

Executive Summary

Widespread trade liberalisation and regulatory reform have improved business opportunities in an increasingly global marketplace. However, the multiplication of competition regimes can be harmful to business, causing overly burdensome merger review requirements. Recent estimates place the number of countries with merger review regimes at over 80.

Many businesses have found their merger plans scuttled when faced with a myriad of merger reviews in differing jurisdictions. Alcan Inc., in their proposed three-way merger with Pechiney and Algroup in 2000, had to file 16 merger notifications in eight languages and had 35 firms to provide anti-trust advice². The costs imposed by multiple reviews – both direct (professional advisors' fees, management time etc.) and indirect (delayed transactions, business uncertainty, etc.) are sizeable, and one may legitimately question what it is about mergers as a form of business activity that can warrant such a time-consuming and costly approval process.

In this context, Canada Europe Round Table for Business (CERT) has taken the initiative to help business deal with the increasing investment risks that differing policies and their applications can represent for cross-border mergers and acquisitions. CERT has assembled a range of partners from our membership and from prominent industry bodies and formed a high-level Interest Group. The participants have contributed on the need for concerted action by competition enforcement authorities towards the convergence internationally of review processes used in multi-jurisdictional merger and acquisition cases.

The goal of this project is to make a constructive contribution to the development of a flexible framework which may be utilised by the Canadian and European Union (EU) administrations to both increase the bilateral convergence of their respective merger control regimes, and to show the way for international cooperation on the process of merger review. With this project, CERT believes that its recommendations can help reinvigorate economic growth by addressing a major barrier to doing business not only between Canada and Europe, but also worldwide.

This report contains contributions from the CERT Interest Group members that outline why international convergence of merger review is necessary, areas where meaningful convergence may occur between competition enforcement regimes, and delivers concrete recommendations on how greater convergence can be achieved. CERT challenges the governments of Canada and the EU to show leadership in developing a multilateral framework on merger review procedures by adopting and promoting recommendations outlined in this paper.

CERT CEO Round Table and Symposium

At its CEO Round Table of 28 November 2001, CERT delivered a series of detailed recommendations, challenging regulators and trade negotiators in Canada and the EU to lead a multilateral effort to promote the convergence internationally of competition policy in the area of merger review.

At this meeting of over 80 CEOs, senior executives and government officials from Europe and Canada, Richard Evans, Executive Vice-President of Alcan Inc., delivered the CERT Competition Law Interest Group report key findings and recommendations. He emphasized the importance of this initiative by outlining that *“Streamlined merger review procedures will lead to a stronger investment climate, which will in turn strengthen the economy and lead to greater choice and lower prices for consumers. This initiative takes on particular significance as governments strive to stave off a worldwide economic downturn.”*

The CEO Round Table was the first of what is to become a regular meeting of business and political representatives from Canada and the EU, with the express goal of facilitating the dialogue required to increase the free movement of capital, goods and services between the two territories.

² Jacques Bougie speech *“Reflections on Merger Task Force at the Turn of the Millennium: The Requirement for Convergence of Multi-Jurisdictional Merger Review Systems”* on the occasion of the Merger Tasks Force's 10th Anniversary Conference, 2000.

The following day, the first annual CERT Symposium entitled "*International Competition Law: The Business Case for Convergence*", gathered CERT Interest Group members to discuss their detailed recommendations with over 150 delegates from government and the private sector.

Attendees at both events also heard senior speakers from the Belgian Federal Government (representing the Belgian EU Presidency), the European Commission Directorate General Trade and Directorate General Competition, the Canadian government's Department of Foreign Affairs and Trade and Department of Industry and the World Trade Organization (WTO). CERT wishes to extend its support to these governments for their efforts to bring about the launch of a new round of talks in the WTO at Doha earlier in the month.

CERT and the WTO

CERT believes that it is critically important to continue to design a fair, efficient and effective rules-based global trading system in which countries live up to existing agreements and help to strengthen the credibility of the multilateral trading system itself. Indeed, all countries gain where there are clear rules governing international trade and effective means of applying those rules at the international level. The economic prosperity enjoyed by Canada and the EU, as well as the future of global security and cooperation, are largely dependent upon a comprehensive and well-functioning multilateral commercial framework.

CERT believes that the governments of both territories would do well to seek and take into full account the views of Canadian and European business on issues of concern to them. As Canadian and European businesses identify market access opportunities, so too are they ready to assist in dismantling barriers to the free flow of goods and services across borders. CERT is a natural partner and channel of communication between the EU and Canadian authorities and the private sector. As such, CERT's views should be included in the official positions raised at bilateral and multilateral negotiating sessions, and specifically, while negotiating priorities at the WTO.

