

III. THE EC MERGER CONTROL REGULATION

The implementation of the EC Merger Control Regulation is a potentially important development for the ability of Canadian businesses to compete successfully in European and other markets. Mergers, acquisitions and other arrangements that might be affected by the Regulation may provide an effective means for Canadian companies to gain access to expanding Community markets, or consolidate their positions within these markets as the remaining EC internal barriers are lowered. The treatment of mergers under the Regulation may also affect the nature of competition facing Canadian companies not only in the EC, but also in Canada and other countries. In particular, permissive EC competition policy treatment of mergers could lead to the creation of large Community market leading companies as competitors for Canadian businesses.

This section examines these and other issues relating to the EC Merger Control Regulation which came into effect in September 1990. It briefly considers the state of merger control in the Community prior to acceptance of the Regulation in December 1989, and outlines the major provisions of the Regulation and proposed guidelines for its enforcement.⁷ In addition, the section examines the potential implications of the Regulation for Canadian businesses and public policy.

1. EC Merger Control Before December 1989

The applicability of EC competition policy to mergers remained a largely unsettled matter in the EC until the 1973 Continental Can decision. In this case, the European Court of Justice established that a merger could constitute an abuse under Article 86 of the EEC Treaty, if as a result of the merger, a business strengthens a dominant position "in such a way that the degree of dominance reached substantially fetters competition."⁸ The Court, therefore, supported the prevailing view of the EC Commission, which was that mergers having the effect of monopolizing a transborder market in the EC might be treated as an abuse of a dominant position.⁹