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Merger Control Under Trade Liberalization: Convergence or Cooperation?

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Canada

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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.

For Canada, the greatest potential for friction will arise, in the first instance, with the United States, because of the implementation of the FTA and that country's complex merger control enforcement process, including private suits (injunctive and treble damages) and suits by State Attorneys General; extraterritorial application of domestic law; and discriminatory provisions regarding production joint ventures. Moreover, in past merger cases, U.S. statutes have, on occasion, been interpreted liberally enough to protect U.S. exporters and not just competition, an interpretation that shades into a protectionist policy of supporting national winners. Lower U.S. prenotification thresholds and less generous safehavens could also create additional compliance costs and uncertainty for Canadian firms.

Convergence towards pure competition-based, non-discriminatory tests and a common merger analysis framework (e.g., defining common approaches to issues of market definition, relevant factors, and efficiencies) could eliminate substantive differences in merger tests and reduce - but not eliminate - uncertainty and excessive compliance costs which deter pro-competitive or competitively neutral mergers. Convergence inevitably raises issues of "standards", however, and the supposed superiority of U.S. standards over those of other countries. Canada could be subject to U.S. pressures concerning the transparency of its merger control process as well as access to the courts for private parties. Safehavens could become an issue as well, although Canada is armed with a strong argument.

The superiority of U.S. over Canadian "standards" has yet to be proven. Canada's merger control strengths, which it should preserve, include:

i) a rapid and relatively efficient process managed by a single jurisdiction which avoids unnecessary litigation; and
ii) recognition by law of the dynamic nature of competition and of the impact of trade liberalization on competition.

Beyond convergence lies the issue of cooperation. The qualitative and uncertain nature of merger analysis implies that the possibility of conflicting decisions will always be present, even after convergence. Cooperation is required to resolve issues related to the restructuring of mergers, competing contested reviews before the courts, and the extraterritorial application of domestic law. Options include models of shared sovereignty, dispute settlement mechanisms, or a common merger control institution for the free trade area.

Further analysis relating Canada's merger control interests to its interests in other areas of the trade and competition policy interface (e.g., treatment of cartels, anti-dumping replacement, differences in the treatment of dominant monopoly positions) is required before drawing conclusions on an appropriate course of action beyond the status quo. In light of ongoing work at the OECD, this paper suggests certain limited Canadian objectives in the area of merger control in the future NAFTA work programme:

- convergence of certain procedural requirements;
- exchange of information between enforcement agencies;
- elimination of discriminatory provisions; and
- establishment of work program to review options for reducing the potential for jurisdictional conflict.

Résumé

Ce rapport évalue l'impact que la libéralisation du commerce et, plus précisément, l'Accord de Libre Échange Canada-États-Unis (ALE) exercent sur le contrôle des fusions, et en analyse les incidences pour le Canada dans le contexte des efforts en vue d'obtenir une meilleure convergence des politiques de concurrence.

Le Canada poursuit un ensemble cohérent de politiques touchant le commerce et le contrôle des fusions. La libéralisation du commerce sous le régime de l'ALE et, éventuellement, de l'Accord de Libre Échange Nord Américain (ALÉNA) atténue les principaux problèmes de concentration de l'économie canadienne, quoique les recours commerciaux, des règles d'origine quelquefois trop rigoureuses, des procédures de passation des marchés publics restrictives, et les fluctuations de taux de change continueront de jouer contre le marché unique. Des problèmes de concurrence demeureront également dans les secteurs soumis à la réglementation. En outre, une fois que les accords commerciaux existant seront entièrement mis en oeuvre, et sauf améliorations ultérieures, toute nouvelle tendance à la monopolisation dans la zone de libre échange ne sera plus limitée par une plus grande concurrence à l'importation, sauf depuis l'extérieur de la zone. Ainsi, paradoxalement, la libéralisation du commerce pourrait alors accroître les frictions autour du contrôle des fusions en Amérique du Nord en augmentant le nombre de transactions sujettes à des examens par plusieurs juridictions.

Des frictions pourraient surgir, par exemple, à partir:

- de différences fondamentales entre les critères d'évaluation appliqués aux fusions (notamment, l'introduction de critères ou facteurs non fondés sur le principe du maintien de la concurrence et l'application de dispositions discriminatoires fondées sur la nationalité de la propriété ou sur l'emplacement de la production);
- de demandes contradictoires de restructuration d'une même fusion faites par plusieurs juridictions, et aussi de contestations d'examens de fusions devant les tribunaux de plusieurs juridictions; et
- de l'application extraterritoriale de la législation nationale sur le contrôle des fusions.

Une comparaison des régimes de contrôle des fusions du Canada, les États-Unis et la Communauté européenne révèle une tendance à une convergence de fait entre la réglemenation et la jurisprudence des deux premiers pays. Les trois régimes examinent surtout l'effet qu'ont les fusions dites horizontales sur le pouvoir de marché des entreprises. Mais il subsiste un certain nombre de différences importantes,

notamment en ce qui touche la complexité, la transparence et l'incertitude rattachées aux lois, aux institutions, et aux procédures respectives. Ces différences découlent en partie des régimes juridiques et des traditions propres à chaque juridiction, mais aussi de sensibilités différentes quant à la relation qui existe entre le contrôle des fusions, la compétitivité et la politique industrielle.

Pour le Canada, dans un premier temps, ce sont les relations avec les États-Unis qui pourront causer le plus de frictions en raison de la mise en oeuvre de l'ALE et de la complexité du système américain de contrôle des fusions, y compris les actions privées (redressement par injonction et dommages-intérêts au triple), les procédures intentées par les procureurs généraux des États, l'application extraterritoriale de la législation nationale, et les dispositions discriminatoires concernant les coentreprises de production. De plus, dans les affaires de fusion précédemment examinées, les lois américaines ont parfois été interprétées assez largement pour protéger les exportateurs plutôt que la concurrence. Ces interprétations virent quelque peu vers une politique protectionniste de soutien aux entreprises nationales. Les firmes canadiennes pourraient également devoir faire face à des coûts supplémentaires afin de se conformer aux seuils de notification préalable des fusions qui sont plus bas aux États-Unis qu'au Canada. De même, les autorités américaines appliquent des paliers, en dessous desquels les fusions ne sont pas supposées entraver la concurrence, qui sont moins généreux que ceux appliqués au Canada. Cela pourrait également augmenter l'incertitude pour les firmes canadiennes.

La convergence autour de critères d'évaluation non-discriminatoires et purement axés sur le maintien de la concurrence et autour d'un cadre d'analyse commun (par exemple, en élaborant une définition commune de "marché pertinent", de facteurs pertinents, et du traitement des efficiences) pourrait éliminer les principales différences substantives entre les tests appliqués aux fusions et réduire - mais non éliminer - l'incertitude et les coûts excessifs qui entravent les fusions qui sont bénéfiques ou sans effet sur la concurrence. Mais la convergence soulève inévitablement des questions de «normalisation» et pose le problème de la "supériorité" supposée des normes américaines par rapport à celles des autres pays. Le Canada pourrait être soumis à des pressions américaines en ce qui concerne la transparence de son processus de contrôle des fusions et l'accès des simples particuliers aux tribunaux. Les paliers appliquées par le Canada pourraient aussi causer problème quoique le Canada peut faire valoir de solides arguments en leur faveur.

La supériorité des «normes» américaines par rapport aux nôtres reste à prouver. Pour ce qui concerne le contrôle des fusions, le Canada a des points forts qu'il devrait conserver, par exemple:

i) un processus rapide, relativement efficient et géré par une seule juridiction de façon à éviter les procès inutiles, et
ii) la reconnaissance en droit de la nature dynamique de la concurrence et de l'impact que la libéralisation du commerce exerce sur la concurrence.

Au-delà de la convergence il y a la **coopération.** La nature qualitative et incertaine de l'analyse des fusions suppose que la possibilité de décisions conflictuelles sera toujours présente, même après la convergence. La coopération est requise pour régler les problèmes liés à la restructuration des fusions, aux conflits soulevés par les examens contestés devant les tribunaux, et à l'application extraterritoriale de la législation nationale. Les options possibles sont, entre autres, les modèles de souveraineté partagée, des mécanismes de règlement des différends ou une institution commune chargée du contrôle des fusions dans la zone de libre-échange.

Une analyse plus poussée comparant les intérêts du Canada dans le contrôle des fusions et ses intérêts dans d'autres domaines de la politique de la concurrence (par exemple, le traitement des cartels, le remplacement des mesures antidumping, les différences dans le traitement des positions monopolistiques dominantes) est requise avant l'établissement de conclusions sur la ligne à suivre au-delà du statu quo.

En conséquence, et à la lumière du travail mené par l'OCDE, ce document suggère, dans le domaine du contrôle des fusions, certains objectifs canadiens limités pour le futur programme de travail de l'ALÉNA, à savoir :

- la convergence de certaines règles de procédure,
- l'échange d'information entre les organismes d'exécution,
- l'élimination des dispositions discriminatoires, et
- l'examen d'options visant la réduction du potentiel de conflits entre les juridictions.

1. Introduction[1]

In a speech at the 1992 World Economic Forum, the EC Vice-President for Competition Policy argued that it was time to develop a more explicit set of principles in the GATT covering competition policy.

Interestingly, previous efforts at the multilateral level to establish rights, obligations, and disciplines regarding the regulation of conspiracies, trade practices and mergers (which are the concern of competition policy) have not borne fruit. The 1947 Havana Charter establishing an International Trade Organisation contained a Chapter IV on Trade Policy and a Chapter V on Restrictive Business Practices. The United States did not ratify the Charter, however, and competition policy obligations were not incorporated into the GATT, although discussions have been carried out at various times.

Work at UNCTAD led to the adoption by the United Nations in 1980 of a non-binding "Set of Multilateral Agreed Principles and Rules for the Control of Restrictive Business Practices". Under the Code, governments are morally obligated - but no more - to adopt competition laws and ensure that their private or public enterprises respect the Code's provisions.

On the face of it, one of the reasons for the lack of multilateral disciplines concerning competition is that, while countries cannot unilaterally overcome other countries' trade barriers, they can seek to independently regulate private business practices. However, the very success of the current multilateral trading system in increasing world trade, coupled with the liberalization of capital flows and investment, has heightened interest in how and whether to regulate conspiracies, trade practices and mergers at the international level. Indeed, concerns have arisen, inter alia, over the extraterritorial application of domestic competition laws.

Moreover, even as countries have adopted competition laws, the impact of differences in their substantive provisions and enforcement on trade and investment flows has come under increased scrutiny. Successive GATT Rounds and other agreements have swept away much of the overlay of trade restrictions, and domestic price, entry and other regulatory controls impeding international trade such that the marginal effect of competition policy on the composition of economic activity in developed countries may now be discernable.

[1] This paper is part of a work program established by the Policy Planning Staff of External Affairs and International Trade Canada to explore various aspects of globalization. See Keith H. Christie, "Globalization and Public Policy in Canada: In Search of a Paradigm", Policy Planning Staff Paper No. 93/01, EAITC, January, 1993.

Under the Bush administration, for example, the United States expressed considerable concern over the supposed exclusionary effects of vertical restrictions and alleged buyer cartels in Japan. These arrangements are thought to be responsible, in part, for limiting the access of U.S. firms to the Japanese market. Under the Structural Impediments Initiative, therefore, the United States sought stronger domestic enforcement of Japanese competition laws. The EC, for its part, has expressed concern over vertical supplier arrangements in Canada's telecommunications industry, citing Bell Canada's arrangements with Northern Telecom. Competition policy, therefore, has also been swept into the so-called new trade agenda which focuses on concepts such as effective market access and revealed protection.

Sylvia Ostry, for her part, has argued that differences in domestic competition policies might contribute to what she called "system friction". Dr. Ostry has suggested that the best, though perhaps limited, avenue for reducing or ameliorating system friction would be through harmonization of the relevant government policies. Subsequently, OECD ministers recommended in 1991 that it should be determined whether policy harmonization in selected areas, including competition policy, was desirable and feasible. The objective of such analysis would be to propose new international "rules of the game". In this regard, the Canadian Bureau of Competition Policy is chairing a special OECD Convergence steering group under the Competition Law and Policy Committee, which is to report to the OECD Ministerial Council in June 1994 on the need and potential for greater convergence, coherence and cooperation among members' competition laws, enforcement practices, and competition agencies.

