Competition agencies and global markets: the challenges ahead

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Introduction/Abstract

1. Over the past decades, competition policy has made great progress in opening markets to competition and improving consumer welfare. Across many countries, there is growing evidence that shows the significant benefits that come from well-judged interventions against cartels, abuse of dominance, anti-competitive mergers and state restrictions on competition.[2]

2. In the 21st century, it is likely that markets will continue to be increasingly globalised. Competition regulation and enforcement, however, will remain predominately centred on domestic, national regimes and needs. The question of how national competition authorities should best work together to ensure that consumers benefit from open competitive markets at the international level, as well as domestically, is a central question for competition policy in a globalised economy.

3. A system of national regimes in a world of international markets risks considerable harm to competition and consumers at an international level, as it can result in a failure to address (i) private anti-competitive behaviour, (ii) unwarranted public restrictions on competition, (iii)

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[2] See, for example, the OFT's ongoing evaluation work, available on the OFT website at www.oft.gov.uk. Other agencies, such as the Dutch competition authority and the European Commission, also carry out evaluation exercises into the effect of their activities, either on an ongoing or ad hoc basis. The US Federal Trade Commission, for example, in 2008 carried out a detailed self-assessment and evaluation as it prepares to enter its second century (see '2008: FTC at 100', documents available at www.ftc.gov/ftc/workshops/ftc100/index.shtm).

potential chilling effects from differing substantive standards and policies and (iv) burdens caused by duplicative and inconsistent procedures.

4. Following a review of the current competition enforcement landscape from an international perspective, this paper explores the options for national regimes to address these harms. Networks of competition authorities have arisen as a solution and have already achieved a great deal. Relative to other possible international solutions, such networks appear to offer the best way forward for the foreseeable future.

5. Specifically the paper examines the huge achievements of the International Competition Network (ICN) to date and suggests that, having achieved an enormous amount since its inception in building consensus and establishing its legitimacy and its role on the world competition stage, the ICN should now consider looking at its objectives and long-term vision. One articulation of this vision could be that the ICN should work to meet the challenges for **all** market participants, including businesses, governments and consumers, posed by competition in international markets and among interdependent economies. As part of this, the ICN should consider whether, in order to meet these challenges, it ought to refocus its objectives to establish a different balance in dealing with these four harms.

6. In so doing, national competition agencies can come together to define a clear narrative about how they work together to ensure that open and competitive markets work well for consumers both domestically and internationally. This paper aims to stimulate a debate in that direction.

I. Today's competition enforcement landscape – increasing globalisation and proliferation of national competition regimes

7. The globalisation of markets is a growing and important phenomenon.[3] The world's economies are progressively more interlinked and interdependent. As the global financial crisis that began in the latter half of 2008 demonstrates, conditions in national markets can very rapidly spread and have an effect on a truly global scale.

[3] In the last two decades or so, for example, cross-border economic activity has been increasing to the extent that trade flows and foreign direct investment rates have been growing at rates higher than overall economic activity (measured by world gross domestic product). See Budzinski, Oliver, *International Competition Policy between Centralism and Decentralism: A Systematic Analysis of the Benefits and Risks of International Antitrust* (August 31, 2006). Available at SSRN: http://ssrn.com/abstract=927708.

8. The two main factors driving globalisation are technological innovation and liberalisation/deregulation.[4] Technological innovation has significantly reduced key costs to international business, such as communication and transport, allowing for easier, faster and cheaper importing and exporting of goods, as well as facilitating sourcing of goods/services and financial transfers of funds. At the same time, foreign trade has been liberalised through international policy initiatives such as the GATT, the creation of trading areas such as NAFTA and the EEA, and the development of international bodies, such as the WTO and WIPO, to facilitate international trade and business. These measures have been supported by widespread national deregulation of key industries such as telecommunications, energy, banking, transport and postal services, creating the possibility for previously closed national markets to be opened up to foreign players.

9. This has resulted in the emergence of the so-called 'new economy' markets- driven by the internet and other technological advances, which have features that lend themselves to the evolution of the economy on a global scale.[5] With the development of these new markets, global players (such as Apple, Google and Ebay) have emerged to service them. Technological developments such as those that have underpinned 'new economy' markets will continue to drive globalisation and the global economy in the longer-term.

10. At the same time, there has been a proliferation of national competition regimes. Until the last decade or so, competition regimes outside the US and the EU could be described as somewhat scarce on the ground.[6] Since then, however, they have flourished, as can be seen from the fact that the ICN, which was launched in 2001 with agencies from 13 countries, now has 96 Member countries.

11. However, most national competition regimes focus on domestic concerns, often (as in the UK) with the objective of enhancing domestic

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[4] See speech of John Vickers to the European Policy Forum in January 2001, *Competition Policy and Globalisation.* See also, Budzinski *supra.*

[5] Namely the role played by transaction platforms which can benefit from network effects, the innovation of social networking as a driver for advertising and content, and significant demand and supply-side economies of scale. See Evans, *Antitrust issues raised by the emerging global internet economy,* Northwestern University Law Review [2008].

[6] In Continental Europe in the 1970's, few countries other than what was then West Germany even had national competition laws. The situation was similar on other continents. Even in the following decades, there remained only a small number of competition regimes worldwide. See Philip Collins, *Competition Law - Challenges and Opportunities for Business and Agencies in an International Context*, Speech given on 30 July 2008 at Competition Commission of Singapore Distinguished Speakers Series.

consumer welfare, not global welfare or broad international concerns. As a result, whilst the world economy is increasingly integrated and globalised, competition enforcement is carried out in a 'patchwork' of national competition regimes, each with potentially different priorities. The serious implications this may have for competition, business and consumers are discussed below.

II. Key problems with the current system of national competition enforcement in a globalised world

12. Potential harm to consumers[7] from the 'patchwork' of national regimes in a world of increasingly globalised markets can result in a failure to address:

- **Private anti-competitive behaviour** (that is, cartels, abuse of unilateral market power, anti-competitive mergers and other private restrictions on competition)

- **Public restrictions** on competition (for example, state restrictions on entry, protectionism, etc)

- **Different** or inconsistent **substantive standards** and policies that give rise to a risk of 'chilling' conduct that could be pro-competitive, and

- **Duplicative and inconsistent procedures** across national competition regimes that create additional burdens for business which are ultimately passed on to consumers.

13. For the remainder of this paper, the terms in bold above will be used as shorthand for these four issues.

Private anti-competitive behaviour

14. International market behaviour can be pro-competitive and beneficial to consumers (for example, international mergers can bring significant price reductions, innovative products and improved quality of goods).[8] However, the growth and opening of global markets can also create

[7] The term 'harm to consumers' is used a catch-all and should be read broadly as direct harm where consumers are buyers or indirect harm where businesses suffer and pass on to consumers. Thus, for example, a cartel selling to downstream businesses market is seen as ultimately harming consumers. The term can also be a proxy for harm to the economy as, for example, when export firms pay higher input prices because of weak competition in upstream markets.

