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Internationalization Of Merger Laws

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Abstract

The abstract explores the thrust behind the internationalization of merger laws, including globalization, market integration, and the need for consistent regulatory frameworks to manage anti-competitive concerns and economic nationalism. The paper also discusses the benefits of international cooperation and the creation of standardized guidelines to foster a more predictable and transparent merger review process. Ultimately, the internationalization of merger laws aims to strike a balance between facilitating cross-border investment and safeguarding competitive markets, contributing to a more integrated global economy.

Introduction

Over time, factors like globalization and the existence and expanse of multinational enterprises, have significantly changed the world economic landscape. These multinationals have expanded their influence by entering into business transactions like mergers and acquisitions across the globe, competition now exists on an international level.[1] These merger transactions are generally of three types- equal mergers, megamergers, and killer mergers. Despite these variations, their effect on competition remains somewhat similar. They attract the attention of the regulatory authorities because they come with suspicion of future anticompetitive behavior such as dominant position or price control which is a consequence of having a dominant position in the market. Although, when seen through a purely economic lens it can be said that these mergers especially international megamergers create a procompetitive environment not only in the domestic market and trade but also has a positive competitive effect on markers throughout the world because of their expanse and reach in different markets across the globe.[2] But when looked through the competition law or policy lens, these megamergers become a concern for policy makers and regulatory bodies. It is important to keep an eye on these transactions to ensure free trade and competition in the market especially after economic liberalization and deregulation of trade has already happened. In the ever-evolving global business arena, economic integration coexists with diverse political, cultural, and legal landscapes among nations. This dichotomy persists despite the seamless nature of today's interconnected markets, underlining the intrinsic ties between globalization and the sovereignty of individual nation-states. One such arena where this interplay is notably pronounced is in

[1] David J. Gerber, "Forward: Antitrust and the Challenge of Internationalization" (1988) 64 Chicago-Kent Law Review 689
[2] Oliver Budzinski, "Toward an International Governance of Transborder Mergers - Competition Networks and Institutions between Centralism and Decentralism" (2003) 36 New York University Journal of International Law and Politics

competition law, where divergent national objectives shape unique regulatory frameworks.[3] The surge in cross-border business activities, exemplified by the exponential growth of global mergers and international cartels, reflects the rapid transformation of the global economic terrain. From the relatively modest $111 billion in cross-border M&A deals in 1990 to the staggering $780 billion in 2005-07 (pre-crisis average), and currently resting at $349 billion, these figures mirror the dynamic shifts in the global economic landscape.[4] Yet Competition/Anti trust law is national whereas markets has transcended that boundary and have become international.[5] It is rooted in microeconomic theory, intervenes in markets to rectify inefficiencies and market failures.[6] However, the extent of such intervention remains a subject of intense debate, illustrated by conflicting ideologies from the 'Harvard School'[7] to the 'Chicago School.'[8]

Central to this discourse is the regulation of transnational mergers i.e. megamergers, a domain entangled in a web of different national and regional regulatory authorities. This fragmentation raises a pivotal question: should this current patchwork of disparate regulations be supplanted by unified international merger rules? The intricacies and complications arising from multi-jurisdictional notifications for transnational mergers does underscore the imperative for streamlined and harmonized international merger guidelines but is that practically possible?

Hence, in part 1 of this essay we will discuss brief historical background and why the laws relating to merger laws should not be internationalized, this will be highlighted by the help of a few case studies in somewhat equal scale of economies setting i.e. EU and the US. The author believes that the difference in their regulatory approach is enough to highlight the divide that hinders the internationalization of merger laws and rightfully so even for these developed economies, hence there is no need (yet) to further delve into an analysis of developing or underdeveloped economies as well, that is for the future. Next, in part 3 the essay will discuss the alternative approach to radical internalization i.e. harmonization of merger laws internationally, and the already existing mechanism in play that facilitates that. Finally in the 4th the essay will reach its conclusion.

