1. Introduction

1. INTRODUCTION

Globalization and the expansion of markets beyond geographic boundaries[1] 'has generated an increase in international mergers as firms seek to strengthen their position for strategic advantage'.[2] The widening of markets has also increased the potential for the effects of transnational mergers to extend beyond the physical location of the firms involved, thereby arousing the interests of multiple agencies. This, combined with the explosion of national merger regimes over the past two decades,[3] means that more mergers are now being subjected to multiple filing requirements, with the result that parties and their advisers must navigate, at considerable time and expense, a maze of different substantive, analytical and procedural rules.

Despite significant international effort toward identifying and promoting best practice and cooperation, the emergence of new and significant regimes, particularly in China, Brazil and India, has resulted in merger review processes for transnational mergers becoming more complex and

[1] See generally Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008) 8.

[2] Michael A. Utton, *International Competition Policy: Maintaining Open Markets in the Global Economy* (Edward Elgar, 2006) 73. See also Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar, 2008) 29 and Noonan, above n 1, 9. Peter Lattman, 'Confidence on Upswing, Mergers Make Comeback' (New York Times Dealbook, 14 February 2013) <http://dealbook.nytimes.com/2013/02/14/confidence-on-upswing-mergers-make-comeback/?hp> accessed 18 February 2013.

[3] From 20 in the early 1990s to well over 100 today. See Bill McConnell, 'US Pushes for Waivers in Cross-Border Mergers' (The Street, 25 September 2013) <http://www.thestreet.com/story/12049435/1/the-deal-us-pushes-for-waivers-in-cross-border-mergers.html> accessed 28 September 2013. See also Maher M. Dabbah and Paul Lasok QC (eds), *Merger Control Worldwide* (Cambridge University Press, 2nd edn, 2012) 2. See also Avery, et al, *The Essentials of Merger Review* (American Bar Association, 2013).

less predictable.[4] Although it is difficult to quantify precisely the cost attributable to the review of transnational mergers, that there is a significant cost to business is now widely acknowledged and has been the subject of detailed study.[5] The increased costs associated with compliance are not restricted to the firms involved, but extend to regulators whose workloads and associated costs remain significant.[6] These regulators are typically financed either by the parties making application, the taxpaying public or a combination of the two. The consumer public may also suffer loss if potentially pro-competitive mergers are delayed or thwarted by regulation[7] and indirectly as firms seek to pass on their costs through increased prices.

The existence of these costs does not, in itself, demonstrate any need for reform; these 'costs' might be considerably less than the cost society would incur, social and economic, should anti-competitive mergers be allowed to flourish.[8] However, it is clear that the potential for merger

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[4] Anna Tzanaki, 'CPI Report: Competition Policy in Global Markets – Efficiencies and Remedies in Lean Times' (*CPI International*, 26 June 2012) <https://www.competitionpolicyinternational.com/cpi-report-competition-policy-in-global-markets-efficiencies-and-remedies-in-lean-times> accessed 14 February 2013 and Utton, above n 2, 73.

[5] See PriceWaterhouseCoopers, 'A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews' (June 2003) and ICN, 'Report on the Costs and Burdens of Multijurisdictional Merger Review' (Mergers Working Group, Notification and Procedures Subgroup, November 2004). See also ICPAC, 'International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust – Final Report' (Department of Justice, United States, 2000) 91.

[6] See, for example, Competition Bureau (Canada), *Merger Review Performance Report* (2007) 6–7.

[7] See Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, 2007) 911–12 and John E. Lopatka and William H. Page, '"Obvious" Consumer Harm in Antitrust Policy: the Chicago School, the Post-Chicago School and the Courts' in Antonio Cucinotta, Roberta Pardolesi and Roger Van Den Bergh (eds) *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2002) 132.