[8] These benefits do not always involve the creation of larger, global markets but may also make it easier for companies to locate closer to their customers (for example, 'Japanese' cars sold to Americans may be built in plants that are located in the US).

incentives for firms to engage in behaviour that can have a negative impact on markets and consumers across borders, whether through collusion, unilateral conduct or merger activity.[9]

15. As regards collusion, national firms facing competition from foreign producers/suppliers on their traditional home markets may have the incentive to act together to maintain price levels. This can be particularly the case in relation to homogeneous products that have the potential to be freely traded.

16. This trend can be seen through empirical research and data, such as an exemplary overview of recent international hardcore cartels taken from Levenstein and Suslow which includes over 40 cartels whose coverage spanned from two to 30 countries.[10] Similarly, from 1990 to 2009, the European Commission has seen a consistent and significant increase in its cartel decisions and fining levels, from 11 cartel decisions imposing fines of roughly €500 million in the period 1990-94 to 28 decisions imposing fines of over €8 billion in the period 2005-09.[11]

17. The EU experience suggests that wider benefits could be delivered to consumers worldwide from more effective international enforcement. Recent estimates place the total overcharge from EU-wide cartels alone at between EUR 30 billion and EUR 138.7 billion.[12] Similarly, Connor's empirical research into private international cartels shows that the total known affected sales by international cartels from 1990 to 2008 amounts to over USD$ 16 trillion and that the rates of discovery of global cartels are rising.[13] Connor's meta-analysis of overcharges from 395 cartel episodes shows that overcharges are significantly higher for durable international cartels than other cartels.[14]

18. As regards unilateral conduct, although the opening up of national markets reduces barriers to entry and allows consumers to choose alternative suppliers, all of which may reduce the market power of

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[9] This is true, not only for 'new economy' markets but also for other, more traditional markets, such as energy, transport, agriculture and manufacturing-based industries.

[10] See Oliver Budzinski, *International Competition Policy between Centralism and Decentralism: A Systematic Analysis of the Benefits and Risks of International Antitrust*, supra.

[11] Source: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

[12] See Nazzini and Nikpay, *Private Actions in EC Competition Law*, Competition Policy International, Vol 4, No. 2, Autumn 2008.

[13] John M. Connor, *Cartels & Antitrust Portrayed: Private international cartels 1990-2008*, presentation, 20 December 2008.

[14] Connor, John M. and Bolotova, Yuliya, Cartel Overcharges: Survey and Meta-Analysis (March 2005). Available at SSRN: http://ssrn.com/abstract=788884

suppliers,[15] there are a number of factors that significantly increase the opportunities for firms to acquire market power.[16] First, significant economies of scale can lead to opportunities for early entrants into new markets to acquire the necessary size to achieve market power across borders. Second, while new technologies offer consumers more information about suppliers, they also enable suppliers to obtain better information about their customers,[17] which can give a significant advantage to incumbents over potential entrants. Third, network effects, particularly in 'new economy' markets can be significant, and industries may tip in favour of one standard or system.[18]

19. International merger activity over the last decade has also been significant, in particular in industries such as telecommunications, pharmaceuticals and media. For example, the number of cross-border mergers notified to the European Commission has increased steadily from 11 in 1990 to over 400 in 2007.[19] It can be argued that there is considerable potential for consumer harm arising from solely 'domestic-focused' oversight of mergers because a national regime may impose conditions for merger clearance that prioritise national interests and domestic consumer welfare over the potential for consumer harm in other jurisdictions which lack the ability to effectively challenge the merger. The impact of the merger may therefore be harmful to overall consumer welfare.

20. The current patchwork of national competition regimes creates a real risk of international private anti-competitive behaviour slipping through a 'gap' in enforcement.

21. The 'gap' may arise from a lack of capability of national regimes to act against a foreign-based firm due, for example, to insufficient resources, insufficient power to obtain the necessary evidence, or lack of jurisdiction to enforce decisions against foreign firms. These problems are particularly likely to be experienced by the competition agencies of smaller jurisdictions.

22. Alternatively, a 'gap' may arise where national regimes consider that there is insufficient domestic harm to warrant intervention. Take, for

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[15] See the speech of John Vickers to the European Policy Forum in January 2001, *Competition Policy and Globalisation.*

[16] Infra.

[17] For example through internet searching and buying patterns captured by 'cookies'.

[18] Indeed, Budzinski notes that anticompetitive modes of unilateral conduct on international markets have also become more frequent in recent decades in the course of market globalisation.

[19] Source: http://ec.europa.eu/competition/mergers/statistics.pdf

example, an international cartel that results in increased prices in three countries in relatively small product markets. While the overall effect of the cartel would clearly be harmful to consumers across those countries, there is a risk that each of the countries would not prioritise enforcement against the cartel because of the small size of the market in domestic terms. In such a situation, the considerable harm caused by international anti-competitive behaviour could go unchecked. An analogous point could be made about rule of reason cases (which, if taken on by agencies, could provide greater clarity and legal certainty for business conduct).

Public restrictions

23. Globalisation can increase the incentives for states to intervene in markets and pursue protectionist agendas.[20] Similarly, in a world of international markets and interdependent economies, the impact of public restrictions on competition and of regulation can be felt beyond domestic borders.

24. There are many ways in which public restrictions and regulation can result in harm to markets and consumers across borders, including:

- trade and industrial policies that favour domestic industries
- state aid to national firms
- strategic merger control policies[21]
- exemptions from the competition rules for particular sectors or conduct (such as export cartels)
- regulating industries in a way that favours domestic products or suppliers or that does not take into account the impact beyond domestic borders
- restrictive product standards or IP policies that put foreign producers or suppliers at a disadvantage.

25. More subtly, national agencies may be put under pressure to take account of national public policy interests in enforcing competition law, for example, to avoid taking enforcement action against conduct that benefits national firms at the expense of foreign competitors (such as

[20] More economically developed and wealthier countries face, for example, the risk that domestic industries may relocate to cheaper territories, generating economic, social and political harms. Less economically developed countries face, for example, threats to their continued economic development from 'brain-drain', from imports replacing nationally-produced goods, from instability brought about by unfettered trade and from possible 'beggar-thy-neighbour' attitudes on the part of other countries.

[21] Such as using the 'legitimate interests' exemption for state measures under the European merger control regulation (ECMR) or requiring the review of transactions by the Committee on Foreign Investment in the United States (CFIUS).

closed distribution systems, exclusionary unilateral conduct by key national players etc.).

26. The potential for harm from public restrictions on competition is substantial. Even amongst EU Member States, who share many common goals, incentives for such action can be compelling:

- One area is that of State Aid, which requires ongoing enforcement and education work by the European Commission, particularly in the context of the current financial crisis. Ireland, for example, announced a bank guarantee scheme that supported only banks with Irish parent companies, resulting in a flight of capital towards those banks at the expense of banks in Ireland with foreign parent companies. The Commission had to engage in immediate discussions with the Irish Government to reform the scheme.[22]

- It has been suggested that the EU is facing a 'renaissance of protectionism[23] in other areas such as merger control, where a number of Member States have taken measures to interfere with cross-border transactions to protect national interests. Examples include the effective blocking of the Abertis/Autostrade merger (abandoned after months of legal disputes with Italian public authorities) and the Spanish 'Endesa saga' (where the Commission had to take enforcement action against the Spanish authorities).[24]

27. Less open and developed economies than those of the EU, or states that feel their industries are under threat from external competition without the corresponding benefits of being a member of a single market area, could be even more tempted to engage in public market interventions and protectionism (whether direct or indirect, through regulation or through trade, industrial or competition policies) to try to shield domestic firms from foreign competition.

