The benefits of converging standards in merger review procedures

C J Scott-Wilson
on behalf of:
European Aeronautic Defense and Space Company

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Introduction

Convergence is normally "a good thing". A simple procedure common to all Countries - with common information requirements, procedural steps and timetables – seems to have obvious advantages for business in terms of compliance costs. Industry has welcomed this initiative.

However these moves towards 'convergence' are not motivated by a desire to benefit industry. The motive is to avoid differences of opinion that might otherwise damage the credibility of the Competition authorities. Any benefit for business will be a spin-off.

Moreover, the promised benefits could prove to have been more apparent than real. Even if standards and systems were totally harmonised it would not prevent conflicting decisions. Each authority would be applying the rules to the situation within its own jurisdiction and geographical markets: and this sets an absolute limit to what might be achieved by convergence.

Any benefit of common procedures will be further limited if the substantive Law were different, or were being applied differently, in different jurisdictions. Indeed, so long as business still requires different professional advisers in different countries the reduction in compliance costs would be negligible: and the only benefit would be a certain tidiness.

In the final analysis convergence is not an end in itself. A bad Law, badly applied does not become a good Law because it is applied equally badly in every country. Real benefits will only accrue when one looks beyond the process of converging standards to consider the standards on which they are converging. This requires consideration of best practice and, more importantly, a common understanding of what constitutes "best" in this context.

Substantive issues

The scope for convergence is not limited to procedural matters. Exactly the same procedures could give widely different results depending of the rules that are being applied. Any suggestion that the only differences between countries were procedural has been proved wrong by the GE/Honeywell case.

This debate therefore requires an appraisal how one can best achieve the purpose of Competition Law, namely "to ensure a system in which competition is not distorted" and what the outcome might look like. The differences in outlook and approach revealed in the GE/Honeywell case raise significant issues in this regard.

In both the EU and the US the fundamental purpose of the Law is to ensure that the benefits of greater efficiencies are passed on to customers rather than retained by suppliers. However, in seeking to achieve this:

- The US takes the pragmatic view that if prices are likely to fall as a result of a transaction then, it follows, that the benefits are being passed on.

- In contrast, the EU takes a more theoretical approach in which it is assumed that prices will rise as a result of any transaction unless the market structure is such as to prevent it.

This approach has led the EU to a point where it is effectively using Competition Law to restructure markets to suit a pre-conceived template rather than analysing the effects of the transaction in question.

This difference in approach becomes important when considering how the two systems treat winners. In the US, provided a fair share of the benefits is passed on, winners will be allowed to win. In the EU, beyond a certain point success raises a 'presumption of guilt': shifting the burden of proof onto the parties and requiring them to prove a negative.

Rebutting this presumption is almost impossible. To do so, one would have to prove to the Commission that it was wrong either in its definition of the relevant market or in its finding of dominance. Persuading someone to accept that they are wrong is never easy and it is made even harder by the fact that these terms are so malleable as to be largely subjective.

- Thus, it is possible to go on defining the product market by reference to narrower and narrower criteria and the SSNIP test will not set a limit on the process. In the final analysis, the only constraint on the Commission when it defines the market is the point at which the Court might rule that the market definition is so ridiculous as to constitute a manifest error.

- A subjective product market definition means that determination of an undertaking's market share is also subjective and, since a large market share is now considered to be evidence, if not *prima facie* proof, of a dominant position that too is a subjective judgement.

- Moreover, where the resulting market share is still not sufficient to establish dominance the authorities may consider joint dominance. And where the market is defined so narrowly as to exclude any overlap between products they may introduce the concept of portfolio power or bundling.

In the circumstances it is hard to conceive of a case where the authorities would be unable to block a transaction should they choose to do so.

It is probably inevitable that decisions required in the field of Competition Law contain an element of subjectivity on the part of the decision-maker. It is important to reduce this to a minimum. It is even more important, however, to ensure that there are checks and balances to ensure that subjective decisions do not become arbitrary decisions. This is the essence of due legal process.

Procedural Issues

The convergence of different systems necessarily implies change. However, bureaucratic systems can be expected to resist change and to reject criticism. In every case the authorities will start from a proposition that their system is (a) satisfactory and (b) better than anyone else's. The process of convergence will require, therefore, a common understanding as to what an optimum solution should look like. Compliance costs will be an important consideration. However, other, more fundamental issues will also need to be addressed.

Law or Policy?

It is important to decide whether these issues should be considered as procedures for the enforcement of Law or for the implementation of Policy. In the EU, for example, the answer is unclear. One can infer from the self-righteousness with which the Commission rejects political interference that they see themselves as acting in a legal capacity: and it follows that it should conform to standards of due legal process. But does it?

A good starting point from which to consider these standards is Article 6 of the European convention of Human Rights which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". This right has three elements to it: fairness, impartiality and transparency.

