

Some recent lower court rulings have begun to reflect a similar approach to efficiencies.⁶⁵

The Competition Tribunal's interpretation of section 96 would, potentially, nudge Canada's treatment of efficiencies closer to U.S. practice. The substantive merger tests in Canada and the United States may, therefore, be closer than they appear on the basis of the Canadian statute and previous U.S. court cases. Even if one accepts the Director's interpretation of section 96, the most important difference between the treatment of efficiencies appears to be that, in the United States, efficiencies must not lead to any transfer of surplus from consumers to producers (i.e., must ultimately benefit consumers), whereas Canadian law apparently allows for that possibility.

The practical impact of the efficiency defence has been limited. Since the adoption of the Competition Act, no merger reviewed by the Bureau of Competition Policy has been deemed to have satisfied the trade-off test.⁶⁶

The wording of the EC Merger regulation would indicate that the Commission is directed to take into account productive and dynamic efficiency gains as long as they are at least partially passed on to consumers (similar to U.S. consumer welfare approach).

5.3 Discriminatory provisions

Generally, merger control in Canada, the U.S. and the EC is applied in a non-discriminatory manner with regards to ownership or production location.

The Brooks Bill, however, (adopted in June 1993) amended the 1984 National Cooperative Research Act to allow certain production joint ventures, in addition to certain R&D joint ventures, to qualify for a single damage limitation on civil anti-trust liability (i.e., no treble damages). The Bill contains a provision requiring that the joint venture's "principal production facilities" be located in the United States. This discriminatory treatment of joint ventures on the basis of location could distort trade and investment. Moreover, in terms of protecting competition, there is no justification for such discrimination.

⁶⁵ Neil Campbell and Michael J. Trebilcock, "A Comparative Analysis of Merger Law: Canada, the United States and the European Community", World Competition Law and Economics Review, Volume 15, March 1992, number 3, p. 21.

⁶⁶ Although one apparently came close. See Paul S. Crampton, op cit, supra, note 61, p. 381.