28. By taking such measures, domestic producer or total welfare can be increased at the expense of foreign welfare. Additionally, domestic producer welfare may be increased not only at the expense of foreign

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[22] See Neelie Kroes, *The State Aid Action Plan: a roadmap for reform and recovery*, speech given at a conference on 'The new approach to state aids - Recent reforms under the State Aid Action Plan and next steps' Brussels, 21st November 2008.

[23] See Neelie Kroes, *European competition policy facing a renaissance of protectionism - which strategy for the future?*, speech given at the St Gallen International Competition Law Forum, 11th May 2007.

[24] See Gerard *Protectionist Threats against cross-border mergers: unexplored avenues to strengthen the effectiveness of Article 21 ECMR,* Common Market Law Review 45: 987 – 1025 [2008].

consumers (who face higher prices for exported products and do not obtain the benefits of greater production) but also at the expense of domestic consumers (who face the same disadvantages). Global welfare can therefore be significantly reduced. This can also occur from the failure to take into account potentially negative international effects resulting from domestic restrictions or regulation.

29. Considerable indirect future harm can also result, as measures taken to shield national firms from foreign competition or that simply fail to take into account international negative effects can weaken the competitive structure of markets and thus create the potential for future anti-competitive conduct.

30. National competition regimes, on their own, will be limited in their ability to address these risks, given the political power of domestic producer interests and the jurisdictional limits on the role of independent agencies. Nevertheless, there is much progress that can be made. Competition advocacy can have a powerful effect. Moreover, national governments may wish, looking at best practice in other states, to enhance the role of competition authorities as a mechanism to address the potential for powerful and vocal private interests to trump the public interest. More generally, it is important to find ways to learn from the considerable progress that has been made in recent years so that, over time, competition agencies are better able to contribute in this field.

Different substantive standards

31. The increasing proliferation of competition regimes does not necessarily entail an increase in the consistency or coherence of competition enforcement. Most national competition regimes address cartels, mergers and unilateral conduct. However, there is no guarantee that these rules or their enforcement are consistent across jurisdictions or even aim at addressing the same types of behaviour. While some competition regimes may adopt consumer welfare based principles for intervention, others may have different approaches and/or priorities.

32. A recent ICN report on unilateral conduct, for example, shows that many differences exist between authorities in relation to the objectives of competition policy.[25] Many jurisdictions surveyed have objectives that go beyond narrow competition objectives, for example promoting market integration, assisting SMEs, ensuring fairness or protecting

[25] See ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, presented at the 6th Annual Conference of the ICN, Moscow, May 2007.

national champions. Taking into account these wider considerations can result in differences in the enforcement policies of competition authorities and in different signals being sent to business as regards what behaviour is acceptable.

33. Equally, there may be variance among national agencies in terms of their resources and ability to carry out competition enforcement, including the ability to collect, review and assess different types of evidence or complex economic arguments and facts.

34. These factors can result in differences in enforcement priorities and approaches which may lead to different effects across jurisdictions, and while the effects in some jurisdictions may be positive, in others they may be negative. Briefly, there are two types of situation that can arise:[26]

- First, a competition regime may seek to attain objectives other than the economic welfare benefits of competition – this would result in ex ante errors in intervention and enforcement ('wrong rule').

- Second, even where competition law interventions are driven exclusively by clear economic welfare objectives, beneficial activity can mistakenly be prohibited or harmful activity can mistakenly go unchallenged – this would result in ex post errors ('right rule, wrongly applied').

35. Such differences can result in a reduction in consumer welfare and in harm to business and the wider economy more generally.[27] In particular, for businesses operating internationally, it may give rise to the 'highest common denominator' risk. This is the need to adjust behaviour to the 'highest common denominator' of permitted conduct under the rules of different jurisdictions and thus forego potentially efficiency-enhancing conduct that would be permitted in some jurisdictions but not in others. This is a particular concern for firms that operate globally, and it can have significant negative welfare effects.[28] In particular, while the initial burden and harm is on business, global welfare will be indirectly

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[26] For a fuller discussion, see Fingleton and Nikpay, *Stimulating or Chilling Competition*, 2008 Fordham Comp. L. Inst. 385 (B. Hawk ed. 2009).

[27] See Fingleton, *Competing interests*, Global Agenda (2005) at 164.

[28] As Campbell and Rowley point out, *'the highest common denominator is not necessarily desirable, nor is the lowest common denominator necessarily undesirable. Unless the jurisdiction with the most demanding requirement has a law that closely approximates a sound economic standard, the result will be less than optimal*.' See Neil Campbell and William Rowley QC, *Climbing the competition policy Everest: the evolution of unilateral conduct*, Global Competition Review (2006), Nov, 31-34.

affected by the responses of business (for example, from decisions to forego welfare-enhancing conduct that would, in fact, be permissible in a given jurisdiction).

36. However, in recent times, there have been two developments that significantly reduce the risk of different substantive standards. First, in many jurisdictions, there is increasing consensus around the promotion of consumer welfare as the ultimate goal of competition policy.[29] Second, there has been an exponential growth in the use of economic thinking and analysis in most major jurisdictions – the EC, for example, now has a Chief Economist with a significant complement of staff. This has resulted in an increasing convergence between competition economics and competition policy.[30]

37. The possibilities for different substantive standards and enforcement priorities have reduced significantly in relation to cartels and mergers, where the harmful consumer welfare effects are by now well recognised worldwide. The risks of different substantive standards however remain substantial in relation to unilateral conduct[31] and potential rule of reason coordinated conduct cases.[32] These require potential harms to be balanced against potential efficiencies and can involve considerable economic argument on both sides (complainant and defendant).

'Informed divergence'

38. In considering the implications of different substantive standards, it is of course important to recognise that the potential welfare harms will necessarily depend on the conditions in domestic markets. For example, where there is a history of state ownership of enterprises, protected monopolies, concentrated markets or closed economies, there may be a lower likelihood that self-correcting market forces will, absent intervention, erode market power. This can result in markets

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[29] See, Fingleton and Nikpay, *Stimulating or Chilling Competition*, 2008 Fordham Comp. L. Inst. 385 (B. Hawk ed. 2009). See also, Hovenkamp, Herbert. (2005). '*The Antitrust Enterprise – Principle and Execution*' Cambridge, Mass. / London: Harvard University Press. However, there is not universal agreement on this. An alternative view is that keeping markets robust and able to function properly should be the ultimate goal of competition policy and that market players and markets themselves have a right to be protected from harm by anti-competitive practices. See, for example, Irwin Stelzer's views on the EU's imposition of a record fine on Intel for abusive of its dominant position, Financial Times 27 May 2009.

[30] See Faull & Nikpay '*The EC Law of Competition*' 2nd Ed. (2007).

