Multilateral deals in a world of non-convergence

September 2016

Sir Philip Lowe addressed the theme of 'Multilateral deals in a world of non-convergence' at the GWU – Concurrences Conference in Washington DC on 19 September 2016. The below text is a redacted version of his speech.

Sir Philip Lowe is a Senior Advisor in the Strategic Communications team at FTI Consulting. He is a former Director General of the European Commission for Competition, Energy and Development Cooperation.

Ten years ago, at the International Competition Network's 5th Annual Conference in Capetown, there was understandable satisfaction that the number of competition authorities that were participating in the ICN had grown from 86 to over 100. The perception was that more and more governments had recognised that making markets work for consumers, businesses and society as a whole was a better alternative to central planning or lighter forms of public intervention. And competition authorities were an essential ingredient in ensuring that markets worked. The reality that many markets were becoming global, only encouraged the optimism among the founders of the ICN that international convergence in antitrust was of increasing priority for its many member countries.

The ICN's mission is after all "to advocate the adoption of standards and proceduresin competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide."

The active participation of US and European competition authorities in the debate on China's reform of merger and monopoly laws, and the Chinese State's positive response to it, illustrated the generally held view that further convergence of competition law and policy across jurisdictions, as reflected in the ICN's mission statement, was in sight.

The fact that the ICN's subsequent annual conferences were held in capitals of countries of such economic and social diversity as Russia, Japan, Switzerland, Turkey and Morocco may also have given the impression that antitrust was on an inexorable march to full harmonisation.

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But was there any precise moment in which a wake-up call was needed in relation to this optimistic view?

Real progress had after all been made. Competition laws on the statute books of the majority of ICN member countries contained similar objectives and prescriptions related to making markets work for the benefit of consumers and ensuring a level playing for businesses. Enforcers held out the prospect of stronger coordination between agencies on sanctions and on remedies. At least as far as mergers were concerned, there was already active coordination between the US and the EU on the substantive assessment of cases, on the timing of final decisions, on proposed remedies and where they should be applied.

However since the inception of the ICN, companies and legal practitioners have consistently drawn attention, within debates under the title of 'comity', to the ongoing lack of convergence between the assessments, the decisions and the due process in different jurisdictions. Some called for deference of smaller and less experienced authorities to the processes and decisions of more mature agencies. Others called for more robust proposals for harmonisation on substance and procedure.

Expectations on international convergence

There are several fundamental reasons for believing that the initial level of expectations within the ICN on international convergence was unrealistic.

In the first place, the introduction of competition rules into the legislation of developing, emerging countries, as well as those transitioning from central planning, could not simply be a transposition of US or EU law. It was bound to be influenced by the structure and stage of economic development of the sectors concerned. Even if it guaranteed non-discrimination between domestic and foreign companies, some countries would be reluctant to let their competition authorities approve a transaction that could be perceived to harm the development of its economy, or prohibit one that could possibly contribute to more jobs and growth. Equally no country would want to find itself overly dependent on a foreign source of supply, with security implications, unless there was a clear framework of international law for the transaction, backed up by a substantial degree of mutual trust between the governments of the countries that the cooperating companies belong to.

The question of course of the contribution of any deal to the economy of a country is a difficult one. There can be short-term advantages but longer term disadvantages, such as the loss of indigenous skills and assets. On the other hand, allowing a new foreign entrant into the domestic market could threaten jobs in an incumbent company in the short term but through more competition could create more employment and prosperity for the country in the longer term.

At the same time, all countries are concerned about national security. The US has a CFIUS committee and a number of EU member states seek to ensure that these concerns are met by various means. There have been strenuous efforts on both sides of the Atlantic to ensure that exceptions to competition tests remain narrow and relate simply to the three main issues of media plurality, systemic risk in the financial sector, and national security. The European Commission in particular has taken generally successful legal action against some EU Member states to limit too wide an interpretation of these exceptions. But these exceptions exist and, in an economic environment of slow growth and concern about national competitiveness, the pressure to widen them is not likely to go away. The new UK government for example appears to want to extend regulatory safeguards within merger control to 'critical infrastructures', in particular in the energy sector, but the concept could well impact on other sectors.

If, despite the weight of economic argument against doing so, governments and parliaments believe that criteria, for example related to industrial strategy, need to be taken account in merger control, then the law can obviously allow them to do that. The achievement of greater harmonisation of merger control based solely on competition criteria will therefore continue to depend on advocacy and empirical analysis of the effectiveness of laws which take into account other considerations.

