that Coca-Cola would not take over any of the remaining bottling companies in Kenya. Coca-Cola SABCO appealed against this conditionality and continued to appeal even in 2000 when the NCA was investigating several complaints against the company's practices. The NCA however rejected these appeals.

This case is interesting to examine from a legal and political economy perspective. First, there was a contravention of Kenyan competition law by Coca-Cola SABCO because it had acquired one of the bottling plants Kenya without seeking approval from the NCA. When the NCA discovered this at the time of investigating the second acquisition, it became evident that the proposed acquisition of all the other bottling companies and consolidating them into one entity to be run by Coca-Cola SABCO would lead to both horizontal and vertical concentration of market power and the likely abuse of dominance, and hence stopped the process from going forward.

The Kenyan NCA thus applied competition law to prevent likely anticompetitive practices in the market in its dealings with a huge MNC. The case goes on to show that many mergers may be taking place without the knowledge of NCAs in developing countries. In spite of this, the actions of the Kenyan authorities are definitely an encouraging trend in the efforts of NCAs to uphold competition principles in developing countries. Authorities in South Asian countries would do well to follow this lead.

E. *Gencor / Lonrho* (1999)

The *Gencor/Lonrho* case was an instance of the EC's application of its 'effects' doctrine to assume extra-territorial jurisdiction in the context of a proposed merger between two South African incorporated platinum mining companies. Although the South African authorities had approved the merger, the EC issued a decision arguing that the proposed merger would lead to a collective dominance in the worldwide platinum market, as well as affect trade between members of the EC. Gencor appealed the decision arguing that the 'implementation' of the agreement took place in South Africa, and not in an EC member state because of which the EC had no jurisdiction over the merger.

The European Court of First Instance rejected the argument and held that the requirement of 'implementation', as laid down in the previous *Wood Pulp* case was satisfied through mere sales of platinum by the South African companies within the EC, regardless of the location of the source of the raw material or location of the production plant. As the companies sold platinum in the EC and would have continued to do so after the merger, the requirement of implementation within the EC was satisfied.[13]

In this case, the South African Competition Commission was however well within its mandate to approve the merger without extending the 'implementation' requirement to the EC. Section 3 of the South African Competition Act says that the Act only applies to economic activities within, or having effect within the Republic of South Africa. Since the EC could not use the South African Act to block the merger, it had to use its own doctrine of extra-territoriality to block the merger.

The NCA decisions in this case are almost opposite to those in the previous cases. A merger sanctioned by a developing country NCA was blocked by the EC. In previous cases, an MNC merger approved by the EC was usually approved in the developing country but with conditions, if the latter's NCA felt that competition was being harmed.

F. *Bayer / Aventis* (2002)

When the South African NCA was approached by Bayer Ltd and Aventis Crop Science for approval of a merger, it gave a conditional approval, provided Bayer divested itself of several brands of agricultural insecticides and fungicides. Bayer ranks 7th among all agrochemical companies in terms of worldwide sales, while Aventis ranks 4th on the world-wide scale. Together they will become the second largest in the world with a market share of about 25 percent.[14]

G. *Total-Mobil* (2005)

In least developed countries (LDCs), lack of implementation of the competition regulations results in failure on the part of the NCAs to analyse the effect of a

cross-border merger in the domestic market. An example from Malawi substantiates the statement. On October 13, 2005, Total Malawi Limited lodged an application for authorisation of a takeover of Mobil Malawi Limited (Malawi) by Total Malawi Limited (Total) with the Malawi Fair Trading Commission. Total and Mobil are subsidiaries of Total Outre-mer S.A. and Mobil Holdings (Europe and Africa) Limited, respectively.

This is an international merger with both the parties to the merger having subsidiaries in Malawi. At the international level, the merger has already been consummated. The parties were seeking a similar arrangement to be authorised for consummation in Malawi. The Malawi Competition and Fair Trading Commission evaluated the merger application and also conducted its own investigations. The relevant market was defined as the importation, supply and distribution of petroleum products in Malawi.

