CBI
THE VOICE OF BUSINESS

Canada-Europe Round Table Symposium on International Competition Law: "The Business Case for Convergence", Brussels, 29 November, 2001

CBI Position Paper - "The Benefits of Converging Standards in Merger Control Procedures"

(1) Introduction:

1. This paper forms part of the CBI's contribution to the Canada-Europe Round Table[1] Symposium on International Competition Law, and focuses on the business need for converging standards and rules in merger control procedures, particularly in the context of setting the early agenda for the International Competition Network[2].

2. This drive for convergence is not intended to preclude any country from properly reviewing the competitive effect within its borders of any proposed merger. The objective is limited to reducing the enormous divergences in existing national procedures which are not generally justified by any unique circumstances in those countries and which can pose serious obstacles to the implementation of cross-border transactions. Equally, none of the existing national or regional merger control systems is considered perfect by any means and there is no hidden agenda, therefore, to promote any one system at the expense of the others. The objective is simply to promote greater convergence on certain key issues and, in so doing, to foster more effective regulation at lower net cost for all concerned in both monetary, resource and timing terms.

(2) Background:

3. In order to understand the benefits that would flow from converging standards in merger control procedures, one needs first to recognise the problems currently being faced by the business community due to the explosion of merger control laws across the world over the last decade.

[1] Also known by its abbreviation "CERT".
[2] Launched in New York in October 2001.

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4. The rapid expansion of international merger control in recent years is imposing increasingly onerous and unjustified burdens on business. Larger companies involved in cross-border transactions are regularly having to make multiple filings in different jurisdictions, not only at vast cost, but to an extent which can actually put the viability of transactions in danger, thereby impeding international economic development.

5. By way of example, Jacques Bougie (CEO of Alcan Aluminium Ltd) told the 10th anniversary conference of the European Commission's Merger Regulation that in 2000 his company had had to submit merger notifications to 16 countries in eight languages at a cost of millions of dollars in its attempt to buy Pechiney SA of France and Algroup AG of Switzerland.

6. Having to make multiple filings means instructing lawyers across the world, having to pay multiple filing fees, delay and uncertainty caused by different procedures and time-limits for making notifications, and having to translate notifications into numerous different languages. Most significantly, some jurisdictions with mandatory pre-notification regimes will not allow deals to be completed prior to clearance which increases the risks of mergers being blocked, notwithstanding that they may be entirely benign in competition law terms.

7. Where a particular transaction impacts competition in several jurisdictions this regulatory burden cannot be avoided, but it would be substantially less onerous if the various national regimes were less divergent and more flexible. For example, some countries base jurisdiction on global turnover, some on local turnover; some have high thresholds, others have low thresholds; some will not consider a transaction until final agreements are signed, others are prepared to act on a letter of intent; some impose strict time limits on filing, others do not; some impose mandatory pre-notification, others do not; some require all significant documents to be translated into the local language, others do not or are prepared to accept a summary in their language; some are happy to take into account filings made in other jurisdictions, some are not.

8. The scale of this divergence leads to the imposition of massive costs, uncertainty and delay for business, with few if any countervailing benefits, even in cases where competition issues do arise.

(3) **Solutions**:

9. In the CBI's view, international action needs to be taken to alleviate such difficulties, with benefits not just to business but to regulators and to the general public as well. The approach should be by way of "soft convergence" whereby influence is exerted on all jurisdictions to adhere to a set of principles which might be described as "best practice".

10. Such principles could include:

(i) introducing threshold tests which ensure a meaningful jurisdictional connection to justify notification in a particular jurisdiction, i.e. requiring reasonably substantial minimum levels of assets/turnover and overlapping presence between the merging parties in that jurisdiction;

(ii) limiting the information required to be included in notifications to matters of fact avoiding the need for sometimes complex and inevitably subjective market share analysis;

(iii) setting common time-limits for filings of notifications and time-tables for clearance; the one month initial review with a three to four month detailed review in problematic cases would be an acceptable norm;

(iv) reducing the need to file in numerous different languages;

(v) the adoption of similar substantive tests for determining the impact on competition of the transaction in question;

(vi) compliance with measures to improve transparency in the decision-making process by competition authorities including avoidance of discrimination;

(vii) consistent and predictable application of the rules;

(viii) fair procedures for review of decisions, such as the right to be heard (for both the merging companies and interested third parties), and the right to speedy access to an independent court or tribunal to challenge a merger-blocking decision;

(ix) respect for the confidentiality of business information provided by the parties in the course of the process.

11. This is by no means intended to be an exhaustive list. For far more detailed proposals, reference might be made to both the paper prepared by the Merger Streamlining Project "Best Practices for the Review of International Mergers", September 2001 discussion draft, and BIAC/ICC "Recommended Framework for Best Practices in International Merger Control Procedures", 4 October 2001. Both papers offer balanced and well thought-out proposals for tackling the problems described.

(4) **Benefits**:

12. The CBI believes considerable benefits could result from such soft convergence of the rules. First, it would promote greater efficiency and confidence in the merger review process in the case of cross-border transactions. This could be particularly important when controversial decisions are taken in high-profile cases, for instance, the European Commission's decision in GE/Honeywell[2].

13. Secondly, and as stated earlier, such convergence would considerably reduce the huge costs and levels of uncertainty faced by the business community due to the expansion of merger control regimes. Reducing such costs would have a beneficial effect on the financial performance of companies, and reducing such uncertainty would allow companies to pursue strategies with greater levels of predictability than is currently the case.

2 Case No. Comp/M.2220 - General Electric/Honeywell. (A copy of the decision can be found on the Commission's website at www.europa.eu.int/comm/competition/mergers/cases/decisions/m2220 en.pdf).

14. Thirdly, the approach we have suggested would promote more efficient use of resources by competition authorities, allowing them to focus their efforts on the more important cases.

15. Equally, it would become more readily apparent if any national competition authorities were adopting significantly divergent approaches to merger control, thereby highlighting those issues which would benefit from discussion between the regulators within bodies such as the International Competition Network.

16. This leads to the fourth benefit, namely, greater levels of co-operation between competition authorities, reinforcing the need for a *forum* within which to share ideas on "best practices" and, likewise, practices to avoid. It would also hopefully lead to enhanced levels of realisation of the need to assess international transactions in an international context, i.e. avoiding the adoption of narrow, nationalistic considerations in their decisions.

17. Fifthly, the general public as a whole should gain too. The adoption of common rules and practices should hopefully reduce the risk that transactions which do not raise competition problems will be blocked. Removing the potentially "chilling effect" of the current problems also removes a potentially significant impediment to international economic development.

(5) Conclusion:

18. In our view, there is much to be gained from the adoption of converging standards in merger control procedures. No country should have anything to fear from such a process, since it need in no way impinge on the essential sovereignty of a country to decide a case which genuinely affects its economy in whichever way it chooses, under its own legal rules. The convergent approach argued for here is absolutely not intended to be a charter for larger countries and their companies to disregard the proper competition interests of the developing world or, indeed, of any other country. Also, without taking sides in the great debate about Globalisation, it is nevertheless an economic reality which business has to respond to as world markets become ever more closely integrated. No one country should be entitled to stand in the way of this process by taking upon itself the right to intervene in cross-border transactions to an extent which is not substantially justified by the real impact of that transaction in its own territory. All jurisdictions have a common interest in avoiding such overreaching.

19. For these reasons, the CBI believes that urgent action is required to address these issues, and if the International Competition Network can help in achieving some results in this area, then it will have more than justified its creation.