[31] See Professor Sir John Vickers in *Competition Law and Economics: a mid-Atlantic viewpoint*, lecture given at the Burrell Lecture of the Competition Law Association, London, 19 March 2007.

[32] See '*Faull & Nikpay: The EC Law of Competition*' 2nd Ed. (2007)

characterised by 'uncontested firms in incontestable markets'.[33] In such situations, competition authorities may need to take a different approach to the assessment of welfare risks and may need to be far more interventionist.

39. As a result, it may well be that the competition rules in one jurisdiction are based on standards that are appropriate for that jurisdiction (given the status and history of its markets, companies, economy etc), whereas those standards would not be appropriate for another jurisdiction. To expect that all standards will converge fully would therefore be unrealistic. To that end, the importance of 'informed divergence' (which acknowledges the need for and reasoning behind potential differences in standards between jurisdictions with different economies) must be recognised, as discussed further in section IV below.

Duplicative and inconsistent procedures

40. The proliferation of national competition regimes gives rise to the risk of duplicative and inconsistent procedures. These can impose significant burdens on business and, to the extent that they can increase the costs or decrease the rewards of doing business internationally, can result in significant consumer harm.

41. The risks and costs of duplicative and inconsistent procedures have long been most obvious in the field of merger control. With most national regimes having rules that govern mergers, those firms that wish to expand across borders can find themselves facing many different merger regimes. While some are voluntary (in that they do not require firms to notify potential mergers, as is the case in the UK) and others have notification regimes that clearly require a sufficient impact on domestic competitive conditions before requiring notification, some can take a more expansive view and require notification of mergers that do not have any real nexus to the jurisdiction. This can significantly increase the costs for firms. Budzinski cites the Alcan/Pechiney/APA Algroup merger as illustrative of the problem of duplicative merger procedures.[34] That merger had to be notified in more than 40 jurisdictions, of which 16 entered into a formal review procedure. All documents had to be translated into eight different languages. Payment of more than US$100,000 in filing fees alone was necessary and the

[33] See speech by David Lewis, Chairperson of the Competition Tribunal of South Africa on Competition and Development, given at the 6th Annual ICN Conference, Moscow, 2007.

[34] See Oliver Budzinski, *International Competition Policy between Centralism and Decentralism: A Systematic Analysis of the Benefits and Risks of International Antitrust,* supra.

services of 35 law firms were required. Altogether, the direct costs amounted to more than US$10 million.

42. Other significant costs associated with duplicative review of competition cases (whether in relation to merger control or otherwise) include those arising from explaining the same factual scenarios to multiple agencies, preparing the data to the specifications required by each reviewing agency, hiring local counsel to review the submissions, providing duplicative economic and other analyses, attending multiple hearings, providing multiple copies of documents, reports and presentations, and translation and authentication costs.

43. To the extent that these increased costs make it more likely that firms will be disincentivised from attempting to enter new markets or to expand their operations beyond their traditional territories, consumers will lose the benefits of the potential competition that they could offer. More indirectly, to the extent that agency resources are taken up with unnecessarily duplicative reviews and, in some cases, enforcement action, resources may be diverted away from other, potentially more harmful conduct. While this cannot readily be quantified, there is no reason to assume that significant negative effects on consumer welfare would not result.

44. In recent times, the risk of duplicative or inconsistent procedures has reduced as a result of increased information-sharing among jurisdictions and efforts to identify and promote best practices. The work of the ICN in relation to merger notifications and procedures is a prime example of this. Nonetheless, continuing efforts to reduce the burdens placed on business through multiple reviews will be needed.

III. The role of international networks

45. Given the serious problems that can arise from the patchwork of national competition regimes in a world of increasingly globalised markets and interdependent economies, what potential solutions are available? Traditional methods of international cooperation based around comity, while useful, appear limited in what they can achieve. One alternative is to explore the possibility of creating some form of supra-national competition agency or court to enforce on an international basis. Another is to rely on one or more of the major jurisdictions to tackle international private and public anti-competitive behaviour. A third option is to build on the work that competition networks have already done and to further develop those networks. For the reasons

explored below, the latter may be the best option going forward, this paper explores the role of the ICN in that context.

Traditional methods of international cooperation

46. In recent decades, there has been an increasing effort to cooperate more in the field of international competition enforcement. This has led to a move from the more traditional (and essentially unilateral) extra-territorial application of a country's competition rules to foreign firms to a more cooperative approach based on the coordination of competition enforcement through the recognition of the principles of negative and positive comity.[35]

47. As far back as 1967, the OECD adopted a 'Recommendation' that its member countries cooperate with each other. The Recommendation has been updated and modified over the years. It provides for timely notification of action that may affect another country's important interests, the sharing of information and where appropriate parallel investigations and the consideration of whether to request another country to take enforcement action for conduct occurring in that other country. This is a clear recognition of the role that comity principles can play in enabling countries to cooperate on competition enforcement.

48. Most frequently, enforcement activities based on comity principles have been coordinated through bilateral cooperation agreements and mutual legal assistance agreements.[36] Such agreements tend to provide for similar matters to the OECD Recommendation, namely notification, consultation and where feasible in practical and legal terms, cooperation in enforcement. Many agreements, such as the EC-US 1991 Competition Cooperation Agreement and 1998 Positive Comity Agreement, specifically include positive comity obligations.

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[35] According to the OECD, negative comity is the principle that a country should notify other countries when its enforcement proceedings may affect their important interests and give full and sympathetic consideration to ways of fulfilling its enforcement need without harming those interests, whereas positive comity is a principle of voluntary cooperation involving a request from one country that another country initiate or expand enforcement activities to remedy anti-competitive conduct happening in its territory that substantially and adversely affects the first country's interests. See OECD, CLP Report on Positive Comity, Note by the Secretariat 6, 17-18 (14 June 1999). Positive comity is more dynamic than negative comity, as it entails an active agreement to undertake action at the request of another state.

[36] See Parisi *Enforcement Cooperation among antitrust authorities,* IBC UK conference on EC competition law, 19 May 1999. Mutual legal assistance agreements, however, are somewhat limited in what they can achieve as they relate to criminal investigations rather than civil investigations. International legal instruments, such as extradition treaties, have also played a role in the coordination of antitrust enforcement activities.

49. However, there are inherent disadvantages with discretionary bilateral cooperation on the basis of comity principles.[37]

- First, such a system operates on a case by case basis. It cannot therefore be relied on as a matter of course or assumed to be available when new situations arise. This lack of guaranteed reliability may cause national agencies to be unwilling to make use of potential opportunities for such cooperation.

- Second, comity principles alone may not be sufficient to ground effective cooperation. For example, such principles may not be able to resolve a conflict of jurisdiction where both countries believe that they have a predominant interest in a matter.[38] The situations in which comity principles can be relied on may therefore, in practice, be more limited than would necessarily be assumed.

- Third, successful cooperation on the basis of comity principles would require a jurisdiction to commit resources and effort to the requested action. Jurisdictions may face conflicting priorities in terms of issues of domestic importance, which would detract from their ability or willingness to do this, and may have access to fewer resources generally.

