"Planning is the main link. The architect plans buildings. The researcher draws up plans to investigate issues and solve problems. In each case these plans must say something about structure, about how the task is conceptualise, and about the methods to be used in carrying out the plans" (Colin Robson:1999).

THE INTERJURISDICTIONAL PROBLEM IN CROSS-BORDER MERGER & ACQUISITIONS

INTRODUCTION

The number of mergers and acquisitions (the "M&As") in industrialised countries escalated dramatically during the 1980s, as did the number of foreign acquisitions. However, the volume of global investment strategies has increased international conflicts, especially between the United States and European Union countries and one of the major conflicts can be reflected through the merger control system, when a single international merger frequently falls within the jurisdictional and substantive scope of more than one State's law. The result is that international mergers engage the attention of antitrust authorities in several countries provoking undesirable consequences for regulatory authorities and the business community.

Although, commentators have advanced several proposals on the rising problem of international antitrust disputes, determining the system able to deal effectively with these problems remains elusive.

This project aims to provide an approach for avoiding interjurisdictional conflicts between the United States and the European Union merger regimes, or at least reducing such interjurisdictional conflicts. To do so I propose a qualitative research project on the comparative basis that would combine a set of case studies. The comparative method will help me to analyse the two different law merger regimes in place in the United States and the European Union in order to identify whether the differences and commonalties between the two law merger regimes are mainly related to substantive or procedural matters.

I believe that the identification of differences and commonalties regarding substantive and procedural matters between the two law merger regimes, will allow me to find areas of convergence for a future approach for avoiding the interjurisdictional conflict in M&As.

THE AIMS OF STUDY

This study will attempt to compare two different merger regimes in place in the United States and the European Union in order:

(I) to identify the extent of differences and commonalties regarding substantive and procedural matters between the United States and the European Union merger regimes; and

(II) to propose an approach for avoiding interjurisdictional conflicts between the United States and the European Union merger regimes, or at least reducing interjurisdictional conflicts in such merger regimes, evaluating such approach in terms of effectiveness for the both regulatory authorities and the business community perspective.

JUSTIFICATION FOR STUDY

In brief, interjurisdictional problems arise because a single international merger frequently falls within the jurisdictional and substantive scope of more than one State's law, such the law of the European Economic Community.

From the point of view of regulatory authorities, this can have undesirable consequences, due to factors such as disagreements over the proper scope of jurisdiction, frustration in efforts to collect information located within another State, different opinions about the proper remedy, and perhaps most importantly, policy differences about the appropriate regulatory response.

From the point of view of the business community, the consequences can be also equally unwanted: the multiplicity of jurisdictions leads to greater uncertainty over the legality of an agreement. Also simply because more than one approval is formally or practically necessary; it may be lead to conflicting resolutions, where one authority approves and another doesn't with respect to the same deal, often forcing the business enterprises to respond to the most restrictive regime; and it may lead to wasteful duplication of effort.

As firms expand into the global market, these types of problems will arise more frequently. It has therefore become necessary to analyse the two merger regimes in conflict, point out the types of problems outlined above by reviewing some law cases, in order to find out the appropriate approach for addressing such conflicts.

LITERATURE REVIEW

One of the most important patterns of globalisation and the major component of the foreign direct investment are cross-border M&As. The value of international M&As grew from 1980, USD 153 million to almost USD 1 trillion in 2000, and there is an increasing tendency towards very large-scale deals (1).

However, the volume of international trade and investment has also increased international conflicts, especially between the United States and European Union countries and one of the major conflicts can be reflected through the merger control system.

The presence of American firms in European markets as well as the presence of European firms in American markets enhances the likelihood that changes in the ownership of firms as a result of M&As on one side of the Atlantic, may affect competition in markets on the other side of the Atlantic (2). The result is that international mergers often engage the attention of antitrust authorities in several countries, as has been pointed out by a review of several law cases, conducted by the Organisation for Economic Co-operation and Development (3).