While work proceeds multilaterally, greater progress on the establishment of rights, obligations, and disciplines has been achieved at the regional and bilateral levels. The NAFTA, for example, contains a Chapter 15 on competition policy, monopolies, and state enterprises. The Agreement requires each Party to maintain measures to proscribe anti-competitive business conduct and to consult with each other on the effectiveness of these measures. Without specifying how, the Agreement also requires each Party to cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area. Although the NAFTA's dispute settlement mechanism does not apply to this commitment, the Agreement provides for the establishment of a Working Group on Trade and Competition to make recommendations "on relevant issues concerning the relationship between competition policies and trade in the free trade area".

This paper assesses the impact of trade liberalization, particularly the Canada-United States Free Trade Agreement and the future NAFTA, on a sub-set of Canadian competition policy, merger control, and assesses the coherence of merger control and trade policies in light of the FTA's objective, stated in Article 102 b), of facilitating conditions of fair competition within the free trade area.

The paper identifies potential merger control frictions by comparing Canadian, U.S. and EC merger control law and enforcement practices and explores Canadian interests in the international merger control agenda. The paper begins by situating merger control within the larger framework of Canadian competition policy.

2. Competition and Competition Policy

Competition is essential to the operation of a market economy. It encourages firms to minimize costs and helps ensure that these savings are passed on to consumers. It also facilitates the efficient allocation of resources by ensuring the exit of inefficient firms from an industry.

There has always been some concern about *maintaining competition*, however, and fretting over how best to do this. Adam Smith observed that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the publick, or in some contrivance to raise prices...*But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies.*"[2] Fear that capitalism might be characterized by abusive business practices, therefore, has respectable origins among classical economists.

In 1889, Canada became the first country to pass legislation "relating to conspiracies and combinations formed in restraint of trade,"[3] one year before the more famous Sherman Act in the United States. Despite early concern with maintaining competition, however, Canadian law has traditionally been less interventionist than that of the United States, reflecting what one observer has called "Canadians' ambivalence about the virtues of competition as the primary means of allocating the

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[2] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Oxford, Clarendon Press, 1976, Volume I, p. 145.

[3] *An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade* (52 Victoria,c.41).

nation's scarce resources"[4] and others have called Canadians' "more deferential attitude toward authority in general".[5]

The original Canadian statute made persons who conspire to "unduly" prevent or lessen competition guilty of a misdemeanour. This has been interpreted as meaning that it is "acceptable for sellers (or buyers) to get together to enhance prices, so long as they do not "abuse" their collective market power by "going too far"."[6] In the United States, on the other hand, the U.S. Supreme Court declared in 1958 that the Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[7]

Between 1890 and 1969, Canada prosecuted only 70 conspiracy cases compared to 1,279 cases brought before U.S. courts by the Department of Justice and the Federal Trade Commission.

In 1986, new, considerably revised, legislation was passed by Parliament, crowning an almost two-decade old reform effort. The Competition Act is a law of general application, as a matter of federal jurisdiction under the general trade and commerce power section of the Constitution (91(2)). As its title indicates, the Act's objectives are broad. Its purpose, outlined in section 1.1, is to "maintain and encourage competition in Canada" in order to:[8]

- promote the efficiency and the adaptability of the Canadian economy (efficiency objective);

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[4] W.T. Stanbury, "Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform", in R.S. Khemani and W.T. Stanbury eds., Canadian Competition Law and Policy at the Centenary, IRPP, Halifax, 1991, 667 pp.

[5] Bruce Dunlop, David McQueen, and Michael Trebilcock, Canadian Competition Policy, Toronto, Canada Law Book, 1987, p. 20.

[6] W.T. Stanbury, op cit in Khemani and Stanbury, supra, note 4, p. 107.

[7] *Northern Pacific Railway Co. v. United States, 356 U.S. 1,4 (1958).*

[8] Maintaining and enhancing competition, therefore, is not good in and of itself, but a means of achieving other objectives.

- expand opportunities for Canadian participation in world markets at the same time recognizing the role of foreign competition in Canada (export and/or competitiveness objective);
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy (justice objective);
- provide consumers with competitive prices and product choices (consumer interest objective).

Whereas legislation prior to 1976 provided only for criminal matters, the new Competition Act provides for both criminal matters and reviewable matters. The change eases difficulties the Crown previously encountered in prosecuting certain matters requiring "proof beyond any reasonable doubt". The new legislation also recognizes that certain business practices have no redeeming qualities and are always against the public interest, while other matters are best considered on a case-by-case basis.

Criminal practices include conspiracy, bid-rigging, misleading advertising and deceptive marketing practices, predatory pricing, price discrimination, and price maintenance.

Reviewable matters include mergers, abuse of dominant position, refusal to deal[9], consignment selling/exclusive dealing/tied selling/market restriction, and specialization agreements[10].

The reasons for prohibiting certain business practices and reviewing others, therefore, are rooted partly in our notions of fairness and justice, partly in the social compromise surrounding capitalism, and partly in economic theory. As David McQueen has rightly pointed out, competition policy (that is, government intervention aimed at maintaining and enhancing competition) also "fits into the framework of political institutions and of how we resolve recurring conflicts between one dollar one vote and one man one vote".[11] These sometimes conflicting purposes find their reflection in the multiple objectives which the Act seeks to promote.[12]

[9] Occurs when a supplier refuses to supply a customer on the usual terms of trade.

[10] Refers to an agreement between competitors to each discontinue producing a product or service in order to facilitate specialization.

[11] David McQueen, "On Some Other Objectives of Competition Policy", in Khemani and Stanbury, supra, note 4, p. 23.

[12] Interestingly, the consumer protection objective of the Act, as outlined in section 1.1, is last. Indeed, the Economic Council of Canada had recommended in 1969 that competition legislation's sole objective should be to promote the efficiency of the economy without regard to wealth redistribution effects. The legal weight to be given to the ordering of the purpose clause in

For the very same reasons as in Canada, policies and enforcement practices among OECD countries vary considerably, reflecting different legal and historical experiences, but also different approaches to the role of competition in allocating resources and the role of competition law and enforcement as a tool of industrial or other policies.

3. Mergers and merger control

Mergers are combinations or amalgamations of firms whereby one entity disappears or one firm obtains effective control over another. In most cases, mergers are a normal part of the competitive process. Indeed, they assist in the re-cycling of assets of inefficient and failing firms. **Merger control** is the specific subset of competition policy concerned with the surveillance of mergers. In this regard, there is a fundamental difference between the surveillance of mergers, which is the surveillance of **control over productive assets**, and other areas of competition law which tend to regulate business **conduct**.

There is no single economic theory or body of empirical evidence capable of explaining why firms merge. Among the most common motives advanced are a desire to:[13]

i) increase market power;
ii) diversify to spread risks;
iii) achieve sufficient size to obtain economies of scale and/or scope;
iv) reap profits associated with a merger;
v) obtain greater prestige by acquiring more employees.

Data gathered by the EC Commission lists the following stated motives for large mergers and joint ventures within the Community: the reinforcement of market position (by far the most important motive), expansion, complementarity, diversification, restructuring, R&D, and cooperation, among other unspecified motives.[14]

Prior to 1972, only four OECD countries, including Canada, plus the European Coal and Steel Community had enacted specific legislative provisions to prevent anti-

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interpreting subsequent sections of the Act has not yet been determined, however.

[13] OECD, Merger Policies and Recent Trends in Mergers, Paris, 1984, p. 8.

[14] UNCTAD Secretariat, "Concentration of market power and its effects on international markets", TD/B/RBP/80/Rev.1, September 24, 1992, p.10.

competitive mergers. Over the next 20 years, however, 14 other OECD members, the EC, and a number of developing countries instituted some form of merger control.[15]

This legislative activity was spurred by the high number and value of mergers in nearly all OECD member countries and studies documenting the high and increasing levels of market and overall concentration in many countries (to which mergers were shown to have contributed significantly) as well as by doubts about the economic benefits derived from many mergers.[16]

Merger control has traditionally, but not exclusively, been concerned with horizontal mergers and their effect on market power, that is, on the ability of a firm or a group of firms to raise and maintain prices above the perfectly competitive level without losing sales to existing competitors or potential rivals. Market power can only be defined with reference to a specific product and geographic market. Concern over market power is distinct from concern over corporate concentration, conglomerates, and vertical mergers.[17]

The "classic" method of measuring market power, pioneered in U.S. jurisprudence, has been to examine market share data and market structure. More recently, a general tendency has emerged, reinforced by economic analysis, to recognize that competition is a dynamic process which can be viewed in a number of ways, notably through:

i) prices;
ii) market structure;
iii) barriers to entry/contestability of markets;
iv) time (e.g., in the long run vs. the short run); and
v) innovation and quality.

Exclusive focus on static market shares or market structure could lead to erroneous conclusions on the potential anti-competitive effects of mergers.

[15] Although the rate of adoption of competition laws by developing countries in the past decade has been rapid, most still do not have them. See Rajan Dhanjee, "Mergers and Developing Countries: Trends, Effects and Policies", World Competition, Volume 16, No.2, December 1992, p. 29.

[16] OECD, op cit, p.7. The number and value of mergers in developed countries since the end of the Second World war has tended to be cyclical with the peak of the most recent cycle likely being 1988 or 1989. See Rajan Dhanjee, op cit, pp.5-6.

[17] Vertical mergers involve suppliers not competitors. Vertical mergers may raise market power concerns in certain circumstances (e.g., elimination of a specific potential entrant, increasing barriers to entry, facilitation of collusion or interdependent behaviour).

4. Competition in Canada under Free Trade

The most important link between competition policy and other policies is that with trade. This is also not a recent discovery. Adam Smith believed that:

> merchants and manufacturers ... being collected into towns and accustomed to that exclusive corporation spirit which prevails in them, naturally endeavour to obtain against all their countrymen, the same exclusive privilege which they generally possess against the inhabitants of their respective towns. *They accordingly seem to have been the original inventors of those restraints upon the importation of foreign goods, which secure to them the monopoly of the home market.*[18]

In the XIXth century, it was observed that "the tariff is the mother of the trusts". Indeed, commentators have speculated that the original Canadian anti-combines legislation was calculated to fend off criticism that the National Policy, a policy of high tariffs designed to nurture the growth of a manufacturing industry in central Canada, facilitated the creation of combines.[19] These same commentators have pointed out that the history of competition in Canada is fraught with examples of substantial tariff and non-tariff barriers to trade facilitating monopoly, merger, and collusion.

The traditional view of the Canadian economy is that it is characterized by small and geographically-segmented markets that often lead to high levels of market concentration. Studies prepared before the implementation of the Canada-US Free Trade Agreement showed that most markets in Canada tended to be oligopolies. For example, in 1986 Khemani found that:

> 92% of the five-digit standard classification commodities in manufacturing (e.g., four-door passenger sedans, canned soup... etc.) are produced in industries where four or fewer firms account for 60% or more of total sales. 82% of these commodities are produced by four or fewer firms with 80% of total industry sales.[20]

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[18] Adam Smith, op cit, Volume I, p. 462. My italics.

[19] Michael J. Trebilcock, "Competition Policy, Trade Policy, and the Problem of the Second Best", in Khemani and Stanbury, supra, note 4, p. 30.

[20] R.S. Khemani, "Merger Policies in Small vs. Large Economies, in Khemani and Stanbury, supra, note 4, p. 206.

The combined effects of high concentration and tariffs acted as barriers to entry, possibly encouraging oligopolistic coordination among incumbent firms possessing significant market power.[21] At the same time, limited market size, transportation costs, and potential or actual oligopolistic rivalry was seen to impose constraints on plants achieving minimum efficient scales of operation.

Canada's competitive environment is changing, however, partially as a result of the same globalization forces affecting all countries, but, just as importantly, because of the implementation of the Canada-United States Free Trade Agreement which will eliminate almost all tariffs and many non-tariff barriers between the two countries by January 1, 1998.[22]

A good body of theoretical and empirical evidence exists to indicate that substantive competition concerns related to Canadian market structure will be lessened by freer trade. Studies of trade liberalization have shown that gains from trade are greater when domestic markets are assumed to be imperfectly competitive.[23] This is because, in addition to the usual gains from trade, the domestic economy benefits from the increased efficiency brought about by foreign competition and because opportunities for collusive behaviour in concentrated domestic industries are fewer. Where collusive behaviour exists, the free trade agreement, by lowering barriers to entry, will make such collusive behaviour more difficult.