1. Historical Background and Context

Efforts towards an international competition code began with the WTO's formation in 1994. Prompted by the EU, a 1995 report pushed for enhanced cooperation, forming the WGTCP. By 2001, the Doha meeting emphasized key principles like transparency, non-discrimination, and supporting competition institutions in developing countries. However, at Cancun in 2003, consensus on negotiation modalities couldn't be reached, leading the working group to become inactive in 2004. Various factors contributed to this failure, including US reluctance to endorse the EU's proposal, opposition from influential developing countries, and challenges arising from varying economic backgrounds. Developing nations stressed the importance of tailored competition policies aligned with their developmental stages rather than simply adopting policies from developed nations..[9]

Internationalizing Merger Laws – The Divergences and Challenges

Merger regulation is designed to ensure that a transaction between the merging entities is not anticompetitive i.e. hindering effective competition in the market, that could harm the consumers and the market both. Here the question arises- What will be constituted harmful and thus anticompetitive? This is where most regulatory bodies differ in their decisions and approach but generally such harm would include price increase,

[3] For example, the Competition Act, 2002 (INDIA) in its preamble states "An Act to provide, keeping in view of the economic development of the country, for establishment of a Commission to…."
[4] UNCTAD, World Investment Report 2014, Overview, p. 10
[5] Eleanor M. Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways" (2000) 75 New York University Law Review 1781
[6] Ibid,
[7] Harvard Law School prefers a more aggressive and stringent antitrust policy as opposed to the Chicago School.
[8] Chicago School philosophy gains its name from the work by the scholars of this university. The basic idea of this school is that markets should be left on their own and there should not be any intervention as such by the state, and interference in the operation of free markets does more harm than good.
[9] Eleanor M. Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways" (2000) 75 New York University Law Review 1781

deterioration of product quality, barrier to entry etc. This assessment of harm is typically undertaken for a given and well defined market or set of markets.[10] The markets have thus internationalized, having direct impact on competition laws.[11]

Earlier it was believed that it is impossible for a one or two firms via merger to obtain a dominant position (long term) in the world markets but since then times have changed, evolution of technology has brought the world closer than ever before, this statement would not stand if tomorrow two of the gatekeepers like Meta and Google were to merge. This situation even though it's hypothetical, instantly raises competition concerns for almost all of the world's competition agencies due to the presence and foothold of these giants in almost every jurisdiction across the world. The situation demands cohesive merger control regulations throughout the world featuring solutions to issues like extraterritoriality and jurisdiction, if not then the merging entities will be facing authorities from several jurisdictions due to the effects doctrine.[12] Furthermore, the effects doctrine itself can be applied in a discriminatory way by powerful countries with large and important domestic markets against enterprises of smaller countries that attempt to enter a powerful nation's market to threaten the market positions of domestic enterprises. It is important to mention that not all nation states have incorporated competition laws yet because of reasons like expensive enforcement, lack of knowledge and expertise etc. But even amongst the nation states that have their set of competition or antitrust laws a vast divergence can be seen majorly due to the differing economic structure and market or the nation states and the gap is widest between the developed and sophisticated jurisdictions like US and EU and the developing or under developing jurisdictions like India[13] and Pakistan[14] whose competition agencies and mechanisms are relatively novice and new. Further in this part we will discuss some issues that hinder the internationalization of merger laws and for this purpose we will take examples of several cases involving the EU and US regulatory agencies mainly so that an analysis of similar economies of scale and jurisdiction(developed) can be done to highlight that these issues run deeper than the scale of economies or the gap between developed and developing, to show that even the developed and on par jurisdiction have reasons to diverge on competition issues often.

Case studies- Lessons from the Past

The GE/Honeywell[15], Boeing/McDonnell Douglas[16] and Deutsche Börse/ NYSE Euronext[17] merger stood amongst significant cases exemplifying differences in approach among competition agencies. All three of these cases had similar undercurrents for example issues such as Divergent Approaches, different regulatory Standards, notable discrepancies in their assessment methodologies or legal considerations, varying impacts on the merger outcome etc. The US authorities, namely the Department of Justice (DoJ) and the Federal Trade Commission (FTC), evaluated the mergers under the purview of the Clayton Act[18] and the Sherman Antitrust Act[19]. These laws aim to prevent anti-competitive practices and protect market competition. The European Union assessed the GE/Honeywell merger case in line with the European Union Merger Regulation (EUMR)[20], particularly Article 2 of Council Regulation (EC) No 139/2004.