- Finally, comity may be less successful if the agencies involved are of unequal size and/or power. Agencies in such situations are less likely to interact frequently or to have a recurring need to rely on one another, in contrast, say, to the similarly-placed US and EU agencies who interact and assist one another regularly. In the absence of these factors, the larger agencies may have lower incentives to respond to the needs of the smaller authorities.

50. Some of the limitations of traditional international cooperation can be seen from the fact that cooperation has been remarkably more

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[37] For example, Eleanor Fox states 'comity sounds good and does little work ... The comity concept is horizontal – nation-to-nation. The more fitting paradigm for the new century is overarching, global and spiral.', in, *Antitrust without borders: from roots to codes to networks* (forthcoming).

[38] See, for example, Deborah Platt Majoras *Convergence, conflict and comity: the search for coherence in international competition policy*, 2007 Fordham Comp. L. Inst. 1 (B. Hawk ed. 2008). Also, as Eleanor Fox has noted, 'through all the years from the famous Timberlane case to the present, not one US court has ever found that the interest of another nation outweighed the interest of the United States in cases in which the United States had an antitrust interest at stake'. See Eleanor Fox, *Antitrust without borders: from roots to codes to networks* (forthcoming).

successful in relation to mergers[39] and cartels[40] than in relation to unilateral conduct.[41]

51. There may be many reasons why cooperation in unilateral conduct cases is more difficult. For agencies, this area of competition law is more likely to be influenced by non-consumer welfare objectives than the areas of cartels and mergers. Unilateral conduct addresses behaviour on the part of firms that are already in positions of economic power and use that position to the detriment of other, smaller firms trying to compete (through exclusionary conduct) or directly to the detriment of consumers (through exploitative conduct). Concerns regarding the dangers of 'big business' or objectives such as protecting SMEs or ensuring fairness are more likely to be raised. The differences in unilateral conduct objectives and practices highlighted by the work of the ICN working group on unilateral conduct bear this out. Additionally, unilateral conduct enforcement can be subject to significant lobbying by big firms, which can increase the likelihood of non-consumer welfare considerations playing a role. Finally, the potential for the politicisation of unilateral conduct enforcement cannot be ruled out where important national industries or national champions are concerned.

52. These factors significantly undermine the efficacy of traditional means of international cooperation.

Supra-national competition law and agency

53. Where bilateral cooperation between states who have predominantly domestic-centred enforcement regimes is not sufficient to address the potential harms arising from private anti-competitive behaviour and public restrictions or from the differences and inconsistencies arising out of the patchwork of national agencies, one potential solution may

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[39] In the six years following *GE/Honeywell*, for example, the US Federal Trade Commission consulted with the European Commission in over 50 merger decisions, resulting in the coordination of compatible enforcement remedies in 17 cases. See Deborah Platt Majoras, *remarks before the US Chamber of Commerce on the launch of its Global Regulatory Cooperation Project*, 17 July 2007.

[40] The recent Marine Hose cartel offers a prime example of this cooperation. The cartel took place across jurisdictions and involved all major suppliers of marine hose. Parallel and coordinated investigations took place between the UK, the European Commission, the US Department of Justice and other competition agencies (such as the Japanese Fair Trade Commission). The US arrested eight individuals, including three UK citizens. In relation to the UK individuals, the US and UK worked closely and the US plea agreement allowed the individuals to serve their sentence in the UK, where the OFT brought prosecution under the UK's criminal cartel offence.

[41] In only one case, *Sabre/Amadeus/Air France*, has a positive comity request under the US/EU bilateral agreement been used, when the US referred the case to the Commission for investigation[41]. In other high profile cases, the EU and US authorities have taken markedly different approaches to allegations of harm resulting from unilateral conduct, as for example occurred in the *British Airways/Virgin* case.

seem to be to create a supra-national competition body. However, there are a number of reasons why this would not be a realistic or feasible option.

54. As a general matter of political/international relations theory, there are a number of obstacles to addressing international concerns through the mechanism of a supra-national body. Although more global or regional governance may be needed to address global concerns, the centralisation of decision-making power and coercive authority in such a supra-national body would give rise to fears of unduly curtailed liberty and unaccountability of decision-makers. This has been described as the 'globalisation paradox'.[42]

55. On a more prosaic level, supra-national organisations can be cumbersome and liable to be bogged down by procedural rules. Fundamental concerns over sovereignty and national interests are endemic in such organisations and can have a severely limiting impact on their potential effectiveness.[43]

56. There is no reason to doubt that the same considerations would apply in the specific sphere of competition policy and enforcement. Indeed, previous attempts to establish an international competition law through a supra-national body have been unsuccessful.

57. In 1995, the EC developed a proposal for a world competition law within the framework of the WTO.[44] Under this proposal, there would be a world competition framework, starting with cooperation between states and multilateralisation of previous bilateral cooperation agreement and developing into a fully substantive competition law common to member systems, with a dispute resolution process through the WTO.[45] The proposal received a mixed reaction, with some states, notably the US, being highly sceptical and others favouring a more limited approach. A revised proposal, limiting the substantive scope to

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[42] See Slaughter *A New World Order* [2004]. On accountability more generally, see Slaughter and Hale, *Transgovernmental networks and multilevel governance*, in Michael Zurn, Ed., '*The Handbook of Multilevel Governance* Edward Elgar Publishing, (forthcoming).

[43] Tarullo has noted for example in relation to the WTO that it *'is not designed to help governments act more effectively to address a shared regulatory problem … [Trade ministries'] relationships with counterpart ministries of other WTO members assume that they have divergent interests – whether as negotiators seeking concessions on behalf of their exporters or as litigation opponents in a dispute settlement'.* See Tarullo, *Norms and Institutions in Global Competition Policy*, 94 A.J.I.L. 478 [2000]

[44] Group of Experts Report ('Van Miert Report') (1995). See European Commission XXVI Report on Competition Policy 1996.

[45] See Eleanor Fox, *Linked-In: Antitrust and The Virtues of a Virtual Network,* International Lawyer, (forthcoming 2009).

an anti-cartel law and all but eliminating dispute resolution was proposed. However, although it was put on the agenda for the 2001 Doha round of WTO negotiations, the proposal was dropped when the round faltered.

58. In addition to 'political' problems, the fact that the WTO is a trade-oriented body, rather than one concerned with competition raises further issues, for example: difficulties with open and free discussions in a context where WTO representatives would be committing their national governments to a course of action, the inherent bargaining/trade-off nature of WTO negotiations, and difficulties in enforcement against private anti-competitive behaviour arising from the fact that those subject to the WTO's jurisdiction are its state members, not private actors.[46]

59. As such, a supra-national body to enforce competition law does not appear to be a feasible option in the foreseeable future.

Reliance on 'leading jurisdictions'

60. An alternative to a supra-national competition body could be to look to the 'major' jurisdictions to catch instances of private anti-competitive behaviour. For example, in cartel cases, the very high penalties available in major jurisdictions (in particular the custodial sentences that the US and UK can impose on cartel participants) could be argued to provide sufficient international deterrence. It may not, therefore, be necessary for action to be taken by agencies in all of the smaller jurisdictions in which a cartel also operated.