The Eastman-Stykolt model[24], for example, has Canadian oligopolists setting the price of a homogeneous product at or just below the world price inclusive of the tariff so that imports are excluded from the domestic market. In this case, domestic prices fall by the full amount of the tariff cut because of perfect collusion and because the supply of imports is perfectly elastic. The lower prices are not just transfers to

[21] In a review of eight merger cases between 1987 and 1990, Paul S. Crampton found that the tariff was the key factor in creating separate relevant markets in four cases (with the threat of anti-dumping duties as an aggravating factor in two cases). In two cases, market segmentation was maintained by government regulations (beer, energy). In one case (salted snacks), the market was segmented by high transportation costs. In the final case, competition concerns persisted despite the inclusion of eight U.S.-based firms in the relevant market. See Paul S. Crampton, "Relevant Market Analysis in Recent Merger Branch Decisions", in Khemani and Stanbury, supra, note 4, pp. 205-223.

[22] The FTA (and the future NAFTA) stands out as the central pillar of (hands-off) industrial policy in Canada, all the stronger because it is imbedded in an international treaty.

[23] Robert E. Baldwin, "Are Economists' Traditional Trade Policy Views Still Valid?", Journal of Economic Literature, Vol XXX (June 1992), p. 822.

[24] The discussion in this section is largely taken from Tim Hazledine, "Trade Policy as Competition Policy", in Khemani and Stanbury, supra, note 4, pp. 45-60.

consumers but also lead to efficiency gains. This is the expected result under the usual assumption that Canadian firms are international price takers.

Models based on the more realistic assumption of an upward sloping supply curve for imports show that the impact of a tariff cut on the domestic price is reduced because the tendency to supply more will be diluted by the increase in the supply price of imported goods at higher volumes.[25] In such cases, a perfectly colluding Canadian industry matching one for one the Canadian market price of imports will end up not reducing their price by the full amount of any tariff cut.[26]

Nevertheless, "there is support in the literature for the proposition that the tariff does affect domestic output price and that it tends to do so especially in the highly concentrated industries as predicted by the Eastman-Stykolt model".[27]

Available empirical evidence suggests that import competition in Canada has increased significantly over the last ten years. Canadian manufacturers' overall domestic market share decreased from 66.8% in 1981-83 to 60.7% in 1985-87 and 59.3% in 1989-91.[28] This drop in market share is reported in the majority of manufacturing sectors: 19 out of 22. Not surprisingly, the United States increased its share of the Canadian market in 19 out of 22 industries over the period (i.e., in all manufacturing sectors except transportation equipment[29], tobacco, and beverages). Other countries' shares of the Canadian market also increased in 14 out of 22 industries.[30] Just under half the variability in Canadian propensities to import from the

[25] Over a similar distance, international trade is subject to more transport and handling costs than domestic trade. This is because more domestic transport, wholesaling and retailing services are required when the producer and the consumer are not in the same country. These costs act as natural barriers to international trade. See Donald J. Roussland and Theodore To, "Domestic Trade and Transportation Costs as Barriers to International Trade", Canadian Journal of Economics, XXVI, No. 1, February 1993, pp. 208-221.

[26] A model with imports as a fringe has been developed whereby a tariff cut could induce domestic oligopolists to increase prices. This "perverse" result, recognized as such by the author, is partially dependent, moreover, on the particular assumption that the tariffs involved are specific and not ad valorem. See Thomas W. Ross, "Movements Towards Free Trade and Domestic Market Performance with Imperfect Competition", Canadian Journal of Economics, August 1988, pp. 507-524.

[27] Tim Hazledine, op cit, in Khemani and Stanbury, supra, note 4, p. 57.

[28] The statistics in this section are drawn from Trade Patterns: Canada-United States: The Manufacturing Industries 1981-1991, Statistics Canada, 1993, and are only available for the periods indicated above. It should be noted, as well, that over the period 1981-83 to 1989-91, Canadian manufacturers' share of the much larger US market increased from 1.9% to 2.6%.

[29] Which already benefited from virtual free trade under the 1965 Auto Pact and which accounts for the majority (60% by value) of intra-firm trade between Canada and the United States.

[30] And were unchanged in two industries. Part of the increase in shares is probably a reflection of the full phasing-in of tariff reductions agreed to during the GATT Tokyo Round in the 1970s.

United States over the period is accounted for by the reduction in Canadian tariffs.[31] This confirms the positive relation between bilateral tariff liberalisation in a sector and increased U.S. imports in 16 out of 18 product categories examined by Daniel Schwanen.[32]

Significantly, the greatest inroads into Canadian markets have been made by U.S.-based industries with previously below average market share in Canada, indicating that "new" competition has been brought to the Canadian market.[33] One must consider, nevertheless, that conclusions about individual markets cannot be made, a priori, by examining broad industrial sectors.

The benefits of import competition should also extend to other aspects of competition, such as product variety, because available evidence (e.g., cross-border shopping) indicates that product variety is greater in the United States.

Combined with the rationalisation of Canadian industry[34], the above indicates a growing integration of the Canada-U.S. economy. This view is reinforced by anecdotal evidence.[35]

This gradual expansion of the Canadian market into a Canada-US market should also help to alleviate the traditional problem of Canadian plants being unable to take full advantage of economies of scale and, paradoxically, could lessen the relevance of one of the arguments in support of the efficiency defence in the Competition Act.

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[31] Statistics Canada, op cit, supra, note 28, p. 19.

[32] Daniel Schwanen, "Were the Optimists Wrong on Free Trade?: A Canadian Perspective", Commentary, no. 37 (October), C.D. Howe Institute, Toronto.

[33] Expansion by firms within a market, especially fringe firms, is a form of "entry". It should be noted that these statistics are based on production location and not ownership, so that they provide only indirect evidence of market concentration. The results are probably significant, however, given that, between 1977 and 1989, the share of U.S. exports accounted for by intra-firm trade remained relatively unchanged. See Dennis Seebach, "Globalization: the Impact on the Trade and Investment Dynamic", EAITC, Policy Planning Staff Paper No. 93/7, June 1993, p. 30. The above evidence would also tend to temper fears that "U.S. firms frequently indicate that they are simply not interested in taking the time and trouble to sell products in Canada". See Paul S. Crampton, op cit, in Khemani and Stanbury, supra, note 4, p. 253.

[34] The IMF has sought evidence of rationalisation by examining the dispersion of employment growth within the manufacturing sector. It found the dispersion to be relatively high since 1990, indicating that there have been large inter-industry shifts within manufacturing. Using labour re-allocation measures over a three-year horizon, the IMF has also found some evidence that long-term net flows of labour may be occurring across broadly defined sectors of the economy. (IMF, "Labor Market Aspects of Industrial Restructuring in Canada", Selected Papers on the Canadian Economy, SM/93/45, March 2, 1993)

[35] The London Financial Times ("The View From Canada: Subtle Shift in Attitude", May 12, 1993, page 12) reports that "U.S. multinationals typically no longer view Canada as a "branch plant" country, but as part of their domestic operations. Instead of producing an item at two or more factories on each side of the border, companies such as Proctor and Gamble, Campbell Soup and Stanley Tools now supply both countries from a single plant."

Despite these positive trends, which maintain and enhance competition in Canada, trade remedy legislation, occasionally stringent rules of origin, restrictive government procurement practices, and currency fluctuations will continue to work against the single market.[36] Competition concerns will also remain in federally and provincially regulated sectors - agriculture, transportation, telecommunications, energy, and financial and other services - where competition goals often conflict with other policy goals and where the Free Trade Agreement made limited inroads (although with further gains in the NAFTA).

4.1 Impact on merger control

Ross' analysis on the link between the tariff and mergers shows that "mergers reducing the number of domestic firms will not result in price increases as large as they would have been", so that tariff policy can be a substitute, at least partially, for structural competition policy.[37] This is because Canadian firms operating in a North American market are unlikely to possess significant market power.

Indeed, this is what the merger review process has found. Of the total number of merger transactions coming to the attention of the Mergers Branch of Consumer and Corporate Affairs Canada over the past six years, slightly more than 20% required significant examination (more than two days of review by an officer).[38] For almost 92% of mergers examined (or 98.3% of all publicly reported mergers in Canada), the Bureau concluded that they posed no issue under the Competition Act.

Of the 77 cases where competition concerns were raised and for which the Bureau has completed its examination, by far the most common action (64% of these cases) has been to monitor the merger over the next three years. In the remaining cases (0.5% of all reported mergers), 11 were concluded with undertakings of restructuring, 11 were abandoned in whole or in part as a result of the Director's position, 3 were completed through consent orders, and 3 through contested hearings before the Competition Tribunal.

While certainly indicative of a more activist approach than that observed under prior legislation, merger control under free trade has not led to a large number of

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[36] Trade remedy legislation can facilitate cross-border combines and price fixing, act as a "chill" on exports, and distort investment decisions; stringent rules of origin limit the applicability of tariff reductions; government procurement encourages market segmentation; and currency fluctuations can create swings in competitiveness unrelated to firm productivity.

[37] Cited by Tim Hazledine, op cit, in Khemani and Stanbury, supra, note 4, p. 50.

[38] See Annex 2, tables 1&2.

enforcement interventions. This is not to question the effectiveness or the need for Canada's merger control law, however. Even if the actual number of enforcement interventions is small, one cannot discount the possibility that Canada's current merger control law brings with it significant deterrence effects. The point of this section has been to note that the gradual elimination of tariffs between Canada and the United States is likely alleviating many of Canada's structural competition problems and to note the importance, for competition authorities, of continuing to take proper account of foreign competition.

Indeed, this has been the case in Canada as the Bureau of Competition Policy has declared that "within the scope of a relevant market that may be regional, North American or global, many merger transactions and business practices which formerly would have raised questions now are not of concern to domestic anti-trust authorities."[39]

Commentators have pointed out that the FTA is a once and for all event, however. Once fully implemented, and barring future improvements, any residual or new tendencies towards monopolisation will no longer be constrained by added import competition (except from outside the free trade area). In this context, an independent Canadian merger review process will become more complicated because more mergers will be transboundary in their effects.

Under free trade, a merger of two foreign-based firms will have a greater effect on price in Canada. This is because the foreign share of the domestic market is larger, and so the elimination of a foreign firm withdraws more output from the market, permitting a higher price. There is a greater likelihood that domestic competition will be affected by what happens in the other jurisdiction.

In more and more sectors, the relevant market for competition enforcement purposes will be cross-border or North American in scope with the result that Canadian and U.S. antitrust authorities will, with increasing frequency, be reviewing the same merger transactions. This is not to deny the effects of globalization in creating even larger markets for some mergers. However, in the first instance, the free trade agreement will have bigger effects on merger control in Canada than globalization.

[39] "Globalisation and Competition Policy", a paper presented by Howard Wetston to an External Affairs and International Trade Canada "Rules of the Game" luncheon on March 5, 1993. On the other hand, others have argued that: "trade liberalization and globalization should not, in general, be viewed as a satisfactory substitute for an effective competition policy in constraining the exercise of market power". See Robert D. Anderson and S. Dev Khosla, "Competition Policy as a Dimension of Industrial Policy: a Comparative Perspective", Policy Directorate, Bureau of Competition Policy, Consumer & Corporate Affairs Canada, June 1993, p. 21.

Paradoxically, therefore, while the FTA eases substantive competition concerns in Canada it may raise future competition law enforcement concerns resulting from several merger review jurisdictions in a single market (albeit an inherently more competitive market than either individual market was before the Agreement).

4.2 Merger control frictions

With trade liberalization, friction in the area of merger control could emerge from a number of sources:

1) substantive differences in merger tests leading to conflicting decisions;

2) situations in which a merger poses no competition concerns in one jurisdiction on the basis of one relevant product market, but negatively affects consumers who are in another product market located in another jurisdiction;[40]

3) jurisdictional conflicts related to competing orders for restructuring and the extraterritorial application of domestic competition law;

4) situations where Canadian authorities might have a limited ability to apply remedies, e.g., when merging firms have no assets in Canada.

5) perceived fairness of merger control related to issues such as:

    i) the transparency and impartiality of the enforcement process and institutions;

    ii) the use of time (delays) by a jurisdiction to block unwanted mergers; and

    iii) the discriminatory treatment of mergers (i.e., denial of national treatment to foreign-controlled or foreign-based firms or production facilities).

One also needs to consider:

i) Uncertainty and compliance costs related to providing information to several jurisdictions. Executives have described the costs of merger review not only in terms of lawyers' fees, but also in terms of executive

[40] Merging firms can produce several products, each of which may have its distinct relevant market characterized by different elasticities of demand.

time and lost productivity. Excessive costs can discourage beneficial or competitive-neutral mergers.

ii) Duplication of effort and problems of information gathering among competition authorities examining the same merger.

