

MERGER CONTROL UNDER TRADE LIBERALIZATION: CONVERGENCE OR COOPERATION?

Executive Summary

This paper assesses the impact of trade liberalization, especially the Canada-United States Free Trade Agreement (FTA), on merger control and its implications for Canada in light of calls for greater convergence of competition policies.

Canada is pursuing a coherent mix of trade and merger control policies. Trade liberalization under the FTA and the future North American Free Trade Agreement are alleviating substantive concentration/competition problems in the Canadian economy, although trade remedy legislation, occasionally stringent rules of origin, restrictive government procurement practices, and currency fluctuations will continue to work against the single market. Competition concerns will also remain in regulated sectors. Once the current trade agreements are fully implemented, and barring future improvements, further trends towards monopolisation will not be constrained by added import competition except from outside the free trade area. Paradoxically, trade liberalization may complicate merger control in North America because more mergers will be transboundary in their effects and subject to review by several jurisdictions.

Frictions could arise, *inter alia*, from:

- substantive differences in merger tests (notably the intrusion of non-competition-based tests/factors and discriminatory provisions based on ownership or production location);
- competing orders for the restructuring of anti-competitive mergers and competing contested merger reviews before the courts; and
- extraterritorial application of domestic merger control law.

A comparison of Canada, United States, and EC merger control systems indicates a trend towards *de facto* convergence between enforcement guidelines and jurisprudence in the first two jurisdictions. All three systems are largely concerned with the effects of horizontal mergers on market power. A number of important differences remain, however, notably in the complexity, transparency and uncertainty attached to the respective merger control laws, institutions, and enforcement processes. These differences stem, in part, from different legal systems and traditions, but also from different sensitivities towards the relationship between merger control, competitiveness, and industrial policy.