In March 1992, however, the Competition Tribunal delivered its first decision in a contested merger case (*Hillsdown*). In the non-binding part of its decision, it declared that it had "difficulty accepting" the Director's interpretation of the efficiency defence, namely that the term "effects of any prevention or lessening of competition" refers only to deadweight loss and not, inter alia, to the transfer of surplus from consumers to producers. For various reasons (paramount objectives of the Act, Parliamentary intentions, logic), commentators have questioned the Tribunal's analysis of section 96 which would make the defence "extraordinarily difficult for the merging parties to meet".[62] As the decision is non-binding, the Director has decided not to change the Merger Enforcement Guidelines.[63]

No absolute efficiency defence exists in the United States. In *Proctor and Gamble (1967),* the U.S. Supreme Court refused to recognize "possible economies" as a defence to an otherwise unlawful merger. However, commentators are not in agreement as to whether this language constitutes an outright rejection of the efficiencies defence.[64]

Since 1984, however, the Department of Justice will take efficiencies into account as one of many factors in determining whether to oppose a merger. The parties must provide "clear and convincing evidence of efficiencies sufficient to prevent a price increase arising from the merger and which could not reasonably be achieved by the parties through other means". Similarly, the Federal Trade Commission does not view increased efficiencies as a legally cognizable defence to an unlawful merger, but will consider them in the exercise of its prosecutorial discretion at the pre-complaint stage. In a 1984 decision, however, it appeared to treat evidence of substantial efficiencies that benefit consumers as a valid defence.

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[62] Paul S. Crampton, "The Efficiency Exception for Mergers: An Assessment of Early Signals From the Competition Tribunal", Canadian Business Law Journal, Volume 21, 1992-93, p. 371.

[63] In considering whether efficiency gains are likely to be brought about by the merger, the Tribunal is also required to consider whether such gains will result in a significant increase in the real value of exports or a significant substitution of domestic products for imported products. In the Bureau's view, subsection 96(2) of the Competition Act is not intended to expand the class of efficiency gains considered by the Tribunal, but merely draws attention "to the fact that in calculating the merged entities total output for the purpose of arriving at the sum of unit and other savings brought about by the merger, the output that will likely displace imports, and any increased output that is sold abroad, must be taken into account." While such an interpretation renders the subsection meaningless, it is equally true that a positive change in the trade balance is not an efficiency gain in economics either. While the ultimate intent of this subsection remains a mystery, one suspects that legislators confused trade effects with efficiency gains. This would be in keeping with the Act's rather ambiguous objective of "expanding opportunities for Canadian participation in world markets", which could be read to indicate that companies engaging in a merger could attempt to address competition concerns by emphasizing the net trade gains flowing from the proposed merger. Such emphasis in international merger cases could, in turn, be interpreted as reintroducing performance requirements that are inconsistent with Canada's international trade obligations (GATT, FTA, NAFTA).

[64] American Bar Association Section of Antitrust Law, op cit, supra, note 50, p. 431.