The potential for jurisdictional conflict or conflicting decisions is not hypothetical as a number of cases have demonstrated:

1) the proposed take-over of de Havilland by ATR in 1991 was blocked by the EC, although passed by Canada;

2) the U.S. Federal Trade Commission forced modifications to the acquisition of Connaught Biosciences by Institut Mérieux in 1991 even though the two companies had no assets in the United States; and

3) the proposed joint ventures between ABB and Westinghouse combining their electric power transmission and distribution businesses, on the one hand, and their electric power generation businesses on the other hand. In this case, the U.S. Department of Justice restructured the deals with the consent of the parties in February 1989. The Canadian Bureau of Competition Policy subsequently filed an application with the Competition Tribunal for its own consent order in April of the same year. As the Canadian consent order relied on competition from U.S.-based products, the potential existed for the U.S. remedy to interfere with the Canadian remedy.

5. Merger Control in Canada, the United States, and the EC

This section compares Canadian, U.S., and EC merger control law and enforcement practices.

5.1 Institutions and regulatory objectives

Canada

The Director of Investigation and Research, who is appointed by Order-in-Council, has the responsibility for enforcement of the mergers legislation with the support of the Bureau of Competition Policy. The Director may commence an inquiry on his own initiative or if directed to do so by the Minister of Consumer and Corporate Affairs or if an application by six Canadian residents is made pursuant to section 9 of the Competition Act. These persons are entitled, upon written request, to be informed of the progress of the inquiry. Once an inquiry has commenced, the Director can apply for authorization from a court to search for and seize records, to conduct oral examinations and to exercise the other investigative powers provided for by the Act.

Prenotification is required for firms/transactions above a certain size[41] and provision is made for advance ruling certificates by the Director.

If the Director and parties fail to agree on a solution to a merger matter, the Director has the discretion to apply to the quasi-judicial Competition Tribunal for a variety of orders.[42] The Tribunal has a broad range of remedies (i.e., interim or conditional orders). In the case of a completed merger, orders may include dissolution, asset or share disposal or any other measure. In the case of a proposed merger, the Tribunal may prohibit the transaction, permit it to be completed subject to conditions or order any other action. The Director is the only person who can apply to the Competition Tribunal for a merger to be prohibited, restructured or approved. No application can be made by the Director in respect of a merger more than three years after that merger has been substantially completed.

As observers have pointed out, the focus of the merger review process has been the Director's office rather than the Competition Tribunal. This is partly because of the Bureau's "fix it first" or "compliance-oriented" approach, but also because "it soon became evident to Bureau officials that business executives (and their advisors) wanted a merger review process that would be speedy, confidential, and relatively free of uncertainty".[43] In order to avoid having to go before the Competition Tribunal, business executives have asked the Director what parts of a merger raise concerns so that, if possible, they can be restructured to avoid a challenge.

While it has been pointed out that this process may inadvertently have given the Director more power than intended under the legislation and that the Competition Tribunal has been unable to develop jurisprudence, others say the balance in the enforcement system was deliberate and point to the process' rapidity and relative efficiency.

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[41] Parties, together with their affiliates, must have total assets or total sales in, from, or into, Canada of over $400 million. Second, the value of the target company's assets or gross revenues from sales in or from Canada must be $35 million. See Annex 1 for a detailed review of notification requirements, waiting periods, and timelines under Canadian, U.S. and EC laws. Annex 1 also reviews the nature of information sought under the three notification systems.

[42] The Tribunal is composed of lay members and judges.

[43] W.T Stanbury, "An assessment of the merger review process under the Competition Act", Canadian Business Law Journal, Volume 20, no.1, March, 1992, p. 441.

Prior to the 1986 legislation, merger provisions in Canada were part of criminal law and judicial interpretation required the strict standard of proof "beyond any reasonable doubt". Over a period of 50 years, therefore, the Crown prosecuted only nine cases, of which it won only three.[44]

In 1986, the provisions were changed from criminal to civil law, hence the burden of proof shifted to proof "on the balance of probabilities". The basic test in the Competition Act is whether the merger "lessens or prevents or is likely to lessen or prevent competition substantially". Canada's Merger Enforcement Guidelines make it clear that the Bureau of Competition Policy is concerned with horizontal mergers and their effects on market power as well as with the possible horizontal effects of certain vertical mergers. While the purpose clause of the Act refers to export objectives and equity objectives for small and medium-sized enterprises, the emphasis in the Guidelines is in protecting competition, not competitors. As well, the Competition Tribunal has stated on at least two occasions that it will not consider industrial or other policy considerations.

United States

The United States has evolved a complicated set of procedural and substantive hurdles for any merger or acquisition raising antitrust questions. Enforcement of U.S. statutes is entrusted to two federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), although the statutory scheme also provides for private enforcement and enforcement by State Attorneys General.

Under the Hart-Scott-Rodino Premerger Notification Act, notification of an impending merger is required for most mergers above low dollar thresholds[45] and such notification must be made to both the FTC and the DOJ. They agree on which one will investigate any particular transaction before expiration of the initial phase of the waiting period.[46]

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[44] Under the previous criminal law provisions during the period 1910 to 1986, the test was whether a merger or proposed merger "is likely to lessen competition to the detriment or against the interest of the public, whether consumers, producers, or others". See W.T. Stanbury, "An Assessment of the Merger Review Process Under the Competition Act", Canadian Business Law Journal, Volume 20, No.1, March 1992, pp. 422-463.

[45] One party has total assets or net annual sales of $100 million or more and the other party has total assets or net annual sales of $10 million or more and if, as a result of the proposed transaction, the acquiring party will hold more than $15 million worth of assets or voting securities of the acquired party. Under some circumstances, an acquisition of voting securities worth $15 million or less will be reportable if the buyer is acquiring 50 per cent or more of the issuer's voting securities.

[46] The waiting period required prior to the consummation of a merger is normally 30 days (15 days in the case of a cash tender offer), although the DOJ or the FTC can extend this period for up to a further 20 days. In the event of non-compliance with notification requirements, the waiting period can be extended further upon application to a U.S. district court.

Mergers which have not resulted in a consent decree and which the DOJ wishes to challenge must be brought before the district courts before the expiration of the waiting period (in the case of mergers which have been notified), usually with a request for a preliminary injunction to block the merger pending the decision of the court.

Decrees or orders may require divestiture of lines of businesses that are the basis for the anticompetitive concern and/or non-structural remedies. In the case of FTC orders, there is provision for prior notification and approval of future acquisitions within the markets that present the anticompetitive problems in the transaction that is the subject of the order. A proposed FTC consent order must be accepted by a majority vote of the Commission and placed on the public record for notice and comment period before it can be made final by the Commission. In the case of the Department of Justice, a proposed settlement must be approved by the Assistant Attorney General for Antitrust and also placed on the public record for a notice and comment period before it will be entered by a federal district court.

If the losing party in a merger case wishes to appeal a district court's decision, it must do so within 60 days of entry of the judgment. Further review may be available in the U.S. Supreme Court in some circumstances. Since 1975, the Supreme Court has not reviewed any government-initiated merger cases.

Parties to an FTC adjudicative proceeding may appeal the Administrative Law Judge's initial decision, in the first instance, to the Commission and, within 60 days of the Commission's final order, to the appropriate federal court of appeals. There is also a discretionary appeal to the Supreme Court.

The FTC and DOJ, therefore, are assigned a law enforcement role rather than a regulatory role.

Mergers are subject to several anti-trust provisions:

1) section 7 of the Clayton Act is the principal statutory provision under which stock and assets acquisitions, including mergers and joint ventures, may be held illegal where their effect "may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce or in any section of the country";

2) section 5 of the Federal Trade Commission (FTC) Act prohibiting "unfair methods of competition", has also been used to condemn mergers although

there appears to be no discernable differences between this standard and that established by the Clayton Act;

3) sections 1 and 2 of the Sherman Act have been applied to mergers, but to a lesser extent than the Clayton or FTC Acts. Section 1 refers, inter alia, to combinations "in restraint of trade or commerce among the several States or with foreign nations". Section 2 refers, inter alia, to persons who monopolize or combine to monopolize "any part of the trade or commerce among the several States or with foreign nations".

In 1992, the DOJ and the FTC jointly issued horizontal merger enforcement guidelines for the first time.[47] The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. The DOJ has tended not to view vertical mergers with concern and its approach appears somewhat more lenient than U.S. jurisprudence.

Although U.S. case law has been predominantly concerned with the protection of domestic competition or consumers, there have been instances of protection of U.S. export and investment opportunities. In *United States vs. Western Electric Co.* (1986), the Bell-Operating Company was permitted to participate in a joint venture abroad because of the benefits to trade and balance of payments. In *United States vs. Ivaco* (1989), however, the district court rejected in principle an argument that an otherwise unlawful joint venture could be justified because it enhanced U.S. competitiveness abroad.

Sections 1 and 2 of the Sherman Act have been used to condemn mergers when they form part of a broader monopolization scheme or conspiracy to restrain trade. In this case, the merger must have a direct, substantial and reasonably foreseeable effect on U.S. commerce or on the trade of a person engaged in U.S. export trade. The latter provision, especially, by creating a specific "export trade" product market (which may or may not be appropriate in any given case) appears to open the door for suits aimed not at protecting competition but at protecting competitors.[48]

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[47] Non-horizontal mergers are still covered by the DOJ's 1984 Merger Guidelines.

[48] In *Heatransfer Corp. vs. Volkswagenwerk A.G.* (1978), a U.S. manufacturer of auto air conditioners claimed that Volkswagen's acquisition of a competing U.S. manufacturer foreclosed the plaintiff from the market for air conditioners to be used in Volkswagens. The plaintiff's case dealt principally with the U.S. market, but the district court held that the alleged loss of export sales was covered under s. 7 of the Clayton Act as well as the Sherman Act. A jury verdict for the plaintiff, which included the export market, was sustained.

The U.S. statutory scheme also explicitly allows private parties to sue for and have injunctive relief against "threatened loss or damage" arising from a violation of section 7 of the Clayton Act.[49] "In the *Minorco* case, which was investigated at the national level by the U.K., U.S., EC and Australian authorities, each authority approved the deal, but a private suit in U.S. federal court stopped the tender offer in its tracks, on the basis of a product market definition and a concentration threshold which had been rejected by both the British and the American authorities."[50] In cases where the plaintiff prevails, he is awarded the cost of the suit.[51]

Section 4 of the Clayton Act also allows any person "injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages. According to U.S. sources, perhaps only about 12 out of 226 private merger suits since 1953 have sought to recover treble damages and it is not believed that any have been collected (see table 3 in annex II).

In the 1980s, the DOJ filed *amicus curiae* briefs with the Courts encouraging them to increase the level of evidence that plaintiffs in civil cases must present to move beyond the summary judgement stage. These were generally successful leading to an increasing trend towards summary judgement and motions to dismiss.[52] As a consequence, there has been a decline in the number of private cases brought before the courts. In *Cargill, Inc v. Monfort of Colorado, Inc* (1986), however, the DOJ was not successful in persuading the court to adopt a blanket rule that competitors do not have standing to challenge proposed mergers on the basis of predatory pricing theory.[53] It appears that since that date competitors have become more adept at determining the appropriate grounds for launching a suit. A case to be heard by the U.S. Supreme Court within the next year will determine whether targets of mergers have the right to sue.

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[49] There is no similar recourse to the courts for private parties in Canada.

[50] American Bar Association Section of Antitrust Law, Report of the Special Committee on International Antitrust, June 26, 1991, p.255.

[51] If the defendant prevails, however, his costs are not covered. This "preferential cost-award rule" gives substantial leverage to the plaintiff in out-of-court settlements.

[52] According to U.S. sources, perhaps 75 private merger cases have been heard in the last ten years. It should be borne in mind, however, that many civil anti-trust cases are settled before going to court such that they do not show up in the statistics. The statistics include cases brought by State Attorneys General.

[53] United States General Accounting Office, Justice Department: Changes in Antitrust Enforcement Policies and Activities, October 1990, p. 56

The U.S. merger control process is also complicated by the possibility of enforcement at the state level. "Many U.S. states have statutes which are patterned after section 7 of the Clayton Act. The attorneys general are in no way pre-empted from seeking divestiture by the fact that the transaction was cleared by the DOJ or the FTC."[54] They can seek to enjoin a merger in state court, according to state law, or in federal court in *parens patriae* actions.