[8] See Federal Trade Commission, *Performance and Accountability Report: Fiscal Year 2008* (2008) 38. Compare Philip Nelson, 'A Review of the Antitrust Agencies Estimates: Consumer Savings from Merger Enforcement' (2001) 15 *Antitrust ABA* 83 and Philip Nelson and Su Sun, 'Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates' (2001) 69 *Antitrust Law Journal* 921.

regulation to significantly impact on business,[9] regulators[10] and, ultimately, the consumer and taxpaying public, renders the study of alternative approaches aimed at ensuring the regulation is both appropriate and efficient in its application, one of considerable importance. This has been recognized in recent years, with merger processes occupying the forefront of international competition law debate. Over the past decade, recommendations of the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), as well as an increased level of bilateral cooperation, have significantly improved consistency and cooperation. However, high compliance costs, duplication and uncertainty remain a feature of the transnational merger review process. The inefficiencies associated with the current regulation of transnational mergers[11] have generated widespread acknowledgment of the need for continued efforts directed toward minimizing cost and uncertainty.[12]

When assessing cost it is necessary to draw a distinction between procedural and substantive compliance costs. Although it is against the substantive merger prohibition(s) that the validity of a merger will be assessed, it is the procedures supporting those prohibitions that generate the bulk of the cost associated with merger review, particularly when taking into account the vast majority of mergers which raise no substantive concerns. It is not surprising that early international efforts have been primarily directed toward procedural convergence or solutions, both because of the significant impact on parties of divergence and because it presents less scope for philosophical conflict, and therefore tends to be less politically sensitive, than substantive law issues. Nevertheless, the existence of divergent legal systems and structures supporting merger enforcement limit the extent to which procedural harmonization can be achieved in practice.

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[9] See PriceWaterhouseCoopers, above n 5 and ICPAC, above n 5, 3.

[10] See, for example, Lise Davey and John K. Barker, *Merger Review Benchmarking Report* (Competition Bureau (Canada), 2001) 5.

[11] See generally Robert Paul, 'The Increasing Maze of International Pre-Acquisition Notification' (2000) 11 *International Company and Commercial Law Review* 123. See also J. William Rowley and M. Opashinov, 'The Internationalisation of Merger Review: Towards Global Solutions', in John Davies (ed.), *Merger Control 2003* (Getting the Deal Through, 2003) 5.

[12] See Noonan, above n 1, 14–17, Rowley and Opashinov, above n 11, 5 and Christine A. Varney, 'Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency' (Speech delivered to the Institute of Competition Law, New Frontiers of Antitrust Conference, Paris, 15 February 2010) 2.

Despite these limitations, the desirability for greater procedural harmonization, where appropriate, has achieved wide support, at least at a theoretical level. The same cannot be said of proposals for substantive convergence;[13] the form any such convergence should take, and the desirability of such a result, remains an issue of considerable debate, with many fearing harmonization could only be achieved by reducing existing standards to a 'lowest common denominator'.[14] The application of substantive merger law, even at a domestic level, is one which arouses passionate differences of opinion between business, economists, lawyers and sociologists. At an international level these differences are magnified, with the result that transnational mergers 'cause some of the most complex problems'[15] for competition policy. It is therefore not surprising that agreement on the nature and scope of merger prohibitions have so far eluded the international competition community.

Unlike other forms of potentially anti-competitive conduct, mergers are time-sensitive and frequently subjected to mandatory *ex ante* review, which imposes significant costs for firms involved in pro-competitive and anti-competitive mergers alike. This has serious implications for the development of policy, both domestically and at a supranational level. In relation to most forms of anti-competitive conduct, and particularly in relation to cartel conduct, the policy goals of deterrence, detection and punishment are likely to be enhanced as the number of jurisdictions implementing and actively enforcing those laws increases. In relation to merger laws, however, the increasing number of countries employing an *ex ante* review process, while potentially capturing a broader range of anti-competitive mergers, also significantly increases compliance costs for firms and for regulators and has adverse implications for a high proportion of mergers that would normally be considered socially desirable.

The challenges posed by the regulation of transnational mergers are unique and merit targeted study.

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[13] See Brendan Sweeney, 'Global Competition: Searching for a Rational Basis for Global Competition Rules' (2008) 30 *Sydney Law Review* 209, 242.