Tackling divergence

Hiding industrial policy considerations under the cloak of laws, which are solely competition-based, and imposing remedies to meet those considerations, must surely be problematic. Tackling genuine divergence in law is a challenge but having to tackle the burden of an untransparent and arguably abusive application of the law is something the international business and political community can well do without. Ensuring full transparency and independence of a competition agency in the application of law must surely be a prerequisite to efforts for convergence.

As far as the substantive assessment of deals is concerned, reducing divergences due to the explicit or implicit introduction of non-competition criteria is only one part of the problem.

Different agencies may arrive at different conclusions in their assessment of the competition impact of a deal and may want to impose different remedies. Insofar as the remedies may need to be adapted to national market conditions and specific 'effects', this is understandable, although in global markets, most corporations are looking for remedies which they can implement

everywhere rather than have them balkanised. At the same time, they will be wary to avoid a situation where they initially agree a worldwide remedy with one agency, only to find that others want to tougher ones in addition. Ideally there should be close cooperation between agencies but national procedures and deadlines frequently prevent this. Sometimes too the tactics of the parties prevent agency cooperation.

It is unlikely in the short term that any form of international law can be devised and implemented to deal with these divergences. Progress will depend very much on the work of bodies such as the ICN and OECD in pushing for better law, better implementation and better cooperation between agencies.

The urgency of procedural convergence

One should take a less complacent view on the progress and urgency in respect of convergence on procedural standards. Even if every country has the right to establish the specific controls they want on multinational deals which have effects on their territory, the manner in which those controls are applied must surely reflect some basic principles inherent in the rule of law. The most important of these are respect of a transparent process of investigation and assessment, adequate rights of defence, including access to any information that can support that defence, and recourse, within a time-period which allows the transaction to remain alive, to appeal or review by an independent court.

The political and social environment in which we now live is unfortunately not conducive to considered judgements on transactions. As reflected in social media or consumer surveys, companies may be regarded positively or negatively irrespective of the merits and demerits of the deal which they may be involved in

It would be obviously be regrettable if multijurisdictional deals were simply to be approved or rejected on the basis of the volume of tweets in favour or against it, or indeed if an agency perceives it politically expedient to attack a certain company or deal because of the popular support it might engender. We will be close to that throughout the world if we do not continue to pay close attention to proper due process from the moment when an investigation on a deal is initiated until a judicial review or appeal is completed. An adequate due process during the course of an investigation is in particular essential to ensure that its conclusions are drawn in relation to the full body of relevant facts and not just to presumptions and suppositions. Subsequently any merging or intervening party needs to have recourse to an independent judicial body who can decide, within a short time-period, whether the enforcing agency has taken the right decision.

What is tackled here is fundamental rights which should be internationally accepted which apply to any area of law enforcement and do not relate to the substance of a country's competition law. If the highest standards of due practice are not respected by competition enforcers, we cannot expect competition policy and law to retain much respect. For these reasons, it is urgent for all countries with a competition regime, with the assistance of ICN, OECD and other concerned bodies, to renew and reinforce their commitment to a set of standards for due process- perhaps in an international charter- that will be fully reflected in the law and its application in all jurisdictions. This is not just a message for new agencies in developing and emerging countries. It is unfortunately just as important in mature agencies in developed countries. And while the need for it is important for multijurisdictional deals, it is even more vital in the world of antitrust, in which litigation between competitors, as well as populist reactions to companies and commercial practices tends to obscure the facts and bias assessments of how markets are working, or not working, for consumers.

Sir Philip Lowe is a Senior Advisor in the Strategic Communications team at FTI Consulting. He is based out of Brussels and London.

He was one of the first Directors of the EU's Merger Task Force and headed the Competition department as a whole between 2002 and 2010. He played a key role in shaping the structure and policies of DG COMP.

Prior to joining FTI Consulting, he held a number of senior posts in the European Commission, including Head of Cabinet to Neil Kinnock, the former Vice-President of the European Commission for Administrative Reform and to Bruce Millan, then European Commissioner for Regional Policy.

From 2010 to 2013, Sir Philip was the Director General of the European Commission's Energy department (DG ENER), where he helped to spearhead the ongoing development of integrated and competitive energy markets in Europe.

He served as a non-executive Board Member of the UK's Competition and Markets Authority from 2013 until 2016 and he chairs the Institute of Florence Annual Competition Law Workshop.

Philip Lowe
+32(0)2 289 0930
Philip.lowe@fticonsulting.com

Louise Harvey
+32 (0)2 289 0935
Louise.harvey@fticonsulting.com