Some states have been active in trying to block national mergers that are highly publicized and have a perceived local impact - the likelihood of "politicization" of a particular merger may be heightened at the local level. This tendency is reinforced by the State Attorneys' General conscious effort to develop an alternative to the enforcement standards applied by the FTC and the DOJ. This effort extends to the development of separate enforcement guidelines (which have different approaches to, for example, market definition).

Thus, it has not been uncommon for a merger which the FTC or the DOJ has decided not to challenge, to be challenged in a private suit by a private plaintiff or a State Attorney General. Robert Campeau, for example, had his U.S. acquisitions approved by the DOJ only to be forced to divest because of the actions of the State Attorneys General of New York and Massachusetts.[55] In 1989 (*Maine vs. Connors Bros.*), the State obtained a consent decree requiring partial divestiture in connection with a Canadian firm's acquisition of a U.S. firm.

This multi-faceted enforcement system may work against allowing anti-competitive mergers, but at the expense of greater uncertainty and compliance costs and the greater chance that pro-competitive mergers will not proceed.[56]

EC

The EC Commission is responsible for administration of the Community's competition laws. Final decision-making authority is vested in the Commissioners and

[54] ABA Section of Antitrust Law, op cit, p.259.

[55] See Thomas J. Courchene, ed., Quebec Inc.: Foreign Takeovers, Competition/Merger Policy and Universal Banking, School of Policy Studies Queen's University, 1990, 53 pp.

[56] Since 1992, the merging parties can reduce some of the compliance costs and uncertainty by waiving confidentiality restrictions, thus facilitating the coordination of Federal and state merger control enforcement. States that are parties to the National Association of Attorney's General "Voluntary Pre-Merger Disclosure Compact" have agreed not to serve demands for information during the merger consummation waiting period provided for by the Hart-Scott-Rodino Antitrust Improvements Act and prior to instituting a judicial proceeding to enjoin a merger if the parties to the proposed transaction provide specified information to the "liaison state" defined by the Compact. The Compact does not preclude the possibility of state merger control enforcement if a transaction is approved by the DOJ or the FTC.

investigation and enforcement functions are assigned to DG-IV. The Commission is, in effect, prosecutor, judge and jury in all competition matters, although its action is subject to review by European Courts. Appeals brought by natural and legal persons against Commission decisions relating to mergers will be heard by the Court of First Instance, subject to appeal to the Court of Justice. The grounds for appeal are limited to the legality of acts and failure to act.[57]

Articles 85 and 86 of the Treaty of Rome deal respectively with restrictive practices and abuse of dominant position. A Merger Regulation was adopted in 1989 and came into force in September 1990. The Commission has also enacted an Implementing Regulation dealing with the content of pre-notification filings and various procedural matters.

Under the Merger Regulation, mergers are allocated between the Commission and the national authorities of member states largely, but not exclusively, on the basis of the turnover of the companies involved. The largest transactions are to be exclusively reviewed by the Commission, while smaller transactions will generally be reviewed exclusively by national authorities, unless they request the Commission to handle a merger.[58]

Under a referral procedure (Article 9 of the Regulation), a member state can inform the Commission that a merger with a "Community dimension" poses specific competition concerns for its national market. If the Commission is in agreement, it may deal with the merger itself or refer it to the competent authorities of the member state. If the Commission fails to take a decision within three months, the matter is deemed to have been referred.[59]

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[57] At least four appeals were pending before the CFI at the beginning of 1993. The nature of the appeals have highlighted the fact that the Merger Regulation does not expressly provide for the rights of third parties, either substantively or procedurally, to complain to the Commission and to provide input into the merger review process. This is arguably because the Regulation is concerned with the overall structure of competition, not with protecting individual competitors. For a discussion of this issue, see John Davies and Chantal Lavoie, "EEC Merger Control: A Half-Term Report Before the 1993 Review?", World Competition, Volume 16, No. 3, March 1993, p. 28.

[58] A concentration has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and
b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. For banks, other financial institutions and insurance companies, special rules for the calculation of thresholds are prescribed.

[59] The Regulation provides for the review of thresholds by the end of 1993 by means of a qualified majority of the Council acting on a proposal from the Commission. It also provides for a contemporaneous review of the rights of Member States to "claw-back" jurisdiction under the distinct national market provisions of Article 9.

A safeguards clause also allows a member state to take appropriate measures to safeguard its legitimate interests, other than those taken into consideration in the regulation, provided these interests are compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules are regarded as legitimate interests and the applicability of other interests is left to the Commission to determine.

The Commission has indicated that it does not intend to apply Articles 85 and 86 of the Treaty of Rome to mergers other than by means of the Regulation. In any case, both Articles require **an effect on trade between Member States** before the prohibitions will apply. Nevertheless, Article 86 remains directly enforceable in national courts and Article 85 remains applicable by the competent authorities of member states.

The Regulation provides (at Article 2) that mergers shall be declared either compatible or incompatible with the common market depending on whether or not they create or strengthen a dominant position, as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

The Regulation also provides that the Commission shall take into account the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned (both inside and outside the Community), and the actual or potential competition from undertakings located either within or outside the Community. While this is essentially a competition-based test, the Commission must also place its appraisal within the "framework of the achievement of the fundamental objectives of the Treaty of Rome". These include the harmonious development of economic activities and the strengthening of the Community's economic and social cohesion. This framework appears to leave the Commission with considerable discretion on the basis of industrial policy or other grounds.

The previous EC Commissioner frequently repeated that the EC regulation was concerned with competition policy alone. The new Commissioner, Karel van Miert, has made it clear that it will no longer be prudent to assume that mergers will be judged by competition criteria alone. In his first speech in February of this year, he noted that competition policy "cannot be ...applied without reference to (the) legal, economic, political, and social context" or "determined by dogmatism"; EC industry "must be able to compete on a world stage" and competition policy must facilitate a "realignment and restructuring of industry"."[60]

5.2 Relevant factors and treatment of efficiencies

Unlike the United States, both the EC and Canadian laws explicitly outline the factors to be considered by the merger enforcement authorities and the courts.[61]

In terms of competition-based tests, the most well-known difference between the Canadian, U.S., and EC statutes relates to the treatment of efficiencies. Canadian competition law is unique among developed countries in clearly recognizing that mergers that intrinsically limit competition may nevertheless enhance overall economic efficiency, if they yield cost reductions through economies of scale, synergies, or through dynamic efficiency (i.e., innovation and adaptation of new technology). The Canadian Competition Tribunal shall make no order where a merger brings about or is likely to bring about gains in efficiency, where such gains in efficiency will be greater than and will offset the effects of any prevention or lessening of competition. The Director also takes this trade-off into account before he seeks an order from the Tribunal. Until recently, it was believed, on the basis of Canada's Merger Enforcement Guidelines, that this meant that Canada had adopted the Williamson trade-off or the total welfare approach to merger control as opposed to the consumer welfare approach practised traditionally in the United States.

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[60] John Davies and Chantal Lavoie, op cit, p.28.

[61] Relevant factors in Canada include:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition;
(b) whether the business, or a part of the business, of a party to the merger has failed or is about to fail;
(c) the extent to which acceptable substitutes for products supplied by the parties are or are likely to be available;
(d) any barriers to entry into a market, including the tariff and NTBs, interprovincial barriers to trade, and regulatory control over entry;
(e) the extent to which effective competition remains after the merger;
(f) any likelihood that the merger will result in the removal of a vigorous and effective competitor;
(g) the nature and extent of change and innovation in a relevant market; and
(h) any other factor that is relevant to competition in a market.

Findings cannot be based solely on evidence of concentration or market share.

Relevant factors in the EC include:

(a) market position of the firms concerned and their economic power;
(b) alternatives available to suppliers and users;
(c) access to suppliers or markets;
(d) any legal or other barriers to entry;
(e) supply and demand trends for the relevant goods and services;
(f) interests of intermediate and ultimate consumers; and
(g) development of technical and economic progress, provided that it is to the advantage of consumers and does not form an obstacle to competition.

The relevant weight given to the various factors is not spelled out, but the EC disclosure forms place considerable emphasis on market share. The possibility of the failing firm has been omitted (cf. item b) under Canadian factors).

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.

[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.

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.

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[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.

5.4 Safehavens

As a rule of thumb in Canada:

- if the post-merger market share of the merged entity would still be less than 35%, it will generally be decided by the BCP that the new firm would not be in a position to increase the exercise of unilateral market power; that is, market power just benefiting itself.[67]

- if the post-merger total market share of the four largest firms would be still less than 65% (or if the merged entity's share would be less than 10%), then it is judged unlikely that the merger would lead to increased implicit coordination between surviving firms, such that the overall price level in the market (i.e., prices charged by all firms, including those not involved in the merger) would increase significantly.

In the United States, jurisdictions are guided by the Hirschman-Herfindahl Index (the sum of the squared market shares of each firm in a relevant market) in deciding whether to challenge a merger or not. The guidelines provide that the Department of Justice is unlikely to challenge a merger producing either: (a) a post merger HHI below 1000; (b) a post merger HHI between 1000 and 1800 where the HHI increase is less than 100; or (c) a post merger HHI where the HHI increase is less than 50. Other mergers require more detailed analysis of factors such as ease of entry and potential efficiencies to determine whether they are likely substantially to lessen competition.

In the EC, there is a presumption that merger transactions producing a combined market share of less than 25% are compatible with the Common Market. The notification form requires data to be provided for all affected markets which are defined by reference to a 10% market share test.

In practice, the above differences mean that the Canadian safehavens are more generous than the U.S. and EC safehavens, consistent with Canada's more concentrated industrial structure. With free trade, however, the relevance of more generous safehavens could be questioned in cases where the relevant market is cross-border.

[67] The relevant market can, of course, extend beyond Canada.

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 boycotts and collusion, we have seen that U.S. statutes are broad enough to include mergers.[68]

The FTC has sometimes challenged foreign acquisitions where the acquiror was a "potential entrant" into the United States market, even in circumstances where neither firm has significant assets in the United States, as happened in the Institut Mérieux merger mentioned above. Canada objected to the U.S. approach on the basis of its intrusiveness.[69]

Canada, for overall reasons of foreign policy, has traditionally adopted a cautious approach to the application abroad of domestic law.[70] Recognizing the potential for conflict, Canada and the United States signed a memorandum of understanding in 1984 with respect to the application of national anti-trust laws, updating a previous understanding dating from 1959. The purpose of the Understanding is to avoid or moderate conflicts of interests or policies by establishing procedures for notification, consultation, and cooperation. The two countries agree to seek to reduce, by accommodation and compromise, the scope and intensity of any conflicts and their effects. The MOU also allows each Party to inform the Courts in the other Party of its national interests in private anti-trust cases. The MOU, however, does not contain a dispute settlement mechanism.

5.7 Conclusions

The greatest differences between the three systems relate to:

1) the objectives of merger control; and
2) the complexity, transparency, and uncertainty attached to individual merger control decisions.

While Canada and the United States essentially apply a competition test to mergers, the EC Merger Regulation and decision-making at the level of the EC

[68] See Joseph P. Griffin, "The Impact of Reconsideration of U.S. Antitrust Policy Intended to Protect U.S. Exporters", World Competition, Volume 15, June 1992, No. 4, pp.5-16.

[69] The U.S. consent order required the Connaught rabies business in Toronto to be leased to an FTC approved acquiror for a period of 25 years.

[70] In 1985, Canada passed the *Foreign Extraterritorial Measures Act* to limit the application of, inter alia, foreign antitrust laws in Canada in cases where the government is of the opinion that significant Canadian commercial interests or sovereignty is at stake. It contains various "blocking" provisions. A "claw-back" provision allows, under certain circumstances, Canadian persons or corporations to sue in Canada to recover damages awarded in a foreign antitrust judgement. See William C. Graham, "The Foreign Extraterritorial Measures Act", The Canadian Business Law Journal, Volume 11, 1985-86, pp.410-444.

Commission (which is, after all, a political body) leave greater room for decisions to be based on other policy considerations. Indeed, EC cases which have raised the most difficult competition concerns have been decided by a vote of the full Commission (with at least nine votes out of thirteen required to adopt a decision). It was apparently rumoured that the conditional acceptance of the acquisition by Du Pont of ICI's nylon business in September 1992 was influenced by the progress of the Maastricht debate.[71] Within the EC, France and Italy have been the biggest proponents of taking into account industrial policy considerations, while Germany and the UK have favoured a pure competition-based test.[72]

Canada's treatment of efficiencies and "export gains" from mergers is consistent with a competition-based test, although observers might question the statutory language employed. In the United States, some court cases appear to have been decided with reference to export and investment objectives, although in other cases, such arguments have been rejected. Moreover, the wording of the Sherman Act has left room for some merger cases to be decided on the basis of protection the of competitors, not competition.