Since there is no oil refinery in Malawi, all petroleum products are imported into the country through Petroleum Importers Limited (PIL). Although the merged entity of Total-Mobil or the market leader does not command dominant market share, the forms of barrier to entry in the relevant market worldwide exist in terms of high initial capital investment in storage and distribution facilities, including exorbitant trade licence fees for new entrants. The Board of the Malawi Competition Commission authorised the takeover on economic efficiency grounds and compelled Total to give undertakings for satisfying the following conditions:

(a) The takeover shall not in any way negatively effect economic levels of the parties to the transaction *vis-à-vis* the merged entity;
(b) There shall be no redundancies as a result of the takeover;
(c) Total should notify and obtain authorisation from the Commission for any dealership agreements entered into with any dealer or distributor of its products in Malawi;
(d) In the event that Total decides to import its fuel products outside the PIL facility, such a decision should be notified for authorisation to the Commission.

In this case, the conditions attributed to the approval of the merger enabled the competition authority to closely monitor the activities of the merged entities but unless the implementation agencies commence their functions it is not possible to analyse the effects of the merger in the domestic market. The situation is similar in other LDCs as well.

There is no doubt that competition law and policy is becoming a key element in many developing countries with their increased liberalisation and FDI inflows. Even with the small number of cases studied, it is evident that developing countries must make more efforts to adopt and effectively enforce competition laws and to undertake pedagogical efforts in order to strengthen a competition culture in their markets.

III
International Trends in Merger Control

This section examines some of the international efforts in the area of merger control that are pertinent to the issues we have discussed above. Organisations like the International Competition Network (ICN), the United Nations Conference on Trade and Development (UNCTAD) and Organisation for Economic Co-operation and Development (OECD) have been active in this regard.

Co-operation and Information Exchange between NCAs

There are commonly three types of international instruments that have competition law and policy as their subject: bilateral or tripartite competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. The implementation of these agreements has minimised conflicts among governments and facilitated enforcement in this area. A 2002 OECD report observes that developing countries have not so far substantially participated in such cooperation.

OECD surveys among non-OECD NCAs, including some developing countries NCAs indicated that five authorities had engaged in communications with another NCA about a merger, but none had engaged in more than two such transactions. Of these, Brazil seems to have had the most exchanges with other countries relating to market definition, competitive impact and remedies. [15]

The report concludes that to promote the participation of developing countries, mutual confidence should be built gradually by evolving from simple to more complex cooperation agreements. Balanced cooperation among developing countries would provide a learning experience and help ensure that cooperation with more advanced partners was fruitful.

UNCTAD reaches similar conclusions after examining several cases of the kind reviewed in the previous section. Competition law enforcement in some developing countries is becoming stronger, as is cooperation between NCAs from some developed and developing countries or regions. Some of the cases still suggest that further national efforts and more advanced international cooperation are necessary for developing countries to take effective action against anti-competitive activities affecting their trade and development.

The UNCTAD response is that of the two areas - internationalisation of international competition law and enforcement co-operation – it is preferable to initially pay more attention to work on international cooperation on merger control, because actual co-operation, and discussions within and outside UNCTAD on enhanced co-operation are more advanced in this area than others, e.g. co-operation with regard to cartels.[16]

The UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBPs)[17] contains a number of provisions exhorting states to exchange information. NCAs and states should *inter alia*:

a) seek appropriate remedial or preventive measures to prevent and/or control RBPs within their competence when it comes to their attention that such practices adversely affect international trade and development;[18]
b) institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for effective control of RBPs;[19]
c) establish appropriate mechanisms at the regional and sub-regional levels to promote exchanges of information on RBPs and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of RBPs at the regional and sub-regional levels;[20]
d) on request, or at their own initiative supply to other states, particularly developing countries, publicly available information and, to the extent consistent with their laws and established public policy, other information necessary for the effective control of RBPs.[21]

As we saw, co-operation between developing countries and the leading NCAs, the US and EU has been extremely limited. In the one case where South Africa received help from the EU, the assistance seems to have been critical in resolving the cases. Even a limited co-operation in the other cases might have helped the NCA a great deal in detecting or obtaining information about many of the mergers originating overseas. Such an exchange of information would also have gone a long way in alleviating the institutional constraints faced by NCAs in developing countries like Sri Lanka and Pakistan in the instance of the *Glaxo / Smithkline Beecham* merger.

To the extent that enforcement cooperation is not strengthened, there is a high risk that as developing countries become more active in this area, firms will have to deal with the procedures and possibly inconsistent orders of several jurisdictions, as it happened in *Gillette/ Wilkinson* case where the merger was examined in 14 jurisdictions, including Brazil and South Africa.