'Fairness' may not be amenable to precise definition; however, it implies an even-handed process as between the parties. This would include, the right to state one's case and to challenge the evidence against one before an open minded tribunal: and an outcome that depends on relevant considerations and evidence according to predictable and established rules of Law.

'Impartiality' is a requirement of natural justice which demands that the person who makes the decision is impartial and has no interest in the outcome of the case. A man may not be judge in his own cause.

'Transparency' is an important safeguard against the abuse of power. The Convention on Human Rights specifically refers to a "public hearing". Justice must be seen to be done: and by ensuring that it is seen we go a long way to ensuring that it is done.

These three requirements provide us with an acronym – 'FIT'. If there is to be a convergence of standards then best practice can best be achieved by ensuring the survival of the fittest.

My direct experience is limited to the European system: but I know of no system which should, on this criteria, survive. So far as fairness is concerned:

- Crucial decisions such as the definition of the "relevant market" require consideration of so many interdependent variables that the outcome is not dependent on the evidence but on the subjective judgement of the adjudicator.

- Authorities often rely on arguments presented by competitors who clearly have an interest in the outcome, and from witnesses who 'do not wish to be named'.

- Authorities may introduce novel concepts, e.g. "portfolio power", in cases where these are necessary to achieve the desired outcome. Moving the goalposts in this way creates legal uncertainty. Moreover, where this has happened the implication that there is a desired outcome to be achieved suggests that cases are being approached with something less than an open mind.

These defects might be less serious if decisions were being taken by an independent public tribunal. But, at least in the EU, they are not. The EU Commission is both prosecutor and judge in its own cause and its decision-making procedures are opaque.

In this regard, it is important to distinguish transparency of outcome and transparency of process. Procedures are not rendered transparent because an authority publishes its decisions and sets out its reasoning. A lengthy *ex post facto* rationalisation cannot shed light on the process by which the decision was reached. A "public hearing" requires an open presentation of the case for and against a particular proposition before any final decision is taken.

Accountability

In the EU it is argued that the above concerns are misplaced. It is pointed out that Commission decisions can be appealed to the Court of First Instance: and that there are internal checks and balances to ensure that the correct decision is taken in the first place.

Internal checks and balances are, by definition, internal and so they cannot substitute for due legal process. Moreover, while an effective appeals procedure could remedy procedural defects we do not have an effective appeals procedure in the EU. There are two reasons for this.

- First, appeals are lengthy and generally result in a decision years after it would be of any practical significance. Recognising this problem, the Court has introduced an expedited procedure. We have yet to see how this will work in practice but early indications are not promising.

- Secondly, the jurisprudence of the Court makes it clear that it is not going to re-open the "complex economic issues" on which most cases turn. Thus, the substance of a decision will not be open to appeal. The Court will only consider whether there has been any procedural irregularity: or a manifest error or misuse of power.

Thus, the Commission only has to follow the correct procedures and avoid a "manifest" error: while aggrieved parties are unlikely to pursue an irregularity when their interest in the outcome has become academic.

Judicial Review

In fact, the approach indicated by the Court is not consistent with an appeal against a decision: rather it suggests a judicial review. The decision by the Court only to intervene where there is a manifest error is comparable to the "*Wednesbury Principle*" in Common Law jurisdictions under which the Courts will overturn an administrative decision only if "no reasonable tribunal could have reached it".

This further implies that Commission decisions are administrative rather than judicial acts. If the substance of a decision is not a matter for the Courts then it is presumably a matter of policy. But if this is so, then it is also outside the normal process of democratic accountability. A situation in which no-one is accountable for decisions, either through the legal or the democratic process, is clearly untenable.

Summary and Conclusions

Convergence is not an end in itself. Benefit will flow not from the fact of convergence, but from enshrining best practice in the standards towards which Countries converge. There is a need to establish a consensus regarding what constitutes best practice with regard to the correct application of Competition Law and with regard to the procedures by which it is applied. In this the following basic principles ought to prevail:

- Competition Laws should not be used to impose political solutions or market structures. As an instrument of policy they should be limited to securing the benefits of competition without penalising winners or undermining investments.

- The Law should be applied objectively. In particular the tests and definitions on which decisions are founded should be sufficiently clear to permit legal certainty and predictability.

- Given that an element of subjectivity is inevitable, the competent authorities ought not to be judges in their own cause and decisions having legal consequences should be open to a timely appeal as to substance.

- The procedures by which decisions are reached should be fair, giving the parties the opportunity to present their case and to test the evidence against them before an open-minded and independent tribunal.

- The procedures by which decisions are reached should be open and transparent: and this requires more than the publication of an *ex post facto* rationalisation of the decision.

If the process of convergence results in a system which more closely approximates to these principles: and one in which Countries can be held to account if they do not observe them, then that would be a benefit.