In general, however, there appears to be a de facto trend towards convergence, not only between Canadian and U.S. Merger Enforcement Guidelines,[73] but between Canadian and U.S. jurisprudence. Indeed, in the *Hillsdown* case, the Competition Tribunal referred to U.S. court decisions both in its analysis and its conclusion.

Canada's merger control strengths are:

i) a rapid and relatively efficient process managed by a single jurisdiction which avoids unnecessary litigation; and

ii) recognition by law of the dynamic nature of competition and of the impact of trade liberalization on competition.

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[71] John Davies and Chantal Lavoie, op cit, p. 29.

[72] ibid.

[73] Canadian and U.S. Merger Enforcement Guidelines provide for similar analytical treatment of market definition, foreign competition, the failing firm, and barriers to entry. Too little is known about EC economic analysis to determine whether it differs in any material respect from that of Canada and the United States, although the failing firm factor does not appear to be formally taken into account.

An example of the problems that can occur if the possibility of the failing firm is not taken into account was the proposed takeover of deHavilland by ATR which was allowed by Canada but blocked by the EC Commission, which did not recognize deHavilland as a failing firm. In the end, the company was purchased by Bombardier with the assistance of government subsidies.

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.

in Canada. Anthony C. Masi has argued, for example, that a large measure of past success in the Canadian steel industry was due to informal arrangements between the Big Three steel producers (Stelco, Dofasco, and Algoma) and the federal government. In the 1950s, the three divided and allocated product markets, thus specializing to achieve scale economies. This was possible because the government was "flexible" in the application of anti-combines legislation.[75] Others have argued that this policy greatly reduced the risks associated with investments in the steel industry and increased the international performance of Canadian steel makers.[76]

In 1988, the Canadian Bureau of Competition Policy analyzed the Dofasco takeover of Algoma and concluded that, even though Dofasco and Algoma were respectively the second and third largest steel producers in Canada, "the two companies have concentrated a large portion of their production in separate product markets". The extent of present and potential future foreign competition in the Canadian market for hot rolled sheet and strip steel, as well as efficiency benefits (capital expansion and operating savings) played a major role in the decision which was interpreted as another example of the "flexibility" of Canadian competition policy.[77]

Khemani wrote in 1990 that "the possibility that inefficient plant size or insufficiently long production runs are endemic to Canadian industry cannot be ignored when administering competition policy."[78] In turn, this is seen to justify a particular sensitivity to efficiency gains in Canadian competition law as opposed to the traditional concerns over relative size or number of firms in an industry.[79] Indeed, Canadian policy makers responsible for industrial policy, along with those in other countries, have sometimes been attracted to the "national champion" theory whereby a dominant or a few dominant domestic firms create competitive advantage through economies of scale or scope or by capturing supra-competitive profits in the

[75] Anthony C. Masi, "Structural Adjustment and Technological Change in the Canadian Steel Industry, 1970-1986", in Daniel Drache and Meric Gertler eds., The New Era of Global Competition: State Policy and Market Power, Montreal and Kingston, McGill-Queen's University Press, 1991, p. 196.

[76] T.R. Howell, et al, Steel and the State, Boulder, Westview Press, 1988, p. 455.

[77] Anthony C. Masi, op cit, p. 205.

[78] R.S. Khemani, "Merger Policies in Small vs. Large Economies", in Khemani and Stanbury, supra, note 4, p. 208.

[79] Others have noted that such an approach may not be appropriate in a large economy, such as the U.S., "in which relevant technical efficiencies can be achieved at lower concentration levels. See Robert D. Anderson and S. Dev Khosla, Competition Policy as a Dimension of Industrial Policy: a Comparative Perspective, Policy Directorate, Bureau of Competition Policy, Consumer and Corporate Affairs Canada, June 1993, p 18.

international marketplace. It could be argued that the efficiency and export objectives of the Competition Act reflect these interests.

In The Competitive Advantage of Nations, on the other hand, Michael Porter argues that a "strong antitrust policy, especially in the area of horizontal mergers, alliances, and collusive behaviour is essential to the rate of upgrading in an economy".[80] In his review of the Canadian economy, Professor Porter notes approvingly that:

> the Competition Act significantly and appropriately strengthens the federal government's ability to enforce more vigorous domestic competition. In most respects, Canada's laws now meet the standards set by U.S. anti-trust laws, which are the strongest in the world.[81]

Professor Porter notes with concern, however, the existence of the efficiency exception in the Competition Act because it could have a negative impact on domestic rivalry, especially if it were used broadly to permit mergers among industry leaders.

I would tend to agree with Professor McFetridge that Professor Porter's analysis does not support the conclusion that strong antitrust enforcement causes competitive advantage.[82] Japan has not been noted for its vigorous antitrust enforcement when compared, for example, to the United States. Nevertheless, this does not mean that competition in that country is absent. Rather, competition may express itself more in the long term and through the use of voice rather than exit relationships (e.g., automobile industry). These more productive relationships may account for Japan's "competitive advantage".[83] Until 1990, Italy did not even have a competition law, yet Professor Porter notes that "the real driver of Italian success in many industries is extraordinary rivalry. Almost every internationally successful Italian industry has several if not hundreds of domestic competitors."[84]

[80] Michael E. Porter, The Competitive Advanatge of Nations, New York, The Free Press, 1990, p. 663.

[81] Michael Porter and the Monitor Company, Canada at the Crossroads: The Reality of a New Competitive Environment, Business Council on National Issues and Minister of Supply and Services, 1991, p. 333.

[82] Donald G. McFetridge, "Globalization and Public Policy", Bell Canada Papers on Economic and Public Policy, September 17-19, 1992, p. 6.

[83] "Voice" relationship refers to communicating and working with a supplier as opposed to "exiting" from a contract when its conditions are not adequately fulfilled. See, for example, Hiroyuki Odagiri, Growth Through Competition, Competition Through Growth: Strategic Management and the Economy in Japan, Clarendon Press, Oxford, 1992, pp. 364.

[84] Michael E. Porter, The Competitive Advantage of Nations, New York, The Free Press, 1990, p.447.

What this suggests, as Robert D. Anderson and S. Dev Khosla have helpfully pointed out, is that "rivalry may be achievable through means other than conventional antitrust policies".[85] This view is certainly more consistent with Porter's overall thesis that the multiple determinants of "national advantage" operate as a system with the result that specific cause and effect relationships tend to get blurred. Indeed, as noted by Professor Porter, competition, trade and other policies work hand in hand to affect the competitive environment and they need to be sensitive to each other.

A comparison of merger policies in terms of "strong" versus "weak" or "flexible" merger control policies is unlikely to be productive, therefore, especially as the case for the superiority of U.S. standards still has to be made. What appears more important is the coherence of competition, trade, investment and other policies within the context of a given national economy[86] and the minimization of conflict between jurisdictions.

6.2 Convergence or cooperation?

Convergence would be beneficial to the extent that it reduced substantive differences with respect to merger tests (e.g., agreement on a pure competition-based test which protects competition and not competitors and excludes export/investment objectives; agreement on a consumer welfare or total welfare approach) and to the extent that it eliminated discriminatory provisions in statutes. Even if the Canadian efficiency defence were accepted, however, it is quite possible that a merger would be blocked in cases where the efficiency gains are primarily in one jurisdiction and the wealth re-distribution effects largely in another. Convergence of relevant factors taken into account in merger control analysis would, to some extent, be beneficial (e.g., introduction of the failing firm consideration in the EC).

Convergence of certain procedures could also reduce uncertainty and compliance costs for businesses and duplication of effort and problems of information gathering among competition authorities.

Convergence would not resolve:

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[85] Robert D. Anderson and S. Dev Khosla, op cit, supra, note 39, p. 23.

[86] For example, in terms of investment, mergers accounted for 80% of the value of inward FDI in Canada in the late 1980s. The surveillance of mergers, therefore, has implications for Canada's status as a host economy attracting FDI. The domestic policy environment should be one of neutrality or non-discrimination between trade and investment implying that merger control should continue to be applied on a national treatment or non-discriminatory basis. See Dennis Seebach, "Globalization: The Impact on the Trade and Investment Dynamic", EAITC, Policy Planning Staff Paper No. 93/7, June 1993.

i) situations in which a merger poses no competition concerns in one jurisdiction but affects consumers in another product market located in another jurisdiction;

ii) jurisdictional conflicts related to competing orders for restructuring and/or competing contested reviews before the courts ; and

iii) situations where Canadian authorities might have a limited ability to apply remedies, e.g., when merging firms have no assets in Canada.

To do so would require agreement on a supranational competition agency, or the adoption of some other model for the elimination of jurisdictional conflict (requires some abandonment of sovereignty[87]), or a dispute settlement mechanism.

Given the essential uncertainty associated with merger control enforcement, moreover, issues of perceived fairness are likely to take on greater importance in any convergence discussions. Canada could become subject to U.S. pressures regarding the "transparency" of the merger control process as well as access to the courts for private parties. Similar concerns could be raised by Canada about the U.S. process.

7. Conclusions/Recommendations

1) Canada is pursuing a coherent mix of trade and merger control policies. Trade liberalization under the FTA and the future NAFTA 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.

2) For Canada, the greatest potential for conflict will arise, in the first instance, with the United States because of the implementation of the FTA and that

[87] Possible merger control models include the lead review jurisdiction, the coordinating agency, and the lead jurisdiction with dispositive power models. These models have been proposed by Neil Campbell and Michael Trebilcock, "International Merger Review: Problems of Multi-jurisdictional Conflict", Project on Competition Policy in a Global Economy, November 20, 1991.

country's complex merger control enforcement process, including private suits (injunctive and treble damages) and suits by State Attorneys General; extraterritorial application of domestic law; and discriminatory provisions regarding production joint ventures. Moreover, in past merger cases, U.S. statutes have, on occasion, been interpreted liberally enough to protect U.S. exporters and not just competition, an interpretation that shades into a protectionist policy of supporting national winners. Lower prenotification thresholds and less generous safehavens could also create additional compliance costs and uncertainty for Canadian firms.

3) Convergence of merger control law and enforcement practice would not solve all potential problems relating to the existence of multiple competition jurisdictions. The expected cost of jurisdictional conflict needs to be balanced against various options, notably: the status quo, pursuing models of shared sovereignty, establishing a dispute settlement mechanism, or seeking a common merger control institution for the free trade area. Further analysis is also required to relate Canada's merger control interests to Canada's interests in other areas of the trade and competition policy interface, e.g., treatment of cartels, anti-dumping replacement, differences in the treatment of dominant monopoly positions.

4) In general, Canada should preserve its merger control strengths and:

- support the adoption of competition-based merger control tests;
- oppose the introduction of discriminatory merger control provisions;
- keep the administrative costs of competition law enforcement low; and
- lower the costs and uncertainty associated with business compliance with domestic and foreign competition law(s).

5) Given the essential uncertainty associated with merger control enforcement, issues of perceived fairness are likely to take on greater importance in any convergence discussions. Canada could become subject to U.S. pressures regarding the "transparency" of our merger control process as well as access to the courts for private parties. Safehavens could become an issue as well although Canada is armed with strong arguments in this area.

In light of ongoing work at the OECD, the following limited Canadian objectives in the area of merger control in the future NAFTA work programme might be appropriate:

i) Seek harmonization of certain procedural requirements such as notification (based on a common definition of merger and common forms), waiting periods, and timelines for review. Merging parties should be required to indicate if they have notified other agencies. There should be provision for national treatment regarding access to domestic redress procedures on the basis of existing statutes. Such procedural harmonization would not eliminate the risks of abuse of process, but would put limits on such risks. These discussions could take place in the future NAFTA Working Group on Trade and Competition.

ii) Seek greater exchange of market information between enforcement agencies within the free trade area. Explore the possibility of easing confidentiality rules. Consideration should be given to each agency being able to request the other to enforce an order requesting information located in the other's territory. The agency receiving the request would have the final say about whether the request is reasonable or not.

iii) Seek agreement on eliminating discriminatory provisions.

iv) Establish a work program to review options for reducing the potential for jurisdictional conflict, including dispute settlement or comity provisions.