Basically, the conflicts can occur in the following scenarios: (i) A multinational enterprise based in country A acquires another multinational enterprise based in country B. Both firms have subsidiaries producing similar lines of products in various domestic markets throughout the world. In this case, the impact of the merger would presumably have to be assessed market by market in the light of alternative sources of domestic or import competition in each market. It is possible then that competition authorities in some jurisdictions would find the merger objectionable, while others would not. (ii) A foreign firm based in country A acquires a firm based in country B where the relevant products produced by the two firms are traded freely in a regional market (e.g. in the European Union). Given that the relevant geographic market for the product is supranational, domestic antitrust authorities throughout the regional market are each likely to view their jurisdiction as legitimately engaged. The

competitive effects should be essentially uniform across a defined market, but it is possible that the various domestic competition authorities would come to different factual or legal conclusions. (iii) Finally, a foreign firm in country A acquires a competitor in country B producing a similar product line with a global geographic market, rather than national or regional (e.g., the commercial aircraft manufacturing industry). Here, domestic competition authorities in all countries through the world where the product is sold may be interested in reviewing the transaction (4).

As is well known, the globalisation of economic activity over the past quarter century has expanded trade and investments flows, increased competitive interactions which cut across individual national economies, and generated an explosion of international mergers (5). Not surprisingly, a concomitant legal trend has emerged over a similar time frame.

As recently as 1972 only four countries (Canada, Japan, the United Kingdom and the United States) had enacted merger laws. Since that time, Canada has modernised its merger review regime and numerous jurisdictions, including the European Union have introduced merger laws (6), many of which claim some measure of extraterritorial jurisdiction. The enactment or expansion of competition laws, including merger pre-notification requirements, by many nations, and extraterritorial application of national competition laws cause serious conflicts. As Peter Behrens pointed out, the conflicts arise where the following elements are present: (i) One country applies its merger control legislation extraterritorially to foreign firms, and (ii) such extraterritorial application of merger control provokes hostile reactions by a foreign country (2). If a state has based its jurisdiction on the effects principle, a jurisdictional conflict may be raised because of the consequences within the territory of another state. Under the effects principle, the state may assume jurisdiction where an act that is committed in another state, by citizens or companies of other states, has effects in the former (7). Although the doctrine of the "effects principle" has been an object of considerable debate, it was laid down in several cases as a conflict of law principle for antitrust matters. Various cases highlight the problems. In July 1997, the Federal Trade Commission closed its investigation of the merger of the Boeing Company and the Mc Donnell Douglas Corporation, essentially approving the merger, which was quite significant, as it would unite the first and thirst largest civil aircraft companies in the world. Although the proposed merger had passed muster under U.S. antitrust laws, Boeing still faced the obstacle of gaining approval from the European

Commission, the antitrust enforcement agency of the European Union. The European Commission initially sought to reject the merger and raised objections. Eventually, the European Commission approved the merger, although not before political pressure was applied by the Clinton Administration (8). The United States also applied the effects principle in the enforcement of antitrust law in the famous case of *United States v Aluminium Co. of America.*

Thus, the increasing number of international M&As raises questions of international policy co-ordination and regulatory concerns. It has also been suggested by the Organisation for Co-operation and Economic Development, that international co-operation is needed to minimise anti-competitive effects while avoiding unnecessary burdens and delays resulting from the multiplicity of competition policy regimes worldwide (1).

Commentators have therefore proposed different approaches in order to avoid the interjurisdictional conflict regarding M&As. The European Community and its Member States have already argued in favour of the development, within the WTO, of a multilateral framework agreement of binding principles and rules on competition law. The Vice President of the European Commission has set out the reasons why, in a globalised economy, it has become essential to develop a multilateral approach to competition law and policy (9). There are also some proposed approaches for reducing interjurisdictional conflict in international merger reviews based on the harmonization of domestic law, the use of a "lead review jurisdiction", and the establishment of a supranational decision making institution (4).

It has also been suggested that some existing institutions may have to play an important role in the process for the harmonisation in merger and other competition law areas. Some authors suggest bilateral agreements, while others suggest that treaties could be used to overcome domestic statutory rigidities that bilateral agreements cannot address (10).

The rationales for harmonisation of competition are enhanced global economic efficiency, and decreased transaction costs (11). Silvya Ostry has pointed out that harmonisation of competition laws reduce "system friction", a term used to describe the impact of differing domestic policies on trade and investment flows and the linkages between countries in an increasingly global economy (12).

The reasons for considering the necessity of an international antitrust system is well recognised and there are already some approaches that evaluate the possibility of avoiding the conflict or at least reducing the problem.

But are those approaches easy to implement? Are they efficient?

What are the main differences between the two merger regimes? Are the differences related to procedural or substantive matters? Are the differences related to the method of analysing the merger?

