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Competition Policy Review Panel
Research Paper Summary

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Title: Adapting Competition Policy to Global Economic Environment

Subjects Addressed:

- Service Sector
- FDI in Canada
- Merger Review
 - International Policy Harmonization
 - The Treatment of Efficiencies
 - The Balancing Weight Standard

The Services Sector:

The research report notes that the services sector has been rapidly expanding in Canada and that this is consistent with the experience of other OECD jurisdictions. It is further observed that the services sector is taking on a greater prominence in Canada because its growth in both employment and output is surpassing that of goods production. An increasing percentage of the service production in Canada is tradable – and in 2006 services accounted for \$65.1 Billion in Canadian exports and \$82.2 Billion in imports (a record-level). The researchers find that like many jurisdictions Canada has experienced difficulty measuring the services sector and the amount of concentration in it. Growth rates in the services sector between 2002 and 2006 range from a low of 8.5% in public services, to a high of 23.8% in wholesale trade. Trade in services is notoriously difficult to measure and the literature has identified four needed pieces of information to accurately track the services trade: value of the services, transaction prices, modes of supply, and foreign-affiliated activities. As well the literature has identified three policy priorities for the services sector in Canada: addressing data and measurement needs, identifying Canada's comparative advantage in the services sector, and the main export markets for Canadian services (as well as competitors in those markets).

Foreign Investment:

The research report indicates that in 2006, foreign investment both CDIA and FDI in Canada reached their highest level in six years, i.e. since the technology boom in 2000. The United States remains the most significant source of inward FDI, accounting for 61% of the stock in 2006, while European investors are of growing importance. The share of inward FDI attracted by manufacturing industries has declined from 59 in 2000 to 55% in 2006, while commodities production (particularly oil and gas) have seen their share increase. CDIA is dominated by financial services. The researchers note that, relatively to other OECD countries, Canada maintains significant restrictions towards foreign ownership in sectors

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such as telecommunications and broadcasting; it is also remarked that this fact is controversial in Canadian public policy debates.

International Policy Standardization:

The research paper argues that procedural differences in merger reviews can make it more difficult to co-ordinate international responses to proposed mergers and acquisitions, specifically by delaying exchanges of information and making them asymmetric. That being said the researchers also note that Canada has been proactive in integrating its competition policy internationally. For instance, Canada is a signatory to information sharing protocols with the US, UK and Australia; and multilateral partner of several jurisdictions under the *Mutual Legal Assistance in Criminal Matters Act* to foster cooperation and conflict mitigation in competition law enforcement. The research paper comments that there may be risks to a relatively small and open economy like Canada's of blindly adopting the higher standards of the US or EU.

The Treatment of Efficiencies:

The researchers have found that Canada has been among the first few jurisdictions to demonstrate a willingness to consider efficiencies during a merger review. In fact, Canadian Competition officials pursue a formal efficiencies defense under section 96 of the *Competition Act* enacted in 1986. On the contrary, the US and EU jurisdictions consider efficiencies as one of many factors pertinent to a merger review. While the US treats efficiencies as part of a "strong lessening of competition" assessment, the EU foremost requires that efficiencies benefit consumers. In Canada, the efficiency defense legislation allows a merger with substantial anti-competitive effects to take place if the merging firms prove the countervailing gains in efficiencies. Thus while Canadian officials may approve a merger leading to monopoly or near-monopoly on the basis of efficiency gains, their US and EU counterparts are very unlikely to permit such a merger for efficiency reasons alone.

The Balancing-Weight Standard:

The research paper finds that whereas most comparable jurisdictions use a consumer-surplus standard for measuring efficiencies resulting from a merger, the Canada's Competition Tribunal has reluctantly introduced a balancing weights standard during the 2002 *Superior Propane* case. Under this standard, firms may operate efficiently and pass part of their benefits of greater efficiency on to consumers. While this approach may be suitable for Canada's small and open economy, its application has been criticized as subject to judgment and uncertainty.

Conclusion:

Global changes such as the shift towards services-dominated economies and the increasing presence of foreign ownership pose several challenges to Competition officials. Firstly, international co-operation has become more important and this has given impetus to harmonize standards and procedures

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across jurisdictions, which may be to the detriment of countries whose particular characteristics, are unlike those faced by large, standard-setting jurisdictions. As a small and open economy, Canada applies an efficiency-defense law under the *Competition Act* using the balancing weight approach as a formal standard to incorporate efficiencies in merger reviews. When pursuing the efficiency defense, Competition authorities should not only consider the costs associated with such a defense but also evaluate whether competitive actions could bring the same efficiencies without the merger. Another potential challenge is that merger transactions in a global economy may require balancing the interests of domestic consumers against those of foreign shareholders, or vice-versa; this will have ramifications on the treatment of efficiencies and the appropriate weighting of consumer and shareholder interests.