Both Canadian and European business are concerned with the increasingly complex and often redundant requirements involved in multi-jurisdictional merger reviews. This issue should be given priority attention, given that the decision made at the Doha Ministerial conference marks a significant first step in the commitment to multilateral negotiations on competition policy in the WTO.

An International Framework for Merger Review

While CERT recognises that the impetus for the convergence of competition rules lies with national enforcement agencies, we also support the work of the WTO on competition policy. The new WTO round is an excellent opportunity to put in place some rules for merger review, rules from which Canadian and European business can benefit in the international market place.

As a body with near global membership and a proven track record of negotiating and enforcing international rules, the WTO is viewed by CERT as a natural body through which to develop a multilateral framework for merger review. CERT firmly supports the sovereignty of each jurisdiction to apply its own laws to mergers that have effects on its market. We believe that such a framework should be based on shared principles that, at least in the initial phases, incorporate a degree of flexibility to allow national governments to meet their commitments.

The work of the recently formed International Competition Network (ICN) should be complimentary to that of the WTO, providing the expertise required to develop an effective framework for merger review procedures for members of the international trading community. CERT supports the ICN in its efforts to develop a procedural framework amongst countries that have effective merger review regimes. CERT will be requesting input into this process as a representative of the Canadian and European business communities, specifically, to the ICN Capri meeting in June 2002.

We propose that the WTO incorporate the ICN developments that would aid its efforts to bring all its members into a multilateral framework for merger review. This will require coordinated technical assistance and capacity building in efforts to support the progressive reinforcement of competition institutions in developing and lesser-developed countries (LDCs). This would likely include the adoption of

aspects of both Canadian and EU Competition laws, and of recommendations outlined in this paper. A global merger review initiative spearheaded by the governments of Canada and the EU, and supported by the private sector, can make important contributions to the process of economic development, facilitating structural adjustments that allow national economies to better compete in the global trading system.

CERT agrees with EU and Canadian government support for a WTO framework on competition. As stakeholders in this process, CERT has contributed this paper in efforts to hasten the effective realisation of such an initiative, specifically, in the area of merger review.

CERT's suggested approach

While vertical competition provisions exist in some WTO agreements (i.e. TRIPs), the existing WTO agreements and related instruments tend to incorporate a number of provisions that deal with this subject in ad hoc and unsystematic ways. CERT believes that there is a need for horizontal competition principles that can be used to develop a merger review framework on a realistic time frame. A gradual approach is required, that focuses on the ability of all those regimes involved to implement and enforce merger review rules and procedures.

We are requesting that the Canadian and EU trade and competition authorities take the lead on this issue by building upon existing areas of cooperation; notably, the 1999 Canada-EU agreement regarding the application of their competition laws. We further propose that the two administrations proceed in the WTO, specifically, in setting negotiations on multilateral merger review as a priority for the post-Doha agenda on trade and competition. This is also an opportunity to take the debate on competition law convergence beyond the all too narrow EU-USA dynamic and give it a truly international dimension.

This submission is meant to serve as input to the development of the post-Doha trade and competition agenda. Furthermore, CERT will continue to operate as a recognized conduit between business and government on Doha views and issues, as a forum that can deliver valuable business intelligence in the preparatory process prior to the launch of WTO negotiations.

The Canada-EU Summit of 18 December 2001

This comprehensive report is formally submitted to Minister Pierre Pettigrew and Commissioner Pascal Lamy on the occasion of the Canada-EU Summit of 18 December in Ottawa, Canada, as a matter for consideration and action on the part of the governments of both territories. It is intended that CERT's recommendations be used initially in efforts to build upon the success of the 17 June 1999 agreement between the government of Canada and the European Union regarding the application of their competition laws. This agreement states that the European Communities and the Government of Canada: *"Acknowledge their commitment to enhancing the sound and effective enforcement of their competition laws through cooperation and, in appropriate cases, coordination between them in the application of those laws."*³

On the occasion of the semi-annual meetings of the appropriate officials of the Parties competition authorities, CERT should be viewed as a natural partner for private sector input. This dynamic can serve as an effective medium through which to strengthen multilateral commitment for greater convergence of merger review rules and procedures.

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CERT proposes a meeting on the occasion of the EU-Canada Summit of May 2002 in Madrid, Spain, at which to receive formal responses from the Canadian government and the EU to this report and the recommendations contained within.

³ *Canada-EU agreement. Framework Agreement for commercial and economic cooperation between the European Communities and Canada*, 17 June 1999, pp.1

Structure of this report

This report is structured in three parts. Section I is an overview of 15 key findings and recommendations delivered at the CERT CEO Round Table of 28 November in Brussels. They have been distilled from our Interest Group contributions, and CERT feels that they should form the basis for an effective merger review framework. Section II contains summaries of the individual Interest Group member contributions. Section III contains the full-length Interest Group contributions (not all Interest Group members have contributed full-length submissions).