The divergence between the US and EU authorities in their evaluation of the GE/Honeywell merger was partly influenced by differences in the interpretation and application of these laws and regulations:

[10] Pascale Dechamps; Ilaria Fanton, "The Impact of Mergers on Innovation in EU Merger Control" (2018) 17 Competition Law Journal 94

[11] David J. Gerber, "Forward: Antitrust and the Challenge of Internationalization" (1988) 64 Chicago-Kent Law Review 689

[12] Eleanor M. Fox, 'International Antitrust and the Doha Dome' (2003) 43 Va. J. Int'l L. 911, 916

[13] Competition Act 2002 (India), amended in 2007 and 2023

[14] Competition Ordinance 2007 (Pakistan), amended in 2010

[15] Case COMP/M.2220, General Electric/Honeywell v. Commission (2001)

[16] Case IV/M.877, Boeing/McDonnell Douglas v. Commission, [1997] O.J. (L 336) 16

[17] Case No COMP/M.6166, Deutsche Borse/ NYSE Euronext (2012)

[18] Section 7 of the Clayton Act: Focuses on preventing mergers or acquisitions that may substantially lessen competition or tend to create a monopoly in any line of commerce.

[19] Sherman Antitrust Act (Section 1 and 2): Addresses anticompetitive agreements and monopolistic behavior that could harm market competition.

[20] Article 2(3) of EUMR: Provides criteria for assessing mergers that might significantly impede effective competition in the European Economic Area (EEA) or a substantial part of it. It examines whether the merger would create or strengthen a dominant position in the market.

Differences in Approach**:**

- Market Definition**:** The US authorities had a narrower market definition, focusing on specific product overlaps between GE and Honeywell. In contrast, the EU Commission adopted a broader market definition, considering a wider range of products and potential competitive impacts.[21]

- Assessment of Market Dominance**:** The US authorities were concerned about potential market dominance in certain segments of the aerospace industry. They emphasized the immediate effects on consumers. Conversely, the EU Commission had stricter criteria, evaluating the potential for a substantial impediment to effective competition in a broader context.[22]

While the US antitrust authorities were more open to considering remedies or conditions to address anticompetitive concerns, the EU Commission found the proposed remedies insufficient to alleviate the competitive effects of the merger.[23]The divergent interpretation and application of these laws and regulations led to contrasting outcomes: the US authorities approving the merger with certain conditions, whereas the EU Commission blocked the merger due to concerns about significant market power and potential adverse effects on competition within the broader market context. The GE/Honeywell case illustrates that while coordination and cooperation among jurisdictions are essential, achieving complete internationalization of merger laws faces significant hurdles due to the complexities inherent in harmonizing divergent legal, regulatory, and economic frameworks across borders.

Similarly, the Boeing/McDonnell Douglas merger case in 1997 drew divergent opinions between the US Federal Trade Commission (FTC) and the European Union (EU). The FTC primarily applied Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition or tend to create a monopoly. The FTC was concerned that the merger could lead to increased market power and higher prices in the aerospace industry. Conversely, the EU, guided by its Merger Regulation (Council Regulation (EC) No 4064/89), approved the merger. The EU believed that while the merger might create a dominant position, it wouldn't significantly impede effective competition in the aerospace sector. This divergence stemmed from differing assessments of market dynamics and competition effects. The FTC's stance focused on potential monopolistic outcomes and reduced market competition, while the EU placed emphasis on a broader evaluation, considering factors beyond market dominance.[24]

Furthermore, in the Deutsche Börse/ NYSE Euronext[25] merger case the European Commission and the US Department of Justice (DoJ) had differing stances on the NYSE Euronext (NYX)-Deutsche Börse (DB) merger. The EU Commission referred to the proposed merger as a "quasi-monopoly," emphasizing its potentially detrimental effects on various segments of the European financial derivatives market. Specifically, the Commission highlighted concerns regarding European interest rate derivatives, equity index derivatives, and single stock equity, expressing worries that over ninety percent of Europe's exchange-traded derivatives would concentrate on a single exchange post-merger. The EU Commission argued that any anticipated benefits from the merger would be outweighed by the harm to competition caused by such a dominant market position as together, the two exchanges already are incharge of controlling more than 90% of global trade in these products referred to above. [26] Conversely, the US DoJ evaluated the merger using the "substantially lessening competition" standard. Eventually, on December 22, 2011, the DoJ approved the NYX-DB merger with certain conditions. One major condition was that DB Group had to divest itself of the International Securities Exchange

[21] Eleanor M. Fox, 'Mergers in Global Markets: GE/Honeywell and the Future of Merger Control' (2002) 23 U. Pa. J. Int'l Econ. L. 457-468

[22] Stefan Schmitz, 'How Dare They - European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger' (2002) 23 U. Pa. J. Int'l Econ. L. 325-384