ICN Principles on Merger Review

Among international efforts at merger harmonisation, the ICN is a leading player and enjoys the support of a large section of the international community. The ICN Guiding Principles for Merger Notification and Review Procedures are eight common voluntary guidelines which have significance in the long run as they provide a norm-generating vehicle and a valuable benchmark which NCAs can relate to and gradually assimilate into their national regimes. They are also perceived as a largely mutually accepted starting point for any harmonisation attempts. With respect to multi-jurisdictional mergers the principle states that *"jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs"*. [22]

While the principles are seen to be significant both at the substantive and procedural levels as they reduce the likelihood of conflicting decisions and remedies and contribute to reducing costs and inefficiencies stemming from multi-jurisdictional merger reviews and notifications, they do not envisage the problem examined in this paper. The presently rudimentary principles will have to be expanded substantially to include the issues at hand.

Extra-territoriality

The two leading practitioners of the extra-territoriality doctrine in competition law are the US and the EC. As a detailed discussion of the extra-territoriality is outside the scope of this paper; hence it only deals with the extra-territoriality doctrine in the US and EC in the context of the issues identified for this paper.

US

The US' legal position is laid down in the Foreign Trade Anti-trusts Improvements Act, 1982 (FTAIA), the Sherman Act and the Federal Trade Commission Act (FTC). The US Department of Justice (DoJ) and FTC joint Antitrust Enforcement Guidelines for International Operations, 1995 reiterate the legal position in the Acts that "anticompetitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where such conduct occurs or the nationality of the parties involved".[23]

In the landmark *Empagran* decision, the US Supreme Court had to resolve whether US anti-trust laws could apply to price-fixing activity that had the necessary effect within the US or also had independent foreign effects and was, in fact, in significant part, foreign. The Court held that US courts had no jurisdiction where a foreign plaintiff's claim rests solely on harm sustained in a foreign market, with no injuries arising within the US. Following the principle of comity, the Court cautioned plaintiffs that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority".

The Sherman Act, as amended by the FTAIA, applies only to conduct, which sufficiently affects US commerce and whose effect is unlawful under the Act. The Court further referred to the effects doctrine and emphasised that "the Agencies apply the 'direct, substantial, and reasonably foreseeable' standard of the FTAIA" in relation to conduct abroad that "does not 'involve' import commerce, but does have an 'effect' on either import transaction or commerce within the US". The case is significant in that the US Supreme Court for the first time clarified the reach of the Sherman Act (as amended by the FTAIA) in relation to anti-competitive conduct outside the US and the kind of links that must exist between the foreign conduct and the effect on US commerce.

That a foreign plaintiff will not have a claim before US courts if his claim rests solely on harm that occurred abroad seems to be a useful and necessary limitation on US jurisdiction over anti-competitive conduct abroad, in order to prevent foreign plaintiffs asserting US jurisdiction in cases where there is no (sufficient) effect on US commerce. The *Empagran* ruling held that the "FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements [...] however anti-competitive, as long as those arrangements adversely affect only foreign markets". The issue that remains is what a 'sufficient' effect on US commerce implies. The test of a 'direct and reasonably foreseeable effect' might be determined more easily than a 'substantial' effect.[24]

EU

Articles 81 and 82 of the EC Treaty constitute the core of the substantial legal provisions in EC competition law. Article 81 EC states that "all agreements between undertakings, [...] and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market" are prohibited and automatically declared void.

The EC regime differs from the US extraterritorial doctrine in two ways:

i) Unlike the Sherman or Clayton Acts, there is no explicit reference to trade with foreign nations within the text of Articles 81 and 82 EC, but the EC competition law applies to foreign enterprises or conduct outside the EC, if that conduct has as its "object" or "effect", the distortion of competition within the Common Market; and
ii) Unlike the US, assertion of EC jurisdiction does not require an intent plus actual substantial anti-competitive effect within the EC, neither does it require, as held in *Empagran*, both a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and an effect that antitrust law considers harmful. Assertion of EC jurisdiction solely seems to require an anti-competitive objective or effect on trade between Member States of the EU.