Such an approach would:

- Protect the most important aspects of Canadian sovereignty. Any results could serve as a model for future cooperation in the OECD or GATT context, just as existing provisions of the FTA have served as model for certain discussions in the Uruguay Round. This approach is compatible with and does not pre-judge the outcome of current discussions in the OECD on trade and competition.

- Minimize the need for changes in U.S. and Canadian legislation. Some of the proposed changes can be implemented at the administrative level.

- Not entail negotiations aimed at bringing Canada to U.S. "standards" in areas such as private suits and treble damages, and thresholds/safehavens.

ANNEX 1: Comparison of Merger Control in Canada, the United States, and the EC.

1.1 Notification, waiting periods, timelines

In Canada, pre-notification is obligatory for transactions which exceed certain thresholds. These transactions (called "Notifiable Transactions") concern four types of merger - share acquisitions, asset acquisitions, amalgamations and incorporated combinations. Parties, together with their affiliates, must have total assets or total sales in, from, or into, Canada of over $400 million. Second, the value of the target company's assets or gross revenues from sales in or from Canada must be $35 million. For amalgamations, notification is required where the value of assets in Canada or annual gross revenue from sales in or from Canada of the continuing corporation exceeds $70 million. Notification is required for a proposed acquisition of "voting shares" of a corporation, where the corporation has assets in Canada, or gross annual revenues from sales in or from Canada, that exceed $35 million and where, as a result of the acquisition, the acquiror will have a greater than 20 per cent voting interest in a public company or a greater than 35 per cent voting interest in a private company.

There are general exemptions from pre-notification for:

a) transactions between affiliates;
b) joint ventures falling within section 112 of the Competition Act; and
c) transactions which have received an Advance Ruling Certificate from the Director of Investigation and Research.

Notifying parties may choose one of two notification forms - the short form or the long form. For the short form, there is a waiting period of seven days. For the long form the waiting period is 21 days. However, if the short form is used the Director can insist on a long form notification if the transaction appears to raise substantial competition issues. In this case, the 21 day waiting period is restarted. In practice, it appears that in complex transactions a longer waiting period is voluntarily agreed. If the acquisition is to be carried out through the facilities of a Canadian stock exchange, the waiting period is ten trading days.

The parties to a merger may also ask the Director to issue an Advance Ruling Certificate (ARC) on their proposal which gives an assurance to them that a proposed merger will not be referred to the Tribunal if the merger proceeds as proposed within one year of the issuance of the ARC. No specific form is needed in requesting an ARC but it is evidently in the parties' interests to provide all relevant information to enable the Director to take a considered decision. There are no time limits for the issuance of ARCs which may take from a few days to several weeks.

In the **United States**, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, a proposed acquisition of voting securities or assets cannot be consummated unless advance notification is provided and the prescribed waiting periods are observed if either party is engaged in activity affecting interstate or foreign commerce of the United States and if certain size thresholds are met: one party has total assets or net annual sales of $100 million or more; and the other party has total assets or net annual sales of $10 million or more; and if, as a result of the proposed transaction, the acquiring party will hold more than $15 million worth of assets or voting securities of the acquired party. Under some circumstances, an acquisition of voting securities worth $15 million or less will be reportable if the buyer is acquiring 50 per cent or more than the issuer's voting securities.

All acquisitions that meet these notification thresholds are subject to the Hart-Scott-Rodino requirements of premerger notification and observation of the waiting period, unless exempted by the statutes or rules promulgated thereunder.

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Hart-Scott-Rodino Act and the implementing rules set forth a number of exemptions for particular transactions or classes of transaction; these include:

a) where less than 10 per cent of the outstanding voting securities of the issuer are acquired and the acquisition is solely for the purpose of investment;

b) where the buyer's percentage share of the seller's outstanding voting securities is not increased;

c) certain acquisitions by banks and thrift institutions that require approval of another federal agency through merger and holding company purchase;

d) acquisitions of bonds, mortgages and other non-voting securities;

e) where the buyer already controls the seller;

f) acquisitions by governments, including agencies and political subdivisions;

g) acquisitions specifically exempted from the antitrust laws by federal statute or;

h) acquisitions of goods and realty in the ordinary course of business;

i) certain acquisitions of assets located outside the United States, certain acquisitions of voting securities of a foreign issuer, and certain acquisitions by foreign persons based on the nexus with United States commerce; and

j) certain investment acquisitions by banks, trust companies, investment companies, and insurance companies.

As regards the waiting period following notification, there is a 30-day waiting period (15 days for cash tender offers) before the acquisition may take place. This waiting period may be extended by the DOJ or FTC if either issues a request for additional information and documentary material (commonly known as a "second request"). The issuance of a second request extends the waiting period until 20 days after the parties substantially comply with the request (or for 10 days after the acquiring person complies in the case of a cash tender offer).

In the EC, under Regulation 4064/89, concentrations with a Community dimension must be notified to the Commission on a prescribed form not more than one week after the conclusion of the agreement or the announcement of public bid or the acquisition of a controlling interest, whichever is the earliest. Under Article 1(2), a concentration has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million;[88] and

b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. For banks, other financial institutions and insurance companies, special rules for the calculation of thresholds are prescribed.

The merger notified to the Commission must not be put into effect until three weeks after notification. However if the Commission finds that the notification is

[88] The ECU was worth about C$ 1.50 at the end of 1992.

incomplete, it will require the information which should have been provided to be supplied within a period fixed by it and the time limits will then begin to run only after receipt of the missing information.

The Commission is required to take a decision on the notified concentration within one month following receipt of the notification or of additional information requested. The period may be increased to six weeks if a Member State informs the Commission that the proposed concentration would be likely to lead to or strengthen a dominant position in a distinct market in a Member State, in which case the Commission must decide whether to deal with the case itself or to refer it to that Member State with a view to the application of its national competition law.

If the Commission decides to initiate proceedings regarding the concentration, the final decision must be taken within not more than four months from the date when proceedings are initiated.

1.2 Nature of Information sought under notification systems and confidentiality considerations

Under the short form information filing in Canada, the parties must describe the transaction, their business and quantify their lines of business, including lists of principal suppliers and customers and sales and purchases to and from them, financial information for the previous two years and copies of all relevant documents relating to the transaction.

The long form notification must include in addition: a description of the business and lines of business of certain affiliates; description of the principal categories of products manufactured, supplied or purchased by the parties and their affiliates; disclosure of holdings of more than 20 per cent of the voting shares of other Canadian enterprises; copies of all reports and data prepared to assist directors; and a summary description of any significant changes in the business involved in the transaction which have been agreed.

A number of provisions in the Competition Act have been introduced to mitigate some of the filing burdens for reasons of confidentiality, lack of knowledge or irrelevance.

As regards confidentiality, provision has been made in the Act for the protection of information submitted to the Director. Under section 29, all persons involved in the enforcement of the Act are prohibited from communicating any information obtained in the course of their duties. The law enforcement exemption provisions of the Access to Information Act apply to evidence gathered in merger proceedings.

In the United States, the initial premerger notification form requires the following information:

a) a description of the transaction and its parties, including the worldwide group corporate structure of each party and significant minority shareholdings;

b) information on U.S. product or service lines of business of the parties;

c) sales information by the Bureau of the Census' Standard Industrial Classification (SIC) code and identification of SIC codes in which both parties currently derive income;

d) whether there have been any prior acquisitions in the areas of horizontal overlap;

e) whether there exist any vendor-vendee relationships between the parties;

f) financial reports and data and copies of certain documents filed with the U.S. Securities and Exchange Commission;

g) the merger agreement or letter of intent and other contracts between the parties;

h) certain planning documents that pertain to the proposed transaction; and

i) in the case of joint ventures, information about the proposed structure, business and financing of the joint venture.

Most importantly, Item 4(c) of the form requests production of all documents prepared by or for an officer or director for the purpose of analyzing the acquisition for various aspects of competition.

A second request for information may be made which requires much more extensive information from the merging parties. Generally, a second request will solicit information on particular products in an attempt to assist the investigative staff in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as a request for the production of documents.

Information under the Hart-Scott-Rodino Act received by the enforcement agencies in the initial filing and in response to a second request is exempt from disclosure under the Freedom of Information Act and therefore cannot be obtained by a third party. No such information may be made public. (There are exceptions for administrative or judicial proceedings and disclosures to duly authorized Congressional committees).

In the **EC**, a special form CO must be used to notify mergers in one of the official languages of the Community. It must be completed jointly on behalf of all parties or by the acquiror or bidder in the case of an acquisition or public bid. The following information is required:

a) details of the notifying party, the parties to the merger, an address for service in Brussels, and the details of representatives;

b) a brief description of the nature of the merger, its legal form, the economic sectors involved, and the economic and financial details of the merger, including the parties' turnover for the last three financial years worldwide, Community-wide and broken down by Member State, profits before tax, number of employees, etc.;

c) full details of the premerger structure of ownership and control, the parent, subsidiary and sister companies;

d) details of personal and financial links between each party concerned and other undertakings active on the same markets;

e) data on each of the relevant product markets affected by the merger for the last three financial years broken down by Member State and other relevant geographical markets, values of markets, market shares, turnover, prices, value, imports, exports, and the most important aspects of business strategy;

f) information on the general conditions in each of the affected markets, including barriers to entry, vertical integration of the parties, research and development, distribution and service systems, the competitive environment, co-operative agreements, trade associations, and the worldwide context of the merger; and

g) a description of the expected effects of the mergers on consumers and technical progress.

In addition, this information must be accompanied by the most recent annual accounts of all the parties, final or most recent drafts of the merger document, any other reports or studies prepared for the purpose of the merger. The financial information must be expressed in ECU. Twenty copies of the Form and 15 copies of all supporting documents must be provided.

Under the merger control regulation, the Commission and officials of Member States are bound by professional secrecy rules whereby information received may only be used for the purpose of the particular proceeding. When publishing the fact of notification, publication must respect the legitimate interest of the parties in the protection of their business secrets.

ANNEX 2: TABLES

TABLE 1: PUBLICLY REPORTED MERGERS			
This list is compiled by calendar year from published reports of acquisitions that appear in the financial and daily press and industry and trade publications. It records reported mergers in industries subject to the Act.			
Year	Foreign[1]	Domestic[2]	Total
1987	622	460	1 082
1988	593	460	1 053
1989	691	400	1 091
1990	676	268	944
1991	544	195	736
1992	474	153	627

1 Acquisitions involving a foreign-owned or foreign-controlled acquiring company (the nationality of the controlling interest in the acquired company prior to the merger could have been foreign or Canadian).

2 Acquisitions involving an acquiring company not known to be foreign-owned or foreign-controlled (the nationality of the controlling interest in the acquired company prior to the merger could have been foreign or Canadian).

Source: Consumer and Corporate Affairs Canada

TABLE 2: MERGER EXAMINATIONS						
	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
Examinations commenced (2 or more days of review)						
Arising from notifiable transactions	65	92	109	75	76	62
Arising from advance ruling certificate requests	40	70	87	87	98	125
Other examinations	41	29	23	31	21	21
Total examinations commenced	146	191	219	193	195	204
Examinations Concluded						
As posing no issue under the Act	120	166	204	170	196	198
With monitoring only	7	10	13	10	5	4
With pre-closing restructuring	2	1	-	-	-	-
With post-closing restructuring/undertakings	2	3	1	2	-	-
With consent orders	-	-	3	-	-	-
Through contested proceedings	-	-	-	-	1	2
Parties abandoned proposed mergers in whole or in part as a result of Director's position	2	2	2	1	1	3
Total examinations concluded[1]	133	182	223	183	203	206
Advance ruling certificates issued[2]	26	59	72	70	72	101
Advisory opinions issued[2]	21	20	17	17	9	27
Examinations ongoing at year end[3]	27	36	32	42	34	32
Total examinations during the year[3]	160	218	255	225	237	238
Applications and Notices of Application before Tribunal						
Concluded or withdrawn	-	2	3	-	1	2
Ongoing	2	2	1	3	2	1
Intent to file	-	2	-	-	-	-

1 Includes advance ruling certificates and advisory opinions issued and matters which have been concluded or withdrawn before the Competition Tribunal.