61. However, while this is a cogent and attractive point, there would be significant drawbacks to relying on action by one or more of the major jurisdictions alone:

- First, not every major jurisdiction has extra-territorial enforcement powers.

- Second, for smaller jurisdictions, relying on one or more foreign jurisdictions to remedy international behaviour that has a domestic effect might be politically unpalatable. Sovereignty and subsidiarity concerns would be significant, as would accountability concerns and

[46] For a discussion of the WTO and its limitations in this area , see Philip Marsden, *Tune in to the International Competition Network - not the WTO - for practical advances in International Anti-trust*, *In Competition*, Brussels (December 2001).

the same type of democratic deficit identified above in relation to a supra-national body.

- Third, it cannot be assumed that the major jurisdictions would have the necessary incentive or resources to act in relation to international behaviour (such as an international cartel) that had only limited impact in their jurisdictions because it had taken place primarily in smaller, more developing jurisdictions.

62. As a result, while the international deterrence effect of action by the major jurisdictions should not be underestimated, reliance on such action should not be the default way to address international anti-competitive behaviour. In addition, action by one (or even more than one) of the major jurisdictions would be of little benefit in attempting to address the remaining problems of public restrictions, differing standards and inconsistent or duplicative and inconsistent procedures.

Competition networks

63. Competition networks offer another alternative. Again, general political theory provides an insight into the workings and benefits of networks, which apply with some force to the competition sphere.

64. Broadly speaking, trans-governmental networks are informal institutions linking regulators, legislators, judges or other actors across national boundaries to carry out various aspects of global governance. They allow direct interaction between officials without much formal supervision by states and feature 'loosely structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation'[47].

65. Vertical networks are comprised of supranational officials working with domestic counterparts, horizontal networks are comprised of actors at the same level. While the latter are more common, the former do exist and can be extremely effective. The EU is a prime example of a successful network with vertical characteristics, whereby EU officials work closely with their domestic counterparts in the Member States to ensure the effective implementation of EU policies.

[47] See Slaughter and Hale *Transgovernmental networks and multilevel governance*, supra, referencing Raustiala *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, Virginia Journal of International Law, Vol. 43, 2002.

The benefits of competition networks

66. Competition networks offer four key benefits in addressing the problems that arise with the current competition enforcement landscape.[48]

67. First, networks offer a forum for experimentation, sharing and learning. They communicate information and also generate new meanings and interpretations of the information transmitted, thereby providing a context for learning by doing. Importantly, they do this both formally and informally.[49] This is vital to ensuring that agencies have the opportunities and support necessary to develop their effectiveness. Increased agency effectiveness is essential in order to promote appropriate and efficient competition enforcement, both domestic and international. International learning and peer pressure are an important stimulants to improved agency performance.[50]

68. A key benefit of competition networks (as with networks generally) where experience and best practice are shared, is the ability to engender 'socialisation' and thereby enhance trust and coordination between countries. This can be seen as a natural consequence of having people with common goals and interests working closely together and sharing ideas and practice. In the competition area, where international coordination of enforcement priorities and efforts is vital to address the opportunities for international anti-competitive behaviour, the value of such 'socialisation' is clear. However, it should be acknowledged that this is somewhat offset by the inability of competition networks generally to 'bind' their members.[51]

69. Second, networks provide a platform for mutual influence and support. This influence stems, not from any formal direct influence, but through persuasion and trust. Raustiala notes that this influence can lead to significant policy coordination, primarily (though not always) through

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[48] See Slaughter and Hale, supra, for a discussion of the benefits of networks generally. These benefits apply equally to competition networks.

[49] See David Lewis' Introductory Address to the ICN 8th Annual Conference, Zurich, Switzerland, 3 – 5 June 2009.

[50] See FTC 100 report, available at www.ftc.gov/ftc/workshops/ftc100/index.shtm.

[51] An exception to this is the European mixed vertical/horizontal competition network, as discussed below.

more mature regimes sharing their experience and knowledge with younger regimes.[52]

70. Over the last few years, both the EU and the US (and, to a lesser extent, countries such as the UK) have provided significant assistance to other competition regimes through discussion, training and ongoing relationships. For example, the US authorities (both FTC and DOJ) send resident advisors to foreign postings to assist newer agencies and have a mechanism in place for foreign colleagues to work in US agencies for a period of time. These opportunities for mutual learning and influence can be invaluable.[53]

71. In particular, in attempting to address the potential harms caused by domestically-centred enforcement of competition laws, support and trust are key. They are also key to efforts to address differences in substantive standards and to remove duplication of procedures. For example, established agencies including the EU and US agencies provided significant input to the drafters of the Chinese Anti-Monopoly Law.

72. Third, networks can provide very efficient means to coordinate action. While this may be less directly relevant to the ICN than to other networks, the ICN may, by building trust and openness among its members, help facilitate coordinated action among sub-groups of its members.

73. Fourth, networks offer a normatively attractive form of global governance in comparison to supra-national bodies because they are composed of national officials who are subject to the same accountability mechanisms that control national governments. In other words, agencies participating in such a network are ultimately domestically accountable, which avoids the democratic deficit problem identified above.[54] Any fundamental changes in the domestic approach must come through domestic legislative action. While this means, for example, that changes to national procedures on mergers to avoid duplication and inconsistency may happen slowly, they happen in a

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[52] Often, exchange and influence can take place between two advanced regimes, as for example happened when the US agencies gave support and assistance to their New Zealand counterparts when the latter was reformulating its competition law in the late 1990s.

[53] See Majoras, *remarks before the US Chamber of Commerce on the launch of its Global Regulatory Cooperation Project*, [17 July 2007]

[54] That is not to say that networks cannot suffer legitimacy and accountability problems of their own. As Slaughter and Hale note, these may arise because networks can take power out of the hands of elected officials and into the hands of unelected technocrats.

domestically legitimate way that also ensures the necessary 'buy-in' from business and consumers.

The EU model

74. There are a number of competition networks already in place. A unique example is the EU's mixed vertical/horizontal competition network, which comprises the European Commission and a network of Member State competition agencies (the European Competition Network, or ECN). Its design and operation are such that it can allow the European Commission and national agencies to effectively address the problems that arise with multiple national competition regimes:

- As regards private anti-competitive behaviour, the European Commission has a central role in the enforcement of competition law in cases with a Community dimension, so that cases with an effect (actual or potential) across Member States can be dealt with even if the effects in individual Member States may not be very substantial.[55] Information is shared through the European Competition Network of Member State agencies. This system provides an effective means of detecting, investigating and enforcing against international anti-competitive behaviour through an agency that has the incentive, ability and responsibility to tackle cases of cross-border harm.

- As regards public restrictions, the Commission has the power to tackle such measures through the mechanisms of its State Aid and Article 86 powers. The supremacy of EU law and the EU institutional system gives the Commission the moral and legal authority to deal with Member State governments on these issues.

- The EU addresses the risk of different substantive standards through the supremacy of EU law. The European Commission sets regulations, takes decisions and issues guidance to Member States in applying competition law. The case law of the European courts is binding. Thus, the EU has an overarching body of law and guidance to which national regimes defer.