[14] See, for example, A. Douglas Melamed, 'International Antitrust in an Age of International Deregulation' (1998) 6 *George Mason Law Review* 437. Compare Joseph Wilson, *Globalization and the Limits of National Merger Control Laws* (Kluwer Law International, 2003) 238.

[15] Utton, above n 2, 73.

2. APPROACH OF THE BOOK

This book will identify current approaches to and best practices in competition law merger review and will evaluate the potential for a more harmonized and coordinated system of merger regulation and desirability. In particular, it will:

- identify the appropriate policy objective(s) for transnational merger regulation
- examine existing national substantive and procedural approaches to mergers with a view to identifying, where possible, emerging themes and international best practice
- examine the legal basis for extraterritorial jurisdictional claims
- identify current levels of comity and cooperation involved in the multi-jurisdictional review of transnational mergers
- identify the nature of the costs and benefits associated with the current approach to transnational merger regulation, and
- evaluate possible alternative approaches to international merger regulation with a view to identifying the most appropriate way forward.

2.1 Objectives of Merger Regulation

An assessment of the current regulation of transnational mergers must be made against a defined objective. Determining that objective is no simple task. The rapid expansion of merger control laws and competition laws generally has revitalized debate about *what* competition law is and should be about.[16] Despite more than 100 years of modern competition law[17] and the global proliferation of competition laws in recent decades, the answer to this fundamental question remains controversial.[18] Consequently, not only do existing national merger regulations reflect different policy objectives, but debate continues at a domestic level about both the actual goals of merger regulation reflected in legislative instruments and about the aspirational policy goals. The result is more than 100

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[16] Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge University Press, 2010) 2.

[17] 'Ancient' competition laws date back to at least Roman times.

[18] See, for example, Louis Kaplow, 'On the choice of welfare standards in competition law' in Daniel Zimmer (ed.), *The Goals of Competition Law* (Edward Elgar, 2012) 3 at 26. See also Dabbah, above n 16, 2.

merger regimes around the globe which reflect a multitude of objectives and substantive, analytical and procedural approaches.

Very broadly, competition policy is predicated on the notion that a competitive business environment is better for society, both economically and socially, than one which is not; in particular, a competitive market is more desirable than a monopolistic one. The ICN recently identified the protection of competition as the sole goal toward which merger laws ought to be directed[19] and it is therefore not surprising that most jurisdictions express the object of their law as being the prevention of conduct that would cause significant harm to competition.[20]

However, the lack of any universal definition of 'competition'[21] or consensus about what constitutes its promotion, means that regimes which articulate this objective may nevertheless be doing so with a view to promoting a diverse range of underlying policy goals.[22] Identifying this policy is important because of the impact it may have on the interpretation and application of the laws themselves. It is particularly important in the case of mergers which, in most cases, are efficiency-enhancing. Assessing whether mergers ought to be permitted therefore involves balancing competing priorities and knowing which factors are intended to carry more weight in this analysis depends upon an understanding of the underlying policy goals.

Related to the issue of policy goals for competition law generally is whether or not a different standard ought to apply where mergers produce effects in more than one jurisdiction. Competition policy has followed 'a national rather than an international agenda',[23] with decisions on mergers tending to be 'based almost exclusively on the market effects within the country concerned'.[24]

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[19] See ICN, Recommended Practices for Merger Analysis, recommendation 1A.

[20] See Henry C. Thumann, 'Multijurisdictional Regulation of Monopoly in the Global Market' [2008] *Wisconsin Law Review* 261, 265 and Richard M. Stuer, 'The Simplicity of Antitrust Law' (2012) 14(2) *University of Pennsylvania Journal of Business Law* 543.

[21] See, for example, Maurice Stucke, 'What is competition' in Daniel Zimmer (ed.), *The Goals of Competition Law* (Edward Elgar, 2012) 27 at 28.

[22] See, for example, Oliver Budzinski, *International Antitrust Institutions* (July 2012) Ilmenau Economics Discussion Papers, Vol 17, No 72, 7 and UNCTAD, *Model Law on Competition* (TD/RBP/CONF.7/L.1, 30/08/10) paras 8–9), ICN, 'Advocacy and Competition Policy Report' (ICN Conference, Italy, 2002) 32 and Kaplaw, above n 18, 3.