[23] Jeremy Grant, Damien J. Neven, 'The Attempted Merger Between General Electric And Honeywell: A Case Study Of Transatlantic Conflict' (2005) 1 J. Competition L. & Econ. 3

[24] William E. Kovacic, 'Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy' (2001) 68 Antitrust LJ 805-874

[25] Case No COMP/M.6166 - Deutsche Borse/ NYSE Euronext, (2012)

[26] European Commission - Press Release- Mergers: Commission blocks proposed merger between Deutsche Börse and NYSE Euronext Brussels, 01 February 2012

(ISE). The DoJ's concern primarily revolved around the significant control the combined entity would exert over competitors in the US market, especially considering that ISE owned a substantial stake in Direct Edge Holdings LLC, a significant competitor to NYSE Euronext in various segments. The DoJ contended that the merger, if not conditioned on divestiture, would substantially lessen competition and potentially violate Section 7 of the Clayton Act. The contrasting decisions of the EU Commission and the US DoJ regarding the NYSE Euronext-Deutsche Börse merger stemmed from their differing perspectives on market dominance, competitive impacts, and the potential harm or benefits arising from the proposed merger. While the EU Commission focused on the consolidation's perceived detrimental effects on European financial derivatives markets and the risk of a dominant position, the US DoJ's concerns centered around the potential for reduced competition in specific segments of the US market and the need for divestiture to mitigate these competitive concerns. Ultimately, these divergent assessments led to differing outcomes, with the EU Commission blocking the merger and the US DoJ agreeing to let it proceed contingent upon divestiture.[27]

Each case illustrates distinct regulatory evaluations and divergent conclusions between US antitrust authorities and the EU Commission, based on their respective legal frameworks and assessments of market effects. The brief analysis of case studies highlights several complexities that underscore the challenges in fully internationalizing merger laws which are in line with primary challenges identified by Budzinski[28] as follows:

- Divergent Legal Frameworks**:** Different jurisdictions have distinct legal systems, antitrust laws, and regulatory standards. Harmonizing these laws across borders proves challenging due to fundamental differences in legal principles, definitions of market dominance, and merger evaluation criteria.

- Varying Market Definitions**:** Jurisdictions often differ in defining relevant markets for mergers. The US and EU, in the GE/Honeywell case, approached market definition differently, leading to contrasting evaluations of the merger's potential impact on competition.

- Conflicting Regulatory Objectives**:** Countries may have divergent priorities in regulating mergers, and balancing concerns about market competitiveness, consumer welfare, and economic growth. As seen above the EU Commission approach was more consumer welfare[29] and competition-centric, referred to as string by American press and authorities, some even said the EU protects competitors rather than competition.[30] After the GE/Honeywell decision the US regulatory bodies approach was more in line with the Chicago school i.e. not that stringent, let the market play out or run its course. Harmonizing these objectives on a global scale becomes complex due to differing national interests.

It is important to note here that although the EU and US both at the time of these cases had several bridging instruments such as EU-US Merger Working Groups[31], several bilateral agreements, and access to multilateral platforms like OECD and ICN yet they failed to arrive at same conclusion in these merger proceedings. These cases highlight the fact that the road to internationalization of the merger is still far away somewhere in the distant future. There are a lot of practical hindrances that need to be addressed before any effort to internationalization can even begin.[32]

[27] Christina D. Cress, The Failed NYSE Euronext-Deutsche Borse Group Merger: Foreshadowing Future Consolidation of the Global Stock Exchange Market, 16 N.C. Banking Inst. 375 (2012). 4

[28] Oliver Budzinski, 'Toward an International Governance of Transborder Mergers - Competition Networks and Institutions between Centralism and Decentralism' (2003) 36 NYU J Int'l L & Pol 1-52

[29] Daniel J. Gifford; Robert T. Kudrle, 'Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union' (2005) 72 Antitrust LJ 423-470

[30] Stefan Schmitz, 'How Dare They - European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger' (2002) 23 Univ. Pa. J. Int'l Econ. L. 325-384

[31] These Best Practices apply to mergers that are subject to the EU Merger Regulation, Council Regulation (EC) No 139/2004 of 2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004), and to Sec.7 of the Clayton Act, 15 U.S.C. Sec. 18 of U.S Antitrust laws

[32] David J. Gerber, 'Forward: Antitrust and the Challenge of Internationalization' (1988) 64 Chicago-Kent L. Rev. 689-710

2. Harmonisation & Co-operation- A placeholder Solution

Harmonization and Cooperation between the Competition Agencies is important so that they can collaborate and focus on capacity building to foster ways in the future for internalization of these laws.

