5.5 Scope of Merger Control

In the U.S., certain regulatory statutes explicitly exempt mergers from the Clayton Act if approved by the appropriate regulatory agency. These include: telephone and telegraph (but not radio and television) approved by the Federal Communications Commission; rail, motor and water carriers approved by the Interstate Commerce Commission; and newspapers approved by the Attorney General. The U.S. Supreme Court has held that antitrust challenges can be made against mergers approved or subject to approval by the Federal Maritime Commission or the Federal Energy Regulatory Commission.

In Canada, section 94 of the Competition Act exempts certain anticompetitive mergers under the Bank Act when the Minister of Finance certifies that the merger "is desirable in the interest of the financial system".

The EC Merger Regulation provides for a temporary securities holding exemption.

The sectoral scope of merger control is potentially more limited in the United States than in either Canada or the EC.

5.6 Extraterritoriality

The U.S. has a controversial and expansive approach to jurisdiction in the antitrust area. The subject matter jurisdiction of U.S. courts extends to mergers having allegedly anticompetitive effects in any part of the United States (the "effects test"). The reach of U.S. courts through "personal jurisdiction" extends to defendants having minimum contacts with the United States such as foreign companies doing business in the U.S.

In 1988, the DOJ adopted International Antitrust Guidelines where it outlined comity (consideration of other countries' national interests) and the adequacy/feasibility of remedies as factors it considers in deciding whether to seek to enforce U.S. antitrust laws in international merger cases. Where one of the merging firms has assets in the United States, the DOJ has taken jurisdiction and ordered relief in foreign markets, e.g., divestiture through consent decrees. In 1992, the DOJ confirmed that it was prepared to take antitrust action against conduct overseas that "restrains United States exports". While aimed principally at foreign