Because determining the type of system able to deal effectively and efficiently with the interjurisdictional problem in merger regimes remains elusive, is that those questions that need to be answered, with the purpose to propose an approach for avoiding the conflict. However, such approaches must converge, as much as possible the commonalties, as well as to detect the areas of differences, in order to reconcile the two merger regimes, and hence adopt the best variant for avoiding the interjurisdictional conflict, or at least, reducing such conflict. Even where the substantive law should not, or cannot, be unified it may be possible to achieve a harmony of outcome by unifying the rules of conflicts of law, and thereby avoid differences (13).

METHODOLOGY

I propose a qualitative research project on the comparative basis that would combine a set of case studies. The comparative method will help me to analyse the two different law merger regimes in place in the United States and the European Union.

The comparative method will also allow me to identify and to analyse whether the differences and commonalties between the two law merger regimes are mainly related to substantive or procedural matters.

This methodology is based on the proposed method of Konrand Zweigert and Hein Kots. They consider that the primary aim of comparative law, as of all sciences, is knowledge, and if one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law provide a much richer range of models solutions. They also considered that the final function of comparative law is its significant role in the preparation of projects for the international unification of law. The political aim

behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law; and the advantages of unified law is that makes international legal business easier.

This study will also take a more empirical approach to discover what the companies involved in some mergers were actually experiencing. I will identify through law cases, the major interjurisdictional problems that have been arisen in the last years.

I also consider that, before approaching a model for avoiding interjurisdictional conflict in merger review, a couple of concrete case examples are worth examining. I believe that the identification of differences and commonalties regarding substantive and procedural matters between the two law merger regimes, will allow me to find areas of convergence for a future approach for avoiding the interjurisdictional problem in M&As.

Considering this, the final function of comparative law to be dealt with here is its significant role in the formulation of an approach for avoiding as much as possible, or al least minimising the discrepancies between the two merger regimes.

For the aims of my study, I believe the comparative method is both useful and necessary, as investigating the differences between two merger law regimes, will allow me to determine if it is going to be valuable to have an international legal antitrust system in order to avoid the interjurisdictional conflict in M&As. I proposed using the relevant findings as a basis for critical comparison, ending up with conclusions about a suggested approach for the law to adopt.

DATA COLLECTION

I will collect data using secondary sources where the information required is already available such as government or semi-government publications and reports. The secondary sources I will use are primary legal sources -legislation made by Parliament, rules, regulations, orders, by-laws of those bodies to whom Parliament has delegated authority, and authority reports of the decisions of the courts-, and secondary legal sources, such as textbooks, digests, journals articles, and reports CMLR antitrust reports includes Commissions Decisions, competition cases before the courts, and other official documents on competition policy).

Contradiction

Although there is no method of data collection that can guarantee 100 per cent accurate and reliable information, I believe this is the appropriate one for the purpose of my study.

The disadvantages of collecting data from secondary sources mainly relate to the availability, format and quality of data. The validity and reliability may vary from source to source. Information from newspapers may have the problem of personal bias, as journalists are likely to exhibit less rigorousness and objectivity.

In connection with the availability of the data, some cases may be rejected because of data limitations, and others, as they occurred too recently to allow for a detailed analysis.

how will this list be chosen?

With regard to the cases, it is important to clarify the following: (i) the selecting of cases will not purport to be a scientific sampling of cross-border mergers over any particular time; it will be merely an illustrative list of cases; (ii) for reasons of legal limitations, the information I will collect will be restricted to facts that were publicly available; and (iii) almost all the cases will represent closed transactions, some several years old, for which subsequent changes in procedure might have made a difference.

what will the remainder represent?

TIMETIBLE ACADEMIC YEAR 2002

May	Literature review, identification and collection of data sources.
June	Continue literature review and collection of data. Begin analysis.
July	Main analysis. Beginning writing up.
August	Complete analysis and writing up. Revisions.
September	Revisions. Submitting dissertation.

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Comments

Research Methods: Venture Capital

Marker One

Well set out proposal and although you invoke the comparative method the methods do not quite meet the challenge.

Marker Two

This is a well structured, clear and intelligently written proposal. The aims you have set are realistically achievable within the available time frame. You could have improved your literature review by being a little more specific about the "gaps" in the literature that your research seeks to fill. And you could have improved your methodology section by giving more thorough consideration to your sources of data.

Agreed Mark 63%