- Finally, the EU's 'one stop shop' system for mergers and the procedural mechanisms set down in Regulation 1/2003 address the

[55] See the principles on case allocation set out in paragraphs 5 to 28 of the Commission Notice on Co-operation within the network of competition authorities, [2004] OJ C101/3..

possibilities for burdens on business resulting from duplication of review and procedural differences.

75. However, the reasons for the success of the EU network are inextricably linked the vertical aspects of its nature:

- First, the fact that it's national members have granted legal supremacy to the EU provides a clear means of addressing substantive conflicts.

- Second, Regulation 1/2003 gives the Commission the ability to initiate proceedings and thereby relieve Member States of their competence to apply the EC competition rules in a case.[56] The threat of taking such action provides a powerful mechanism for the Commission to push Member States towards a common or desired approach.

- Third, the one-stop-shop merger arrangements and Regulation 1/2003 procedures provide a mechanism to quickly and easily determine which body/agency is best placed to act.

76. In addition, the technological means exist for promoting effective cooperation through a specifically designed database that the ECN agencies can access. This provides the Member State agencies with information on cases being undertaken by other members of the ECN and allows for the sharing of encrypted information. The security that this provides is key for allowing complete trust within the network.

77. While elements of the European system may well offer what could be considered as an 'ideal' solution in terms of addressing the problems of national enforcement in an international context, replicating this type of system, with its supra-national elements, across other jurisdictions is not a realistic option, for the reasons outlined above.

The ICN and OECD

78. The main international horizontal competition networks are the OECD (which has been running since the 1960s) and the ICN (which was set up in 2001).[57]

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[56] Article 11(6) of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[57] There are other regional networks.

79. Both the OECD and the ICN offer advantages associated with networks generally in terms of information sharing and mutual influence because of the collaborative ways in which they work. The OECD's competition work is carried out by a central committee and working parties. The OECD's focus is on information sharing, through roundtables, policy recommendations and best practices. The ICN is a virtual network with project-based activities that focus principally on the practical aspects of competition law and policy. Its work is guided by a steering group and carried out/supported through various working groups.

80. Whilst both networks offer benefits, given the nature of the issues discussed in this paper, we focus on the potential role of the ICN to address the problems arising out of increased globalisation and the patchwork of national competition enforcement regimes.

81. The ICN has a number of attractive features:

- First, although the ICN is a relatively young network, it has a very wide membership (107 agencies from 96 jurisdictions worldwide). That membership is comprised of competition agencies that are directly responsible for the implementation and enforcement of their national competition regimes. This gives an immediacy and solidity to the work done by the ICN in terms of potential for visible results.

- Second, the ICN benefits from the substantial contribution of non-governmental advisors including members of the legal, business, consumer and academic communities (though the involvement of the latter two groups needs to be boosted in the future). Their work, as well as being a valuable resource for the ICN, has assisted greatly in giving the ICN a broad support-base and increasing its legitimacy in the eyes of stakeholders. This is demonstrated not only by the active participation of non-governmental advisors in the working groups of the ICN, but also in the high levels of attendance at annual meetings. Even as early as 2006, the ICN was hailed by non-governmental advisors as 'the pre-eminent venue for process and policy convergence dialogue'.[58]

- Third, the ICN is 'virtual' network, so that its work is carried on by its member organisations without the need for a separate 'real' organisation.

[58] Rowley and Wakil, *The ICN five years on*, Global Competition Review [2006].

82. In the areas of mergers, cartels, unilateral conduct, and advocacy, the ICN has achieved substantial, concrete results that strengthen competition law enforcement and policy in the global marketplace. Of course, some of these arise indirectly from discussion of these same issues in other fora, especially the OECD. However, the achievements of the ICN to date demonstrate that it can contribute significantly to addressing the harms that can be caused by private anti-competitive behaviour, public restrictions, different substantive standards and duplicative and inconsistent procedures. Thus:

- In relation to the coordination of action against private anti-competitive behaviour, the ICN's broad membership and its promotion of effective and practical working relationships between members is particularly beneficial. For example, the ICN provides mechanisms for members to discuss with one another via teleconferences, workshops, and conferences. More recently, the ICN piloted a secure on-line discussion forum for experience-sharing among member agencies. Also planned for the coming years is the compilation of staff level contact lists by substantive area that will be distributed among members.

- As regards addressing public restrictions, the ICN has dedicated projects on competition advocacy, including producing an 'advocacy toolkit' that members can use as a guide for conducting their advocacy activities. Members have held experience-sharing calls where they discuss a variety of topics, such as 'advocacy in an economic downturn'.

- In relation to different substantive standards, the ICN's experience to date suggests a high level of competence in developing international best practice. In the merger area, for example, the ICN's Recommended Practices for Merger Notification and Review Procedures has been highly influential among national agencies and international bodies. Similarly, the ICN provides a forum to discuss differences, a 'marketplace for ideas', with reports on the differences in a variety of topics, for example, predatory pricing.

- Finally, as regards duplicative and inconsistent procedures, the ICN has played an important role in reducing the costs and burdens of multijurisdictional merger review, by creating and promoting the Recommended Practices on mergers, as well as through workshops and reports. These Recommended Practices are widely recognised as the international norm. In the area of anti-cartel enforcement work,

the ICN has created an enforcement manual that greatly facilitates international cooperation.

83. In terms of a practical, effective and feasible mechanism to address the problems arising from the current system of national competition enforcement in today's increasingly globalised world, the ICN therefore offers an attractive way forward. In turn, this begs the question of what, if anything, ICN should be doing differently.

iv. A way forward for the ICN

84. To date, the work of the ICN has reflected its original focus and operational parameters of addressing practical competition enforcement and common competition policy concerns.

85. In its early years, ICN projects were chosen in part for their essentially non-controversial and practical nature and were designed to have a broad appeal and be capable of practical outcomes.[59] Hence the initial focus on merger notification, investigative techniques and analysis, and competition advocacy. This was necessary in order to build the network, to achieve legitimacy and 'buy-in' from stakeholders and to establish the ICN's reputation as a useful and efficient competition network.

86. The ICN has been remarkably effective in its work to date. The best practices, reports and templates that the ICN working groups have produced have fostered greater shared understanding and approaches in relation to their subject areas, particularly mergers and cartels. Its work on mergers is a clear example of this. Even the ICN's recent foray into the 'lightening rod' subject of unilateral conduct has promoted an understanding across regimes of different viewpoints and at least made an initial push in the direction of substantive convergence. Perhaps less visible, though as important, have been the benefits achieved by the ICN in supporting competition advocacy and laying important foundations to support informal agency coordination and work on agency effectiveness.

87. The ICN's work has, however, shown that there are some limitations to substantive and procedural convergence. Pure convergence may be elusive not least because, as noted above in section II, domestic economic histories, development and priorities have an impact on the

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[59] See Eleanor Fox, *Linked- In: Antitrust and The Virtues of a Virtual Network,* International Lawyer, (forthcoming 2009).

competition regime of a given country. At its simplest, what is right for one country with a history of open and contestable markets may not be right for a country emerging from a closed economy built on national champions and trade restrictions and having fewer resources. Developing countries may need, at least for some time, to have the goal of inclusive and sustainable development, which will impact on their competition regimes.

