

By not allowing private suits, the Canadian system places prosecutorial discretion entirely in the hands of the enforcement agency.

The United States appears to have the most complex merger control system. Its low prenotification thresholds, less generous safehavens, private suits (including treble damages), and enforcement by State Attorneys General could create additional compliance costs and uncertainty for Canadian firms operating in the free trade area. Ambiguities in and the generality of U.S. statutory language (e.g., the relevant factors for consideration by the enforcement authorities and the courts are not listed) create uncertainty about the future evolution of jurisprudence.

This problem is not entirely absent from the Canadian scheme either. In the *Hillsdown* case, the Competition Tribunal declined to provide a definition of "substantial" lessening of competition arguing that "what will constitute a likely "substantial" lessening will depend on the circumstances of each case." Criteria include the obvious ones of degree and duration, but the Tribunal declared that it "does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes." This uncertainty or ambiguity could be a source of conflict in future contested merger cases.

Another problem is the qualitative nature of many merger control assessments. Even with the benefit of detailed and transparent merger enforcement guidelines, merger control appears to be as much art as science. Market information, such as price and cross-price elasticities of demand, for example, is difficult to collect and evaluate, and potential dynamic efficiency gains impossible to quantify with precision.⁷⁴

The United States' approach to the extraterritorial application of its antitrust laws is of potential concern, particularly in the context of private suits and suits by State Attorneys General, as is the introduction this year of a discriminatory provision in the National Cooperative Research Act concerning production joint ventures.

6. The future of merger control

6.1 Merger control and competitiveness

Merger control has emerged as a subject of theoretical and policy debate in the context of globalization and competitiveness. This debate has found some resonance

⁷⁴ In the *Hillsdown* case, once again, the Tribunal essentially ruled against the Director on the basis of a different expectation concerning the behaviour of fringe firms in the market.