[23] Utton, above n 2, 18.

[24] Ibid.

The issue of appropriate policy objectives for merger review, both at a national and international level, will be examined in Chapter 2.

2.2 Substantive and Procedural Approach to Mergers

Chapters 3–6 of the book identify the substantive and procedural approaches currently taken to transnational merger regulation and evaluate the extent to which they conform to stated or desired goals. This involves consideration of different national substantive tests and procedural approaches to merger regulation with a comparative assessment made of their respective benefits and limitations in achieving this objective. In a book of this size this is necessarily limited to identifying broad themes rather than conducting detailed analysis of approaches adopted in individual states.[25]

Chapter 3 assesses the substantive treatment of mergers in competition regimes. This includes both an assessment of the laws or regulations themselves and the analytical approach adopted for their implementation in practice.

Procedural aspects of merger regulation are canvassed in Chapter 4. By contrast with other areas of competition law and policy, the treatment of mergers involves a significant regulatory component, with most jurisdictions adopting *ex ante* notification and suspension obligations for mergers exceeding defined thresholds. The justification for this lies in the structural change to the market affected by the merging of assets, personnel and intellectual property, which are difficult to reverse. However, the costs associated with this regulation demand that processes be put in place which can facilitate the identification and prevention of mergers which might contravene substantive law, while keeping to a minimum the cost to parties and regulators. What is necessary to achieve these objectives will vary depending on size and economic development and administrative structure of the jurisdiction involved, but it is possible to identify some core principles.

Chapter 5 focuses on the increasingly important issue of merger remedies in a global context. In most jurisdictions competition authorities are given the power to address anti-competitive concerns through the negotiation of merger remedies with parties. This is more advantageous to parties, at least in most cases, than having a merger successfully, or even unsuccessfully, challenged by the regulator, in that it involves much

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[25] Various other works are directed to cataloguing domestic merger laws. For example, Avery, et al, above n 3 and Dabbah and Lasok, above n 3.

less disruption to corporate structure than a subsequent divestiture order. Negotiated remedies can also help to avoid costly litigation. Moreover, the negotiation may result in a higher welfare outcome by conditionally permitting a largely efficient merger that might otherwise have been prohibited.

2.3 Special Features of Transnational Merger Review

Chapters 6–9 address the special features of transnational aspects of merger regulation.

Chapter 6 assesses the extraterritorial approach to jurisdiction in merger cases and, in particular, the implications of the effects test on notification obligations for transnational mergers.

The levels of comity and cooperation that exist in practice in respect of overlapping jurisdictional claims are examined in Chapter 7.

Chapter 8 identifies the costs associated with subjecting transnational mergers to administrative scrutiny in multiple jurisdictions. The costs associated with compliance are not capable of calculation in mathematical terms.[26] First, the costs are not purely economic, with the result that any mathematical attempt to analyse the costs and benefits of mergers will provide a distorted view of the merits or otherwise of merger regulation. The second reason is that, even in relation to those costs and benefits that are capable of economic assessment, the empirical data necessary in order to make a comprehensive assessment is currently lacking. Nevertheless, an assessment of the sources of cost, combined with the empirical data that does exist, suggests that those costs are significant. These costs are both direct, such as through payment of filing fees and the preparation of documentation, and indirect, such as those costs resulting from delays and shareholder uncertainty and the allocation of executive time to the compliance process. These costs are magnified for transnational mergers, where the concurrent operation of national law frequently necessitates multiple notifications.