88. Where convergence is not possible, identifying the nature and sources of divergence and understanding and respecting the divergent underlying rationale appears to be an appropriately pluralist objective for an international network. Such 'informed divergence' would offer business and consumers greater clarity and transparency than focussing solely on a convergence that is not possible.

89. Informed divergence is particularly important in the context of moving from a bi-polar to a multi-polar world. In particular, the emergence and development the economies of China, other Asian countries, South America and Africa[60] will see the emergence of new approaches to competition law and policy and will increase the need to consider the economic and other factors giving rise to those approaches.[61]

90. Recognising the importance of and interplay between convergence and informed divergence would enable the ICN to play a lead role in facilitating debate, discussion and learning about different approaches and how agencies can best work together. The ICN, to this end, will need to continue to encourage dialogue between agencies with the aim of helping members to better understand each others norms, priorities and enforcement objectives. In addition, and crucially, whilst recognising the necessity for 'informed divergence' and the potential need for 'bridging rules' while economies develop, it should find mechanisms to help ensure that Members' interventions are based on reasonable and reasoned economic principles.

91. Past experience suggests that the ICN will be successful in meeting this challenge: it has, in its work to date, shown itself to be willing not only to engage actively with newer agencies, but to encourage them to take key roles within working groups and to facilitate their participation in ongoing debates. This provides a solid foundation that can be built upon

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[60] For a discussion of the growth of countries like China, India, Brazil and Russia, see Fareed Zakaria *The Post American World* [2009].

[61] For example, Hewitt Pate has noted that 'fundamental aspects of Chinese culture and government [...] will make Chinese anti-trust different from Western varieties', *What I heard in the great hall of the people – realistic expectations of Chinese antitrust*, Antitrust Law Journal Vol. 75 Issue 1 (2008).

going forward, recognising that 'informed divergence' will be essential in today's increasingly globalised markets.

Medium to long term objectives for the ICN

92. The question to ask, in light of the successes of the ICN to date, and the challenges faced by a system of national competition enforcement in an increasingly globalised world, is whether the ICN needs to focus on more explicitly ambitious medium to long-term objectives. In contrast with the approach to date, which has, quite rightly, focused on objectives achievable in a short time frame, this would require setting out a vision for what the ICN can achieve over a 10 to 20 year period. For the ICN, such a vision might best be described as working to meet the challenges for **all** market participants, including businesses, governments and consumers, posed by competition in international markets and among interdependent economies, in other words, being an effective network to support national agencies in promoting and protecting consumer welfare in a globalised world.

93. To do so so, ICN will need to ensure the right balance between all four types of harm outlined above, both in terms of objectives and visible results over time. This in turn will require a broader debate about what the ICN should strive to achieve and what is realistic, and what level of long term investment is appropriate. This might involve putting greater explicit focus than in the past on tackling (i) private anti-competitive behaviour and (ii) public restrictions, not least because these may require a longer time frame to deliver results.

94. The work the ICN has done to date would clearly be of benefit if the ICN were to rebalance its objectives to focus on these two areas. Its visible achievements in relation to substantive and procedural convergence means that it has a solid foundation on which to build in order to address the harms from private anti-competitive behaviour and public restrictions. The increasing consensus around the goal of consumer welfare should provide a baseline from which the ICN can promote these objectives.

95. The ICN's efforts to date in relation to competition advocacy will also be of considerable benefit. Advocacy, in particular as regards the need to address public restrictions, will be key in the coming decades. The ICN, having established its legitimacy and usefulness, can build on that foundation to inform debate domestically and to seek to influence

national policies. This is particularly vital in attempting to promote an understanding that national governments and national competition regimes need to recognise the importance of international welfare even where domestic interests may not necessarily be affected by or aligned with international interests.

96. Finally, to create the environment for these objectives to be achievable, the ICN can build on the already strong foundations it has laid of dialogue and sharing in order to foster an environment where trust and relationships between agencies can develop and deepen further. These relationships and the opportunities for 'socialisation' that they provide will be key to ensuring effective cooperation going forward.

97. Nonetheless, despite these strong foundations, it should by no means be assumed that all of these objectives will achievable within a short period of time or with ease. Addressing the incentives for public restrictions may, in particular, be difficult for the ICN to achieve even in the long run, given the importance of other state policies and interests involved.[62] Nonetheless, the ICN's status as a 'competition only' network should not prevent it from discussing how competition interacts with other policy objectives, particularly when these provide the rationale for monopolies or cartels that result from state action. Indeed, it is important that the ICN attempts to address the issue and sets a tone for enforcement efforts and advocacy that recognises and publicises the dangers of such action.

98. We must also recognise that achieving a stronger international approach towards competition advocacy against public restrictions may require incremental changes to national legislation across many jurisdictions. While this may appear to be an ambitious long-term goal, this does not necessarily mean that progress cannot be made: indeed trying to reduce unnecessary burdens that arise from inconsistent merger notification systems raises similar obstacles. Both require promoting a new approach through dialogue and sharing information and experience that national agencies can bring as a useful addition to domestic debate.

99. As part of any rebalancing of its priorities, the ICN must also focus on building up agency effectiveness – without an effective regime domestically, there is limited ability to assist in international efforts at enforcement. The ICN therefore needs to target agency effectiveness as

[62] As Eleanor Fox has noted in *Antitrust without borders: from roots to codes to networks* (forthcoming), 'antitrust is ... deeply interrelated with trade, foreign investment ... and the wide variety of proposed and actual industrial policies'.

a key input to improved competition policy implementation and coordination across developing and developed countries.

Conclusion

100. The current system of national enforcement in an increasingly globalised world can cause significant harm to global welfare. This harm can result from private anti-competitive behaviour, public restrictions, different substantive standards and duplicative and inconsistent procedures. It is vital that competition agencies act to address these problems with vision and determination.

101. Developing agency effectiveness and influence will be key. In the coming years, national agencies will need to engage in discussion and innovative thinking in terms of their ability to cooperate, to take cases where foreign consumer-welfare harm arises, to engage in advocacy and to develop further their ability to influence national governments and legislative bodies.

102. Competition networks offer the best means of promoting this type of discussion and thinking and in providing agencies with the necessary support and tools that they will require to move forwards. With its wide membership, recognised role in international competition policy, and track-record of successful action in the areas on which it has focused to date, the ICN is particularly well placed to promote and support international efforts to address the problems resulting from the current patchwork of national enforcement regimes.

103. The ICN should consider looking now at its objectives and long-term vision, which could be considered as working to meet the challenges for *all* market participants, including businesses, governments and consumers, posed by competition in international markets and among interdependent economies. The ICN should consider whether, in order to meet these challenges, it ought to focus on the problems of private anti-competitive behaviour and public restrictions. If so, the ICN will need to work to promote agency effectiveness, to support efforts at competition advocacy and to foster an environment of trust and cooperation between agencies in order to stand the best chance of addressing these issues.