THE BUSINESS CASE FOR CONVERGENCE: A FOCUS ON PROCEDURES

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INTRODUCTION

On the basis of trends in cross border M&A's, of the considerable research on convergence already undertaken, and salient features of past Canadian experiences, we attempt to identify the most relevant steps that should be taken, in the near future, by private firms and organisations such as CERT, so that cross-border M&A examinations by respective competition authorities can be undertaken more efficiently.

We conclude that:

the focus should be on procedures;

firms involved in cross border M&A's should pressure the competition and trade authorities to complete the work that has been done on convergence;

firms involved in cross border M&A's should document the costs, private and social, associated with recent experiences, and offer their assistance to evaluate and improve a new set of procedures.

THE «FACTS»

In order to determine what are the most relevant proposals to move towards convergence, we first look at the different aspects of the issue:

Cross border M&A's are part of contemporary business practice. Their number and importance will remain high, under the assumption that markets remain open. They must not be viewed as a marginal consideration and treated as an exception. An OECD report of June 2001 documents this point convincingly[1].

The number of countries undertaking examination of cross border M&A's is increasing. It is estimated that there are presently around 60[2]. The issue of convergence concerns an area larger than Europe, and North America. This implies that the costs of non-convergence will increase if there is no change in policy and procedures.

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1 New Patterns of Industrial Globalisation, OECD, June 2001.

2 Hanney, W.M., *Transnational competition law aspects of mergers and acquisitions*, Northwestem Journal of International Law and Business, Chicago, Winter 2000. *Recommended best framework for best practices in international merger control procedures,* BIAC and ICC, October 2001.

The past record shows a low number of cases revealing major differences of opinion between the different competition authorities, but a few recent cases have been particularly difficult and visible. Moreover, there is already considerable co-operation between competition authorities, in particular between the European Commission and the FTC, and between the FTC and the Canadian Competition Bureau. This implies that there are no insurmountable barriers to convergence.

On basic principles, competition policies within the OECD are generally compatible, though there are some differences in substance. However, there are presently considerable differences in procedures[3].

Private firms have indicated that the multiple approvals needed for cross-border M&A's are very costly. My lecture is that procedures account for a large part of these costs.

The need for convergence is recognised. Research is well under way and proposals have been submitted[4]. We are not a stage where policy makers need to be informed of the benefits of greater convergence, but at a further stage where implementation is the question.

There is no agreement however on the scope convergence should take, on the decision making process, or on ways of achieving this convergence.

THE REASONS FOR DELAYS IN CONVERGENCE

Despite the above considerations which point to a strong case for convergence, there are delays in the process of change. There may be three reasons for this. First, there are differences relating to questions of substance, even though the broad objectives of the different competition laws are the same. These substance issues are complex and any attempt to include them in convergence undertakings will generate resistance and delays. Second, political considerations are involved. Globalisation challenges the traditional scope of the nation-state, and respective authorities are not particularly willing to relinquish any element of sovereignty to supra national agencies. A convergence project that would entail a sacrifice of domestic sovereignty will be met by strong resistance. Third, while competition authorities are clearly sensitive to the convergence issue, convergence is not a priority for them. Their focus is, and should be, on the study of competition within their own boundaries.

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[3] Merger Cases in the Real World – A Study of Merger Control Procedures, OECD Competition Law and Policy Committee, (Which Wood report) 1994. Sullivan, M.A, Brillant, M, *A Comparison of Basic Merger Notification Requirements in Canada, the United-States and the European Community*, Annual Conference, Canadian Bar Association, September 2001. Suran, I., Louran, J., *European Union: Transatlantic mergers and merger control*, International Financial Law Review, London, April 2001. Hanney, W.M., op.cit. Kauper, T.E., *Merger Control in the United States and the European Union: some observations*, St-John's Law Review, Spring 2000.

[4] *Recommended best framework for best practices in international merger control procedures*, BIAC and ICC, October 2001. *Notification of transnational mergers*, OEDC Journal of Competition Law and Policy, September 1999.

A FOCUS ON PROCEDURES AND THE ROLE OF PRIVATE FIRMS

The above considerations lead us to be optimistic on the convergence issue, if it is properly framed and if the different stakeholders, which are private firms, competition authorities, international organisations such as the OECD, and policy makers, agree on this framework. Private firms have an important contribution to make to this process.

Since most costs are related to procedures rather than substance matters, since resistance is to be expected from the competition authorities on substance matters, since resistance is to be expected on any change that would result in a loss of sovereignty, since there is already considerable work done on procedures, in Europe and in North-America, the focus in the immediate future should be on finalising the work on procedures relating to M&A notification and approval[5]. I fear that, at this stage, a more comprehensive effort would link the question of procedures to matters of substance and respective responsibilities, and that, for all practical purposes, no progress would be made. While it is true that there is more to convergence than procedures, it is also true that the issues are complex, and related to concerns outside of CERT's expertise. One may object that procedures must be in line with substance matters, and consequently that the latter must be part of a discussion on convergence. Given the past record though, I expect that the differences in the basic principles are not so great as to reduce the coherence of the process.

Since ongoing research reveals considerable progress towards proposals for convergence on procedures, but that we see no signs yet on approval or implementation, private firms and CERT should continue to make it known how important the matter is and stress the urgency to solve a problem for which we seem to have all the elements of a solution.

Since discussion of specific proposals may be on the agenda shortly, private firms and CERT can back up their call for progress on convergence by contributing to the debate. They can document the costs they have borne in the past, in the form of case analyses of the procedures and delays they faced when submitting their recent M&A projects to the different competition authorities. Care should also be taken to point out the social costs of these delays, as policy makers will take these into account. Further on in the process, on the basis of their past experience, private firms should study the proposed procedures, evaluate the cost savings relative to their past experience, and recommend changes that would make the process more efficient.

BEWARE OF EXPECTATIONS

The convergence process is well under way. However, we must not overstate the anticipated effects. Convergence on procedures will reduce considerably the cost of submitting M&A projects to the different competition authorities. But convergence on procedures does not increase the probability that a given M&A will meet approval in all jurisdictions: it may still be approved in one jurisdiction, but not in another.

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[5] This does not mean we should not look into substance issues. See Gifford, G.A., *Can international antitrust be saved for the post-Boeing merger world? A proposal to minimise international conflict and to rescue antitrust from misuse,* Antitrust Bulletin, New-York, Spring 2000.