2 Included in "Total examinations concluded".

3 Certain figures have been revised from those reported in previous annual reports.

Source: Consumer and Corporate Affairs Canada

TABLE 3

ANTITRUST CASES FILED BY THE ANTITRUST DIVISION, FEDERAL TRADE COMMISSION, AND PRIVATE PARTIES IN U.S. DISTRICT COURTS DURING THE 12 MONTHS ENDING JUNE 30, 1980 TO 1989

U.S. Cases[1]

Year	Total Cases	Civil Cases	Criminal Cases	Private Cases	Private cases as a percent of total
1980	1,535	39	39	1,457	94.9
1981	1,434	60	82	1,292	90.1
1982	1,148	29	82	1,037	90.3
1983	1,287	21	74	1,192	92.6
1984	1,201	24	77	1,100	91.6
1985	1,142	30	60	1,052	92.1
1986	922	39	45	838	90.9
1987	858	27	73	758	88.3
1988	752	28	70	654	87.0
1989	737	19	80	638	96.6
Total	11,016	316	682	10,018	90.9

1. Includes all antitrust cases, not just mergers.

Source: U.S. General Accounting Office, *Justice Department: Changes in Antitrust Enforcement Policies and Activities* (Washington, D.C.: GAO/GGD-91-2, October 1990), p. 15.

ANNEX 3: Summary of competition laws of several OECD countries[89]

TABLE 1 AUSTRALIA						
Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
The Trade Practices Act 1974	•competition, public benefit	•acquisition of the shares or assets of a body corporate	•market dominance test: whether, either as a result of an acquisition, the acquiror would be in a position to dominate a market, or if already in such position, would be likely to strengthen that domination Guidelines • Review triggered where: (a) acquiror obtains market share of 45% or more and becomes largest competitor, or (b) acquiror becomes largest competitor and market share exceeds #2 competitor by 15% or more, or (c) market share of dominant firm increases by 10% or more	•no statutory defences or exemptions, however, authorization may be granted if merger would result in "benefit to the public"	•Trade Practices Tribunal (quasi-judicial) •Federal Court of Australia	Administration •Trade Practices Commission (independent federal competition law enforcement agency)

[89] Reproduced from American Bar Association Section of Antitrust Law, op cit, pp. 448-457.

TABLE 2

CANADA

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
The Competition Act	•competition	•the direct or indirect acquisition or establishment by one or more persons of control over, or of a significant interest in, the business of a competitor, customer or other person •covers "indirect" acquisitions outside Canada	•whether merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant geographic and product market Factors Considered (a) foreign competition (b) failing firm (c) substitutes (d) barriers to entry (e) effective remaining competition (f) removal of vigorous, effective competitor (g) change and innovation •no *prima facie* conclusions re. competitive effect based on market share calculations	Defences •efficiency •regulated industry (from case law) Exemptions •banks •joint ventures •general/peripheral exclusions under ss.4 and 6(e.g. fishing industry)	•Competition Tribunal (hybrid: composed of judicial and lay members)	Administration •Bureau of Competition Policy (exclusive enforcement agency)

TABLE 3

EUROPEAN ECONOMIC COMMUNITY

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
• Merger Control Regulation 4064/89 • (Articles 85-86 Treaty of Rome)	• competition • "fundamental objectives of the EEC Treaty"	• a "concentration" or merger occurs when (a) two or more independent undertakings merge, or (b) one or more persons already controlling at least one undertaking, acquire direct or indirect control of the whole or parts of at least one other undertaking • covers mergers outside EEC	• "Compatible/incompatible with the Common Market" test: whether or not merger creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market, or in a substantial part of it • market share of 25% or less deemed not liable to impede effective competition • "safeguard clause" for member states • applies only to mergers of a certain size - see Defences, Exemptions	"Community Dimension" Threshold • (a) combined aggregate world-wide turnover of all undertakings more than ECU 5,000 million (U.S. $6,000 million), and (b) aggregate community-wide turnover of each of at least two undertakings more than ECU 250 million (U.S. $300 million); unless (c) each of the undertakings obtains more than 2/3 of its aggregate community-wide turnover within one member state • joint ventures exemption • temporary securities holding exemption	• Mergers Task Force, Directorate General IV	• European Economic Commission (for all mergers over thresholds) • Member State national competition authorities (for all mergers below thresholds) Review • Court of First Instance, Court of Justice

TABLE 4

FEDERAL REPUBLIC OF GERMANY

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
Act Against Restraints of Competition	• competition (subject to Ministerial override on public policy or economic grounds)	• wide definition includes interlocking directorates and "any association between or among enterprises: resulting in a "competitively significant influence on another enterprise"	• creation or strengthening of dominant position • presumption of market dominance based on market share • presumption of creation or strengthening of superior market position based primarily on size (total sales)	Thresholds • acquisition of 25% or more of registered share capital or voting rights De Minimum Rules • exemption if (a) combined annual sales less than 500 million DM (b) independent enterprise (50 million DM annual sales) (c) less than 10 million DM annual sales in market which has been in existence for at least 5 years Statutory Defence • improvement in competitive structure of one or more markets	• Federal Cartel Office (Bundes-Kartellant") • special permission from Minister of Economy (possible in certain cases) • judicial review by Berlin Court of Appeal, Federal Supreme Court	• Federal Cartel Office

TABLE 5

FRANCE

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
Ordinance No.86-1242 of December 1, 1986	• competition plus general public policy	• a "concentration" (merger) results from any act, in whatever form, which transfers ownership or possession of all or part of an entity's assets, rights, obligations, or the purpose or effect of which is to enable one or more entities to exercise, directly or indirectly, a determinative influence over one or several other previously separate entities	• "of a type which would restrain competition particularly through the creation or the reinforcement of a dominant market position in France or a substantial part of it"	Thresholds • (a) merger parties account for more than 25% of sales, purchases or other transactions for relevant goods, products or services in France or a substantial part thereof, or (b) a total annual turnover of more than 7 billion FF • no explicit statutory defences, exemptions or immunities, however, conditional approval on fulfilment of "obligations which sufficiently contribute to economic and social progress in order to compensate for restraint of competition"	Political • Minister of Economy, Finance and Budget • other Ministers whose areas of responsibility are affected have a role • Competition Council (purely advisory) • *ultra vires* review by Conseil d'Etat	Direction Général (under authority of the Minister)

TABLE 6

IRELAND

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
Mergers, Takeovers and Monopolies (Control) Act 1978	• competition, general public policy	• deemed to exist when two or more enterprises come under "common control" • acquisition of shares with more than 30% of total voting rights is deemed a takeover	• whether merger is consistent with the exigencies of the common good	Size Thresholds • Mergers Act applies if (a) gross assets of each of two or more involved enterprises is IR 5 million or more, or (b) annual turnover is IR 10 million or more • size threshold is subject to ministerial override • banking exclusion • wholly-owned subsidiaries merger exemption	Political • Minister of Industry and Commerce (EC Commission, if of a community dimension) • Minister's order may be appealed to High Court	• Department of Industry and Commerce under direction of the Minister)

TABLE 7

JAPAN

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
Antimonopoly Act	•competition	•Act covers mergers, acquisitions	•substantial restraint of competition in any particular field of trade Reviewable Thresholds •single party or combined market share of 25% or highest market share •total assets of over 5 billion yen	•specific industries exempted only rarely under s.22	•Japan Fair Trade Commission •reviewable by Tokyo High Court, Supreme Court	Administrative •Japan Fair Trade Commission

TABLE 8

SPAIN

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
•Company Act •Antitrust Act	•competition plus general public policy	•mergers (or takeovers) broadly defined	•mergers which affect or are likely to affect the Spanish market, particularly those which create or enhance a dominant position	Thresholds •25% or more of national product or service market, or •parties have combined annual turnover in Spain of 20 billion pesetas or more	Political •Minister of the Economy and Finance •Antitrust Court (purely advisory)	•Minister of the Economy and Finance

TABLE 9

UNITED KINGDOM

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
Fair Trading Act 1973, as amended by the Companies Act, 1989	• competition and public policy	• two or more enterprises ceasing to be distinct	• whether merger likely to have adverse effect on public interest	Thresholds • assets: value of assets acquired exceeds 30 million • market share: 1/4 or more of goods or services of the same description in the U.K. or a substantial part of the U.K. is supplied by one person • no statutory defences or exemptions • however, special rules for certain regulated industries, in addition to "community dimension" which will normally be excluded from MMC investigation • immunity obtainable by negotiating statutory undertakings	• Secretary of State on recommendation of Monopolies and Mergers Commission (MMC) • MMC may only investigate when Secretary of State makes a merger reference	Political/ Administrative • Secretary of State (Government Minister) act on advice of Director General of Fair Trading

TABLE 10

UNITED STATES OF AMERICA

Stature	General Motivation	Merger Definition	Merger Test	Defences, Exemptions	Decision-Making Body	Enforcement
•Clayton Act •1988 Trade Act (Exon-Florio Amendment)	•competition	•acquisitions of stock or assets by corporations, partnerships, other business entities, individual investors	•substantially lessen competition or tend to create a monopoly Merger Guidelines •merger unlikely to be challenged if post-merger HHI is (a) below 1000 (b) between 1000 and 1800 where increase of less than 100, or (c) over 1800 where increase less than 50 •mergers involving foresight entities may raise national security and/or defence issues (Exon-Florio) •$15 million notification threshold (?)	Defences •"investment only" (statutory) •failing company •"convenience and needs" (banks)	•office of Administrative Law Judges (FTC) •Courts (DOJ and private enforcement)	•Antitrust Division of U.S. Dept. of Justice •Federal Trade Commission •State Attorney General •Federal District Court •Committee on Foreign Investment in the United States (Exon-Florio) •Private Actions

ANNEX 4: Summary of Notification requirements in some OECD countries

TABLE 1

SUMMARY OF NOTIFICATION REQUIREMENTS

Country	System of Notification	Notification Thresholds	Time Limit for Initial Decision	Time Limit for Final Decision	Criteria for Decision	Confidentiality	Risks of Failure to Notify
Australia	Voluntary	-	-	45 days (extended if additional information requested	Competition related	Discretionary	Post-closing divestiture
Canada	Compulsory	Combined assets/sales in from or into Canada of Can. $400M; target assets value or sales in/from Canada of Can. $35M	-	7 days (short form) 21 days (long form: 10 days for a tender offer)	Competition	Assured	Fine, imprisonment, divestiture
EC	Compulsory	Combined sales worldwide of ECU 5bn + sales of ECU 250M in EC for each of two or more parties	1 month	4 months	Competition related	Assured in theory: some practical doubts	Fine, periodic penalty payments, ban on merger
France	Voluntary	(Combined market share of 25% or combined sales in France of FF 7bn and each of two or more parties has sales in France of FF 2bn)*	2 months	6 months	"Economic and social balance"	Assured	Post-closing divestiture
Germany	Compulsory	Premerger: worldwide sales of DM 2bn of any party; or DM 1bn worldwide sales by each of two or more parties (also post-merger if worldwide combined sales of DM 500M)	1 month	4 months	Competition (BKartA ban may be over-ridden on other grounds)	Generally assured	Fine, invalidity of transaction
Ireland	Compulsory	Each of two or more parties has assets worth IR 5M or sales of IR 10M	1 month	3 months	"Public good"	Generally assured	Fine, invalidity of transaction

TABLE 1 (continued)

SUMMARY OF NOTIFICATION REQUIREMENTS

Country	System of Notification	Notification Thresholds	Time Limit for Initial Decision	Time Limit for Final Decision	Criteria for Decision	Confidentiality	Risks of Failure to Notify
Italy	Compulsory	Aggregate sales in Italy of L 500bn or target sales in Italy L 50bn	30 days	45 days after reference (can be extended)	Competition	Assured	Fine, post-closing divestiture
Japan	Compulsory	True mergers or acquisitions of the whole of an ongoing business in Japan	30 days	Same (may be extended to 60 days)	Competition	Assured	Fine, post-closing divestiture
Spain	Voluntary	(Combined market share in Spain of 25% or combined sales in Spain of Ptas 20bn)*	1 month	3 months after reference	Competition related	Discretionary	Post-closing divestiture
U.K.	Voluntary	(Assets acquired worth 30M or combined 25% market share in U.K.)*	20 working days (may be extended up to 45)	Fixed for each case (Max. 6 months)	"Public interest"	Assured (though 3rd parties will be consulted)	Post-closing divestiture
U.S.	Compulsory	One part has worldwide sales or assets of $100M and other has $10M of sales/assets, and acquiror will hold securities/assets worth 15M as a result of the acquisition	30 days	20 days after compliance with Second Request	Competition	Assured	Periodic penalty payments, post-closing divestiture

* Thresholds in brackets represent statutory thresholds for merger control in jurisdictions with voluntary notification.

Note: The above table is provided as a summary of national laws for purposes of comparison and illustration only. Because of the complexity of the laws concerned, legal counsel should be consulted for advice in an individual case.

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