This cost assessment will provide a platform for the assessment of possible alternate approaches to regulation conducted in Chapter 9. Regulation which restricts free activity amongst business requires clear justification in public policy and, where justified, implementation should

[26] See generally Kai Hüschelrath, 'The Costs and Benefits of Antitrust Enforcement: Identification and Measurement' (2012) 35(1) *World Competition* 121, 162–3 and Gunnar Niels and Reinder van Dijk, 'Competition Policy: What Are the Costs and Benefits of Measuring Its Costs and Benefits?' (2008) 156(4) *De Economist* 349.

be designed to achieve that objective at the least possible cost. The cost and efficiency of the current multilayered national system of transnational merger regulation must be assessed against possible alternatives or modified approaches, with a view to determining the most optimal approach to transnational merger review that is both capable of achieving the identified objectives while remaining politically viable.

2.4 The Future

Chapter 10 concludes that the future regulation of transnational merger review necessitates a multilayered approach, building on existing cooperative efforts.

The first layer involves national efforts toward implementation of optimal merger review processes, including through implementation of existing international best practice recommendations modified, when appropriate (at least for a transitional period), to acknowledge developmental, structural and cultural differences. This has occurred to some degree, but there remains considerable scope for improvement.

The second layer involves continued efforts within the OECD, ICN and United National Conference on Trade and Development (UNCTAD) toward developing and promoting best practice, combined with the continued implementation of bilateral and plurilateral merger agreements. It also includes establishing revised government level recommendations within the OECD to assist in promoting convergence and cooperation.

Importantly, at least for the foreseeable future, the development of a supranational code or the establishment of a supranational regulator or review body would be neither globally optimal nor politically feasible as an alternative to concurrent national review.

3. SCOPE OF THE BOOK

The scope of the study is potentially very broad and must necessarily be limited to ensure sufficient attention can be paid to key areas. The focus of this book is on the merger regimes adopted in OECD countries which have a commitment to global economic development, possess some of the most developed merger regimes and are likely to play a pivotal role in directing any global reform in this area. However, despite this focus, it is not possible to conduct a meaningful analysis of the transnational merger review system without discussing the significant disruptive effect caused by the expansion of merger regimes globally, most significantly in the BRIC (Brazil, Russia, India and China) countries, but also in an

increasing number of other countries which frequently cast a wide jurisdictional net. Consequently, an assessment of the unique characteristics associated with some of the key new and emerging regimes, particularly in China, India and Brazil, and their influence on the global merger review process, will also be undertaken.

This book is also limited to merger laws which form part of the *competition policy* of each of the jurisdictions considered. Except where directly relevant to competition policy, it does not consider other legal and regulatory restrictions that merging parties may confront, such as corporations laws, foreign policy investment rules or industrial laws, which raise different policy issues.

4. TERMINOLOGY

There are a number of key terms adopted throughout this book which require clear definition.

4.1 Globalization

'Globalization' remains a term with no clear meaning and has been described as an 'elusive and contested concept'.[27] It means different things to different people and in different contexts. In the context of this study it refers to the expansion of markets beyond purely national boundaries. This process of expansion, facilitated by the growing reduction of public trading barriers has important implications for competition policy. Mergers are now more likely to have economic and social consequences that extend beyond national borders. Conversely, mergers are less likely to have a significant impact on competition domestically, because of the increased potential, in many industries, for import competition. This has implications not only for the way in which individual mergers should be assessed, but also for national merger policy. The globalization of markets will, therefore, be an important consideration in determining an appropriate policy framework for transnational merger review.

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[27] Hans Löfgren and Prakash Sarangi, 'Introduction: Dynamics and Dilemmas of Globalisation' in Hans Löfgren and Prakash Sarangi (eds), *The Politics and Culture of Globalisation: India and Australia* (Social Science Press, 2009) 1.

4.2 Competition Law

The scope and nature of competition laws vary to a degree, both in name and substance, between jurisdictions. Competition law is the term adopted throughout to describe those laws directed at regulating activity which restricts free trade between firms, either directly by agreement, such as in the case of cartels, or indirectly by the acquisition of market power. This encompasses laws referred to in some jurisdictions as 'antitrust', 'antimonopoly', 'restrictive trade practices', 'combinations', 'laws of monopolies' or 'restraint of trade' laws.