In the landscape of global merger laws, the aspiration for internationalization faces formidable challenges due to the complex interplay of sovereign interests, divergent legal frameworks, and varying economic structures among nations. Instead, a prudent strategy emerges: harmonization over full internationalization serves as a placeholder solution. Harmonization entails aligning principles, approaches, and guidelines while respecting the autonomy of national legal systems and regulatory bodies. This approach acknowledges the significance of diverse economic and legal contexts, balancing the need for standardized rules with the flexibility to accommodate distinct market conditions.[33] The competition interests have incentivized the nation-states to enter into new generational multilateral and bilateral cooperative agreements, which now exist between all the major nation-states and jurisdictions across the world for example between the European Union and the United States, the European Union and Canada, and the United States and, the United States and Japan, etc.[34]

Multilateral platforms like the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), and the International Competition Network (ICN) play pivotal roles in fostering harmonization and aiding developing and underdeveloped nations in various ways. These platforms serve as forums for dialogue, knowledge sharing, and capacity building. The OECD offers policy recommendations and best practices, promoting convergence in competition policies among member countries while extending guidance to non-members.[35] The ICN, a global network of competition authorities, facilitates discussions on competition law enforcement and advocacy, nurturing cooperative relationships among regulators worldwide.

Crucially, ICN assists developing and underdeveloped nations in capacity building, equipping them with the necessary tools, expertise, and technical assistance to strengthen their competition regimes. They offer training programs, share experiences, and provide resources to enhance the capabilities of competition authorities in these regions. This support helps address the resource constraints and institutional challenges faced by these nations in implementing and enforcing robust merger laws.[36]

Harmonization, supported by these multilateral platforms, strikes a balance between uniformity and flexibility. It acknowledges the need for convergence in fundamental principles while recognizing the diverse economic landscapes and regulatory capacities across nations. By providing guidance, knowledge exchange, and capacity building, these platforms enable developing and underdeveloped nations to navigate the complexities of globalized markets without sacrificing their autonomy. Ultimately, this placeholder solution fosters a cooperative environment that advances the convergence of merger laws while respecting the unique needs and circumstances of each jurisdiction.

3. Conclusion

In the realm of global economics, mergers and acquisitions by multinational enterprises have reshaped competition internationally. These transactions, ranging from equal mergers to megamergers, raise concerns about market dominance and anticompetitive behavior. While economically seen as fostering competition, regulators view them through the lens of competition law, emphasizing concerns about market concentration and free trade.

Despite global market expansion, competition law remains rooted in national jurisdictions. Efforts to create unified international merger guidelines face obstacles due to vast differences in economic structures, legal principles, and regulatory approaches among nations. Case studies involving US and EU regulators highlight

[33] Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement' (1997) 77 BUL Rev. 343-404
[34] Eleanor M. Fox, 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' (2000) 75 NYU L. Rev. 1781-1807
[35] Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement' (1997) 77 BUL Rev. 343-404
[36] See, International Competition Network's Framework for Merger Review Cooperation, 1/03/2012, Commissioned by Japan Fair Trade Commission

discrepancies in assessing mergers, underscoring the challenges in aligning regulations across borders, even within similarly scaled economies. The quest for internationalizing merger laws encounters hurdles due to divergent legal frameworks, market definitions, and regulatory goals. Achieving full internationalization appears distant. Instead, focusing on harmonization and cooperation among competition agencies emerges as a pragmatic approach. Multilateral platforms like the OECD, WTO, and ICN play crucial roles in fostering harmonization, knowledge exchange, and technical support among nations. By offering guidance and capacity building, these platforms help navigate global market complexities while preserving regulatory autonomy.

In conclusion, the complete internationalization of merger laws faces formidable hurdles due to diverse national interests and regulatory disparities. The author believes that the world is not yet ready for an international merger regime due to all the hurdles still in place and also considering that the disparity between developing and developed nation-states that hasn't even been addressed yet. Hence, harmonization, backed by multilateral cooperation, provides a practical interim solution. It strikes a balance between uniformity and flexibility, nurturing a cooperative environment that advances convergence in merger laws while respecting the unique needs of individual jurisdictions.

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