Briefly, the requirement for application of the 'effects doctrine' of extra-territoriality is that of "implementation in the EC" of the transaction. European courts seem to be flexible and liberal (in EC's favour) when it comes to interpreting 'implementation'. Whether a company has headquarters abroad but controls subsidiaries within the EC, whether contracts are made with customers in the EC (as in the *Wood Pulp* case) or mere sales are taking place within the EC (*Gencor/Lonrho*) – the courts are willing to hold that these links to EC territory suffice to satisfy the requirement of "implementation in the EC".

Other jurisdictions, the UK, for instance, take jurisdiction at relatively low levels of corporate control using a "material" influence test as against the European test of "decisive" influence.

Most of the developing countries across the world have failed to create an adequate mechanism for examining cross-border mergers. The NCAs in most jurisdictions do not have any extra-territorial jurisdiction necessary to tackle cross-border mergers. Therefore, the orders and directives of the NCA do not have any binding effect on the foreign MNC, which is involved in the cross-border merger.

The approaches to merger review and control will vary between developing and developed countries based on the success of their extra-territorial regime. States that operate successful extraterritorial regime, like the US and EU may not be inclined to consider the implications of a merger in developing countries if such mergers do not fall within the purview of their extraterritoriality tests, i.e. NCAs and judicial authorities may not be willing to look beyond the extraterritoriality test when considering multi-jurisdictional mergers.

If a merger has direct effect in the market of the US or EU, it will be reviewed with respect to the implications in that market. If such a merger is approved (e.g. for want of proof of anti-competitive effect in that market), the reviewing jurisdiction will not be inclined to consider the effects of that merger in developing country markets, in respect of the subsidiaries of the merged entities. The EC's decision in *Gencor/Lonrho* is a fitting example of this. Furthermore, considering every developing country or LDC jurisdiction where an MNC has operations may not be a priority, both due to time and resource constraints.

Notification Requirements and OECD Guidelines

The OECD's recommended Framework for Notification and Report Form for Concentrations in 2002[25] indicates that member states adopting these notifications should consider the effects of the merger on several jurisdictions. Certain elements of the notification and reporting format are examined here:

i) The details of each entity that:
   a. is directly or indirectly controlled by the notifying entity;
   b. directly or indirectly controls the notifying entity; and
   c. directly or indirectly is controlled by a person referred to in b. are required.

The concept of "control," is a key element in the determination of these entities and has important jurisdictional implications in merger notification regimes, affecting the coverage of the notification rules and the parties and transactions that are subject to them. The definitions in different jurisdictions vary to some degree, but virtually all contain at least the following elements in substance – traditional company law definitions of subsidiaries such as effective ownership of 50 percent or

more of the outstanding voting securities issued by a person or the power to appoint a majority of the board of directors, the supervisory board or the administrative board.

To widen the scope of the term, many countries also incorporate into the definition of control the concept, i.e. the ability to exert decisive influence on the affairs of another person through the ability, for example, to impose or prevent the imposition of significant or fundamental business or operating policies or decisions. In place of a "decisive influence" component like (c) above, a country might instead require identifying information about significant minority ownership interests held by any member of the Notifying Group in another entity, or by another entity in any member of the Notifying Group.

ii) The notifying and reporting entities are also required to identify each country or jurisdiction other in which a notification of the transaction that is the subject of this notification has been or will be filed. The onus is made stricter by a requirement to identify and describe markets in which the transaction could have horizontal or vertical effects.[26]

With these extensive notification requirements, which are adequate to cover the operations of an MNC in all countries where it has subsidiaries or even just a minority stake in an entity, it should be enough to include implications of cross-border mergers in developing countries.

IV
Conclusions

It would be naïve to believe that the merger review decisions of NCAs are dictated only by the letter of the competition law in that country. The state of the nation's economy, its eagerness to remain attractive to foreign investment, the need to create national champions and political or populist considerations are some of the other factors that will influence the decision of an NCA. A country may strive to protect its local market from a negative transfer of wealth but the country that receives the positive transfer of wealth caused by the anticompetitive behaviour of local corporations, may be reluctant to act against such behaviour. Subsequently, nations may lack incentive to regulate activities which create externalities felt elsewhere.[27]

As we saw, when developing country NCAs are called upon to render a decision on cross-border mergers that involve a huge MNC, there are some factors that influence their decision.

First, if the country wishes to remain attractive to foreign investors, the NCA may turn a blind eye and approve a potentially anti-competitive merger. It may even condone lapses such as the failure to notify, like in the case of the Kenyan NCA when it found that Coca-Cola had not notified it of its first acquisition of certain bottling companies.