4.3 Mergers

A merger, sometimes referred to as a 'concentration', is defined as the voluntary or involuntary integration of two or more entities through share and/or asset acquisition.[28] It will not include joint venture activity that does not also involve this share or asset acquisition. Competition law focuses attention predominantly on horizontal mergers because they have the greatest potential to adversely affect competition by directly eliminating one or more competitors; however, anti-competitive vertical and conglomerate mergers are also subject to scrutiny and can raise significant competition concerns, particularly where they result in foreclosure.[29] The focus of this study, particularly that relating to substantive analysis, will be on horizontal mergers, which continue to form the bulk of transnational merger activity, but many of the conclusions reached, particularly those relating to procedure, can be equally applied to vertical and conglomerate mergers.

4.4 Transnational and Multijurisdictional Mergers

The concept of transnational or multijurisdictional mergers has been defined differently in different contexts. For purposes of this study the terms transnational and multijurisdictional will be used interchangeably and will be taken to mean mergers which are subject to review in

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[28] See ICN, 'Defining Merger Transactions for Purposes of Merger Review' (Merger Working Group, 2007) 2–4.

[29] See, for example, Department of Justice, *Non-Horizontal Merger Guidelines* (14 June 1984), para. 4, ACCC, *Merger Guidelines* (November 2008) para. 5.21, ICN, 'Merger Guideline Workbook' (Merger Working Group, April 2006) para. 3.2.

multiple jurisdictions.[30] This might be because parties have one or more places of business in different nations or where the merger has the potential to impact on competition in multiple jurisdictions.

4.5 Regulation

Traditionally the term 'regulation' has been used in reference to industry-specific laws and rules involving direct interference in price, product characteristic and related matters. At its broadest it has been defined as 'limits imposed on the behaviour of economic actors, contained in rules and standards'.[31]

Competition law, including merger law, focuses on the maintenance of a broadly competitive environment rather than specific market characteristics.[32] For purposes of this study, regulation is defined to include the administrative and judicial mechanisms adopted to detect, deter and prevent mergers which contravene, or potentially contravene, the substantive merger laws.

4.6 Agency, Authority, Regulator

Various terms are used to describe competition authorities, sometimes reflecting the different functions they perform. The terms include 'authorities', 'regulators' and 'agencies' and will be used synonymously to refer to those national (or supranational in the case of the EC) bodies responsible for enforcing merger laws and regulations, including pre-merger notification regimes.

4.7 Extraterritoriality

The extraterritorial application of competition laws generally, and merger laws specifically, plays a key role in regulating transnational mergers

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[30] See OECD Council, *Recommendation of the Council Concerning Merger Review*, 23 March 2005, C(2005)34/final and ICPAC, above n 5, 46. Compare Michele Giannino, *International Cooperation and the Regulation of Transnational Mergers* (D Phil Thesis, Queen Mary College of University of London, 2006) 240.

[31] Philipp Pattberg (2006) 'The Transformation of Global Business Regulation' (Global Governance Working Paper Series No 18, Amsterdam, The Global Governance Project, 2006) 1. See also John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 10.

[32] See, for example, Michael D. Whinston, *Lectures on Antitrust Economics* (MIT Press, 2006).

by providing a mechanism by which countries can apply their merger regulations to activity occurring outside their national borders. It therefore requires careful definition. For purposes of this study, extra-territoriality is defined as any legal power claimed by a country over persons located, or activity occurring, outside national territorial borders, whether or not the basis for such jurisdiction is recognized in international law.

4.8 Merger Jurisdictions

The term 'merger jurisdictions' is adopted throughout to refer to those jurisdictions which have adopted competition laws with specific provision for merger review.

4.9 Comity and Positive Comity

Comity is defined broadly as the consideration given by regulators and the judiciary to the laws and interests of other nations when applying their domestic regulations. This will be relevant whenever a merging firm is domiciled in a foreign jurisdiction or where a domestic merger has social or economic consequences outside the regulating jurisdiction. 'Positive comity' encompasses situations in which one country requests that another investigate conduct within its jurisdiction which is harming the interests of another; this may occur in conjunction with the requesting country's own investigation or independently.