Second, the NCA may fear that its decision would not carry enough weight so as to be adhered to by an MNC that has obtained approval to merge in other major jurisdictions. The Sri Lankan and Pakistani NCAs probably abandoned their investigations of the Glaxo-Smithkline Beecham merger for this reason.

Third, the NCA of a developing country may find itself in a situation like the South African NCA in *Gencor/ Lonrho* where the NCA that had clear territorial jurisdiction approved the merger, while a heavyweight NCA like the EC asserted extra-territorial jurisdiction and denied approval. This undermines the credibility of the South African NCA.

Fourth, NCAs in developing countries genuinely suffer resource constraints and are unable to undertake investigations satisfactorily. In such cases, co-operation with an NCA of a developed country can greatly help the other NCA.

The key issue that will determine whether the implications of a transnational merger in developing countries should be considered as the minimum 'nexus' to the developing country of a transnational merger, i.e. the competitive overlap within the jurisdiction and the local assets/turnover in excess of a prescribed minimum financial threshold. This should serve as the triggering event for notification of merger by the MNCs and for the primary reviewing jurisdiction (in the host country/ies of the merging entities) to consider the effects of the merger in the developing countries while reviewing it.

Some form of the 'lead jurisdiction approach' should be followed in transnational mergers. On being faced with such mergers, NCAs must reach agreement that the jurisdiction where a transaction has its 'centre of gravity' or maximum nexus should take the lead in reviewing the merger and crafting a remedy. For this, there has to be adequate co-operation and information exchange for coordinated discussions on remedies between concurrently reviewing agencies to take place.

There seems to be no dearth of international guidelines and principles urging NCAs to involve in greater information exchange and co-operation. Though none of these guidelines and principles specifically addresses the issues that developing countries face while dealing with cross-border mergers, implementing them would go a long way in resolving the issue.

Endnotes

1 The Fortune Global Five Hundred, July 25, 2005.

2 Ariel Ezrachi, Merger Control and Cross Border Transactions - A Pragmatic View on Cooperation, Convergence and Whats in Between, The Oxford Centre for Competition Law and Policy, Working Paper (L) 11/05 p.2. (Hereinafter 'Ezrachi')

3 As Trebilcock and Howse accurately identify in M. J. Trebilcock and Robert Howse, *The Regulation Of International Trade* (London: Routledge, 2005) pp.462-464. (Hereinafter 'Trebilcock & Howse')

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6 Eemland Holdings had other businesses apart from Wilkinson Sword. Information regarding this merger has been largely obtained from OECD Report 'Merger Cases in the Real World – A Study of Merger Control Procedures', 1994 by Richard Whish and Diane Wood pp. 66-83

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10 UNCTAD Report pp. 17-18

11 UNCTAD Report pp.13-14

12 UNCTAD Report pp.14-15

13 Tatjana Sachse, Extra-territorial Application of Competition Laws in the US and the EU, CUTS Centre for Competition, Investment & Economic Regulation 4/2006 p.3 (Hereinafter 'CUTS Paper on Extra-territoriality'.)

14 Competition Commission, Media Release No. 11 of 2002, July 09, 2002, from the website of South African National Competition Authority.

15 Experiences Gained So Far On International Cooperation On Competition Policy Issues And The Mechanisms Used, Revised report by the UNCTAD Secretariat, TD/B/COM.2/CLP/21/Rev.1 April 19, 2002 p.25

16 *Ibid.*

17 UNCTAD Report of the Intergovernmental Group of Experts on Competition Law and Policy on its 3rd Session, TD/B/COM.2/32, TD/B/COM.2/CLP/24, August 03, 2001 p.14. The term 'RBP' as used in the UN Principles includes anti-competitive mergers.

18 UN Principles, para. E.4

19 UN Principles, para. E.6

20 UN Principles, para. E.7

21 UN Principles, para. E.9

22 From the website of the ICN <www.icn.org>

23 CUTS Paper on Extra-territoriality pp.1-2

24 CUTS Paper on Extra-territoriality p.4

25 Report On Notification Of Transnational Mergers, Organisation for Economic Co-operation and Development, DAFFE/CLP(99)2/FINAL, 24 February, 1999 pp.5-10.

26 *Ibid.*

27 Ezrachi at p.5

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